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THE

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CHANCERY DIVISION

AND CASES IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

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ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 2. Yates (Inspector of Taxes) *v.* Starkey - **Vaisey, J. 45**

—— —— *s.* 193, *sub-ss.* 1 *and* 3. Yates (Inspector of Taxes) *v.* Starkey **C. A. 465**

Trustee Act, 1925 (15 *Geo.* 5, *c.* 19). *In re* Shaw's Settlement; Shaw *v.* Shaw. *In re* Wisely's Settlement; Wisely *v.* Public Trustee **Harman, J. 833**

—— —— *s.* 31. *In re* Baron Vestey's Settlement. Lloyds Bank, Ld. *v.* O'Meara - - - **C. A. 209**

—— —— *s.* 36, *sub-s.* 6. *In re* Power's Settlement Trusts. Power *v.* Power - - **Wynn-Parry, J. 689** **C. A. 1074**

1927

Finance Act, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 27, *sub-s.* 1. Littman *v.* Barron (Inspector of Taxes) **C. A. 993**

Moneylenders Act, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 13. *In re* Section 105, Law of Property Act, 1925, C. & M. Matthews Ld. *v.* Marsden Building Society - **Harman, J. 378** **C. A. 758**

1929

Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 1 (*d*). Banque des Marchands de Moscou (Koupetschesky) *v.* Kindersley **C. A. 112**

1931

Finance (*No.* 2) *Act*, 1931 (21 & 22 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1. *In re* Smith, decd. Executor Trustee and Agency Company of South Australia *v.* Inland Revenue Commissioners **Danckwerts, J. 360**

1936

Finance Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 21. Yates (Inspector of Taxes) *v.* Starkey **Vaisey, J. 45** **C. A. 465**

1937

Finance Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 54), *Sch. IV*, *para* 11. Inland Revenue Commissioners *v.* Silverts Ld. - - - - **C. A. 521**

Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 4. Yates (Inspector of Taxes) *v.* Starkey **Vaisey, J. 45** **C. A. 465**

1938

Inheritance (*Family Provision*) *Act*, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-s.* 7. *In re* Smallwood, decd. Smallwood *v.* Martins Bank Ld. **Roxburgh, J. 369**

1939

Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2 & 3 *Geo.* 6, *c.* 107), *s.* 2. NOVELLO & CO. LD. *v.* HINRICHSEN EDITION LD. **Wynn-Parry, J. 595**
C. A. 1026

Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 4. NOVELLO & CO. LD. *v.* HINRICHSEN EDITION LD. **Wynn-Parry, J. 595**

1940

Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 15, *sub-s.* 1. LITTMAN *v.* BARRON (INSPECTOR OF TAXES) - - **C. A. 993**

1941

Finance Act, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1. *In re* BANBURY, DECD. WESTMINSTER BANK LD. *v.* BANBURY **Danckwerts, J. 1**

1943

War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 10, *sub-ss.* 2, 5; *s.* 11, *sub-s.* 1; *s.* 13, *sub-s.* 1 (*b*); *s.* 16, *sub-ss.* 1, 2, 4. *In re* 102–107 FETTER LANE, LONDON. SOLICITORS' LAW STATIONERY SOCIETY LD. *v.* WAR DAMAGE COMMISSION - - **Vaisey, J. 20**

1946

National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81). *In re* MEYERS. LONDON LIFE ASSOCIATION *v.* ST. GEORGE'S HOSPITAL **Harman, J. 534**

—— —— *s.* 8, *sub-s.* 1; *s.* 15, *sub-s.* 1. *In re* BLAND-SUTTON, DECD. NATIONAL PROVINCIAL BANK LD. *v.* THE MIDDLESEX HOSPITAL - - **Danckwerts, J. 70**
C. A. 485

—— —— *s.* 59. *In re* FRERE, DECD. KIDD *v.* FARNHAM GROUP HOSPITAL MANAGEMENT COMMITTEE **Wynn-Parry, J. 27**

—— —— *s.* 60. *In re* HUNTER, LLOYDS BANK *v.* GIRTON COLLEGE, CAMBRIDGE (MISTRESS AND GOVERNORS) **Vaisey, J. 190**

1947

Agriculture Act, 1947 (11 & 12 *Geo.* 6, *c.* 48). STEYNING AND LITTLEHAMPTON BUILDING SOCIETY *v.* WILSON **Danckwerts, J. 1018**

Exchange Control Act, 1947 (10 & 11 *Geo.* 6, *c.* 14), *ss.* 5, 33, *Sch. IV*, *para.* 3. *In re* A DEBTOR, *Ex parte* THE DEBTOR *v.* LIGUORI - - **C. A. 95**

Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 85. *In re* TOWN AND COUNTRY PLANNING ACT, 1947, CRYSTAL PALACE TRUSTEES *v.* MINISTER OF TOWN AND COUNTRY PLANNING **Danckwerts, J. 132**

—— —— *s.* 85, *sub-ss.* 1, 2. THE ABBEY MALVERN WELLS LD. *v.* MINISTRY OF LOCAL GOVERNMENT AND PLANNING **Danckwerts, J. 728**

—— —— *s.* 85, *sub-ss.* 1, 2. *In re* GIRLS' PUBLIC DAY SCHOOL TRUST LD. GIRLS' PUBLIC DAY SCHOOL TRUST LD. *v.* MINISTER OF TOWN AND COUNTRY PLANNING - **Roxburgh, J. 400**

1948

Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-s.* 1; *s.* 81, *sub-s.* 1; *s.* 94, *sub-s.* 1, *Sch. III*, *Pt. II*, *para.* 23. *In re* DUKE OF NORTHUMBERLAND, DECD. HALIFAX *v.* NORTHUMBERLAND **Vaisey, J. 202**

—— —— *s.* 23. STEYNING AND LITTLEHAMPTON BUILDING SOCIETY *v.* WILSON - **Danckwerts, J. 1018**

Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 56. *In re* DUFF'S SETTLEMENT; NATIONAL PROVINCIAL BANK LD. *v.* GREGSON - - **Harman, J. 721**
C. A. 923

—— —— *s.* 325, *sub-s.* 1 (*c*). *In re* SUIDAIR INTERNATIONAL AIRWAYS, LD. (APPLICATION OF VICKERS ARMSTRONGS LD.) **Wynn-Parry, J. 165**

Finance Act, 1948 (11 & 12 *Geo.* 6, *c.* 49), *ss.* 47, 49, 68 (2). DALE *v.* INLAND REVENUE COMMISSIONERS **Harman, J. 983**

Gas Act, 1948 (11 & 12 *Geo.* 6, *c.* 67), *ss.* 19, 56. HINCKLEY URBAN DISTRICT COUNCIL *v.* WEST MIDLAND GAS BOARD - - **Lloyd-Jacob, J. 335**
C. A. 577

1949

Finance Act, 1949 (12 & 13 *Geo.* 6, *c.* 47), *s.* 27. *In re* GIBBS, DECD. MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* INLAND REVENUE COMMISSIONERS **Danckwerts, J. 933**

Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 100), *s.* 4. *In re* ADAMS, DECD. SURSHAM *v.* FARQUHARSON - **Danckwerts, J. 716**

1950

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 9. *In re* ADAMS, DECD. SURSHAM *v.* FARQUHARSON **Danckwerts, J. 716**

RULES, ORDERS, AND INSTRUMENTS JUDICIALLY CONSIDERED

1883

R. S. C., *Ord.* 16, *r.* 11. Dollfus Mieg et Cie, S. A. *v.* Bank of England **Wynn-Parry, J. 33**

—— *Ord.* 42, *r.* 1 (2). *In re* A Debtor, *Ex parte* the Debtor *v.* Liguori **C. A. 95**

—— *Ord.* 55, *r.* 5A. Leicester Permanent Building Society *v.* Shearley **Wynn-Parry, J. 90**

—— *Ord.* 65, *r.* 14. *In re* A Debtor, No. 21 of 1950 (No. 2). *Ex parte* The Petitioning Creditors *v.* The Debtor **Divl. Ct. 612**

Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (*St. R. & O.* 1946, *No.* 1884). *In re* Cunliffe-Owen, decd. Mountain *v.* Comber **Wynn-Parry, J. 964**

Exchange Control (Bankruptcy Notices) Order, 1949 (*S.I.* 1949, *No.* 585). *In re* A Debtor, *Ex parte* the Debtor *v.* Liguori - - - **C. A. 95**

Hinckley Gas Order, 1922 (*St. R. & O.* 1922, *No.* 638), *para.* 32. Hinckley Urban District Council *v.* West Midlands Gas Board - - - **C. A. 577**

Hinckley Gas Order, 1928 (*St. R. & O.* 1928, *No.* 512), *para.* 25. Hinckley Urban District Council *v.* West Midlands Gas Board - - - **C. A. 577**

Land Registration Rules, 1925 (*St. R. & O.* 1925, 1093 *L.*128). *In re* 139 Deptford High Street, *Ex parte* British Transport Commission **Wynn-Parry, J. 884**

War Damage (Increase of Value Payments) Order, 1947 (*St. R. & O.* 1947, *No.* 390). *In re* 102–107 Fetter Lane, London. Solicitors' Law Stationery Society *v.* War Damage Commission - - - **Vaisey, J. 20**

ERRATA

P. 407. *In re Bailey, Barrett* v. *Hyder.*
P. S. A. Rossdale, Bowles with him, appeared for the trustees of the will.

P. 434. *In re Wray, decd.* At line 8. Delete "not".

P. 872. *R. R. A. Walker* appeared as counsel for the plaintiffs.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BANBURY, DECEASED.

WESTMINSTER BANK LIMITED *v.* BANBURY.

[1950 B. 1555]

DANCKWERTS J.

1950

June 9.

Will—Direction to set aside and accumulate annual sum free of tax—Whether setting aside a "payment"—Finance Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

A testator made his will and died before September 3, 1939; consequently the will would be subject to s. 25, sub-s. 1, of the Finance Act, 1941, if applicable. He bequeathed his residuary personal estate on certain trusts, under which his grandson was tenant for life and entitled to the income of the trust fund and his nephew was contingently entitled in remainder. The will further provided "my trustee shall for a period of twenty-one years from "my death set aside annually the sum of 1,500*l.* (free of tax) from "the income of the residuary trust fund and accumulate the same "in the way of compound interest by investing the same and the "resulting income thereof . . . and shall add the accumulations to "the capital of that fund so as to form one fund therewith". On the hearing of a summons to determine whether there should be set aside (a) the annual sum of 1,500*l.* free of income tax at the current rate, or (b) the appropriate fraction prescribed by the above sub-section, as amended by s. 20 of the Finance (No. 2) Act, 1945.

Held, that, having regard to the undue burden which would be placed on the existing tenant for life if s. 25, sub-s. 1, of the Act of 1941 were held not to apply, the sub-section ought to receive a liberal interpretation; consequently the annual setting aside of the prescribed sums constituted a "payment" within the meaning of the sub-section; and accordingly the appropriate statutory fractions must be set aside annually.

ADJOURNED SUMMONS.

The first Lord Banbury, who died in 1936, by his will, made in 1934, constituted a "residuary trust fund" of his personal residue upon trusts under which (in the events which had happened) his grandson, the second Lord Banbury (the first defendant), was tenant for life and entitled to the income, and his nephew, John Edmund Banbury (the second defendant), was contingently interested in remainder as to the capital.

Clause 15 of the will contained the following provision ". . . "my trustee shall for a period of twenty-one years from my death "set aside annually the sum of one thousand five hundred pounds "(free of tax) from the income of the residuary trust fund and "accumulate the same in the way of compound interest by "investing the same and the resulting income thereof from time "to time . . . and shall add the accumulations to the capital "of that fund so as to form one fund therewith".

The question for decision on this summons was whether, having regard to s. 25 of the Finance Act, 1941, and to s. 20 of the Finance (No. 2) Act, 1945 (1), there ought to be set aside in accordance with cl. 15 of the will (*a*) the annual sum of 1,500*l* free of income tax at the current rate applicable in each year, or (*b*) the appropriate fractions as prescribed by the Acts.

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(1) Finance Act, 1941, s. 25, sub-s. 1: "Subject to the provisions of "this section, any provision, however "worded, for the payment, whether "periodically or otherwise, of a "stated amount free of income tax, "or free of income tax other than "surtax, being a provision which— "(*a*) is contained in any deed or other "instrument, in any will or codicil, "in any order of any court, in any "local or personal Act, or in any contract, whether oral or in writing; "and (*b*) was made before the third "day of September, nineteen hundred and thirty-nine; and (*c*) has "not been varied on or after that date, "shall, as respects payments falling "to be made during any year of "assessment, the standard rate of "income tax for which is ten shillings "in the pound, have effect as if for the "stated amount there were substituted "an amount equal to twenty twenty-"ninths thereof." [The proportion stated was amended by s. 20 of the Finance (No. 2) Act, 1945.]

Sub-section 4: "If, in the case "of a payment to which subsection "(1) of this section applies, the relations of the payee and payor are "such that the payee is accountable "to the payor for so much of any "relief from income tax which he "receives as is ascribable to the "payment—(*a*) the liability of the "payee to account to the payor shall "be limited to twenty twenty-ninths "of the sum for which he would have "been accountable if the 1938–9 rates "of income tax, other than surtax, "had applied to the year of assessment in which the payment falls to "be made, and the foregoing provisions of this section had not passed ". . .".

Dunbar (*R. O. Wilberforce* with him) for the plaintiff trustees.
Wilfrid Hunt for the tenant for life.
T. A. C. Burgess for the remainderman.

DANCKWERTS, J., after stating the facts and reading sub-ss. 1 and 4 of s. 25 of the Act of 1941, continued: This section was designed undoubtedly to place upon persons entitled to receive annual sums free of tax the burden of the increase in tax which occurred as the result of the war. Sub-s. 4 is only material in so far as it throws some light on the meaning of sub-s. 1 for the purposes of the present case.

The question is whether the statutory provision reducing the amount of the payment to be made applies to the circumstances of the present case. There is no doubt that the annual sum of 1,500*l* is a " stated amount "; the words " free of tax ", which are equivalent to " free of income tax ", appear in the provisions of the will; and there is no doubt that the setting aside is periodical. The question is whether it is a " payment ". What happens in practice during the period of accumulation is that the trustees will set aside initially as a matter of book-keeping the sum of 1,500*l*., and will then make the necessary investments to carry out the trust; and it is not until the period of twenty-one years has come to an end that they will deal with the income of the fund so accumulated, along with that of the rest of the residuary trust fund, by making payment of the income to the persons who are then entitled to receive the income of the residuary trust fund. Not until the residuary trust fund becomes divisible or payable finally will any payment of that fund, which will include the accumulations made out of income in this way, be made to any particular person. In the meantime the real position is that the trustees are transferring from one hand to another a certain proportion of the income in their hands.

Mr. Burgess claims that such a proceeding is not within the provisions of this Act because it is not a " payment ". He submits that a payment involves a payor and a payee. No doubt that is normally the case: it is indeed recognized by sub-s. 4 of s. 25 of the Act of 1941. On the other hand, Mr. Hunt, on behalf of the tenant for life who receives the benefit only of such proportion of the income of the trustees as is left after the accumulations are met, and who naturally therefore suffers by the deduction of 1,500*l*, or whatever the appropriate sum may be, claims that there is a " payment " because sooner or later the corpus is to be paid over to somebody who succeeds to the residuary trust fund.

The matter seems to be one of considerable difficulty. In my view, Mr. Hunt is plainly right in contending that a case of this kind falls within the mischief of the Act, for no one, I think,

DANCKWERTS J.

1950

BANBURY DECD., *In re.* WESTMINSTER BANK LD. *v.* BANBURY.

can doubt that an undue burden is being placed upon the present life tenant, and that the sum which is to be accumulated ought in fairness to be reduced, so that his income should not be unduly restricted. Since no relief can be given to him if the section does not apply to this case, I have come to the conclusion that a liberal interpretation ought to be given to the words of s. 25, sub-s. 1. Such an interpretation is, I think, indicated by the words "any provision, however worded". That to me indicates that I am to have regard to the substance rather than the narrow words of the section, and to the substance of the transaction. In my view, therefore, there is a "payment" in the present case, even though it may consist in the trustees making a payment to themselves in another account in their name; therefore there is a payment within the meaning of the section; and accordingly the provisions of the Act with regard to the reduction of that payment are applicable in this case.

Solicitors: *Gregory, Rowcliffe & Co.*

F. R. D.

DANCKWERTS J.

1950

June 7.

In re PLAYFAIR, DECD.
PALMER *v.* PLAYFAIR.

[1949 P. 3062]

Settlement—Will—Gift on trusts of the settlement—Accretion or independent settlement.

A testator by his will dated May 17, 1915, bequeathed 20,000*l.* to be paid to the trustees of a marriage settlement made on January 11, 1888, between the testator, his daughter, her intended husband and certain trustees, "to be held by them on the trusts of the said "settlement"; and he declared that that sum was "in addition to "the sum of 10,000*l.* covenanted by me to be settled . . . by the "said settlement".

Held, that the will did not create a separate settlement of the 20,000*l.* on trusts which were declared by reference to the marriage settlement, but that the sum devolved as an accretion to the 10,000*l.* settled by the testator in the marriage settlement.

In re Paul's Settlement Trusts [1920] 1 Ch. 99, followed. *In re Beaumont* [1913] 1 Ch. 325; *Trew* v. *Perpetual Trustee Company* [1895] A. C. 264, 267; *In re Slade* (1919) 122 L. T. 321; *In re Fraser* [1913] 2 Ch. 224, 236; *In re Campbell's Trusts* [1922] 1 Ch. 551, 562; *In re Shelton's Settled Estates* [1945] Ch. 158, 164; *In re Gooch* [1929] 1 Ch. 740; *In re Currie's Settlement* [1910] 1 Ch. 329; and *Culsha* v. *Cheese* (1849) 7 Hare 236, distinguished.

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

ADJOURNED SUMMONS.

Part of the funds brought into a marriage settlement dated January 11, 1888, and made between George James Playfair (afterwards Lord Playfair), Augusta Mary Hickman (afterwards Lady Playfair) and Henry Thomas Hickman, consisted of 5,000*l.* settled as the "wife's trust fund" on Lady Playfair for life, after her death to Lord Playfair for life or until he remarried, and, subject to those interests, on trust for the issue of the marriage with power of appointment, which was never exercised. In default of appointment, the fund, with other moneys, was to be held on trust for all or any of the children or child of the intended marriage, sons to take at twenty-one years and daughters at twenty-one or when they married, whichever first happened. In the event of there not being any child of the intended marriage who should attain a vested interest, "the wife's trust fund and "the income and statutory accumulations (if any) of the income "thereof or so much thereof as shall not have become vested . . . "shall after the death of the said George James Playfair and "such failure of children as aforesaid be held in trust for . . . "Arthur Percy Hickman and Harry Otho Devereux Hickman, "brothers of the said Augusta Mary Hickman, in equal shares".

By the same settlement, Henry Thomas Hickman covenanted that if the intended marriage were solemnized he would during "so much of his life as the said Augusta Mary Hickman or any "of her issue by the said George James Playfair shall be living "pay to the trustees or trustee the annual sum of 300*l.*" and "that . . . (his) executors and administrators . . . shall within six "calendar months from his death pay to the trustees or trustee "the sum of 10,000*l.* with interest . . . at 3 per cent."; and he declared that the "trustees or trustee shall stand possessed of "the said sum of 10,000*l.* upon the trusts and subject to the "powers provisos agreements and declarations hereinbefore "declared and contained concerning money forming part of the "wife's trust fund or as near thereto as circumstances will "permit".

There was one son of the marriage, Lyon Playfair, who was born on January 12, 1888. He was killed in action on April 20, 1915, at the age of twenty-six. He died intestate and a bachelor. Letters of administration were granted to his father, Lord Playfair, who was his sole next of kin.

On May 17, 1915, Henry Thomas Hickman made a will by which he bequeathed 20,000*l.* to be paid "to the trustees for "the time being of the [marriage] settlement . . . to be held by "them on the trusts of the said settlement"; and he declared that "the said sum of 20,000*l.* is in addition to the sum of "10,000*l.* covenanted by me to be settled upon her [Lady Play-"fair] by the said settlement". He bequeathed his residuary to a settlement by reference. If it is held that the 20,000*l*. settled by the will of Henry Thomas Hickman is an accretion to the "wife's fund", it passed to Lyon Playfair, for at the time of his death he had already attained a vested interest in the settlement funds; after his death, the 20,000*l*. devolves as part of his estate; and, under the will of Lord Playfair and in the events which have happened, it is now held on trust for the personal representatives of Lady Playfair as part of her estate.

G. C. D. S. Dunbar for Katherine Arthur Mary Violet Perrin.

C. D. Myles for the persons interested in the residuary estate of Lord Playfair.

DANCKWERTS, J. [after referring to the facts]: There is no doubt that 10,000*l*. was absolutely vested in Lord Playfair's only son, passed to Lord Playfair upon the son's death, and passes under Lord Playfair's will. The question is whether the same result happens in respect of the sum of 20,000*l*. which was bequeathed by the will of Henry Thomas Hickman. Mr. Rose, on behalf of Lloyds Bank Ld., contended that that 20,000*l*. forms part of the estate of Henry Thomas Hickman's eldest son, passing either by virtue of the residuary bequest contained in Henry Thomas Hickman's will, or by addition, which has the same result. He contends that this is a case of referential trusts; and, therefore, under a principle which has been established by cases to which he referred, the relevant trusts, including a trust in favour of the son of Lord Playfair, must be written out in Hickman's will. The son of Lord Playfair was dead when the testator, Henry Thomas Hickman, died, and accordingly the principle of lapse applies and Lord Playfair's son took no interest. Therefore, he says, after Lady Playfair's death, there was no effective disposition of the 20,000*l*., which consequently devolves as part of the residuary bequest.

Counsel referred to a number of authorities, including *In re Beaumont* (15), a decision of Farwell L.J. sitting as a judge of the Chancery Division, in which he states quite clearly the principle and applies observations of an Australian judge of first instance, Manning J., which are cited in *Trew* v. *Perpetual Trustee Company* (16), to the effect that the only safe course is to write out the trusts of the settlement to which reference is made. Mr. Rose argued that the same principle is recognized plainly by Lord Buckmaster in *In re Slade* (17), a decision of the House of Lords. He referred also to *In re Fraser* (18); *In re Campbell's Trusts* (19), a decision of Russell J.; *In re Shelton's*

(15) [1913] 1 Ch. 325.
(16) [1895] A. C. 264, 267.
(17) 122 L. T. 321.
(18) [1913] 2 Ch. 224, 236.
(19) [1922] 1 Ch. 551, 562.

Settled Estates (20), a decision of Vaisey J.; and *In re Gooch* (21), a decision of Clauson J.

On the other side is *In re Paul's Settlement Trusts* (22), decided by P. O. Lawrence J., which Mr. Rose said was disapproved by Russell J. in *In re Campbell's Trusts* (19), and Vaisey J. in *In re Shelton's Settled Estates* (20). Whether they exactly disapproved the decision seems open to doubt. They distinguished it and they certainly recognized the general principle that if there were referential trusts they had to be written out in the instrument making the reference; and, therefore, the funds settled by reference did not necessarily follow the destination of the funds originally settled. Funds settled by reference were not so amalgamated with the funds originally settled that they would devolve with them in all respects. Mr. Rose submitted that if the writing out of trusts involves a gift to a person who predeceased the testator, then that part of the trust must fail. There is clear authority for that proposition in *In re Currie's Settlement* (23) and in *Culsha* v. *Cheese* (24), referred to in Jarman on Wills (7th ed.), vol. I, p. 403.

If the trusts in this case were simply referential trusts—if this were a case of a settlor referring to trusts contained in another document and settled by another person in a separate instrument, the result contended for by Mr. Rose might occur, though in all the cases to which he referred in support of his argument the circumstances differed very substantially from the present. In Joyce J.'s case, *In re Currie's Settlement* (23), the effect of the trust would have been to return the property to the testator and produce an ineffective trust, and there was a reference in the referential provisions incorporating the trusts only so far as they were effective. It seems to me, therefore, that the circumstances were so different in those cases that it does not follow that I ought to apply to the present case the rule applied there.

Here I find indications that the 20,000*l*. bequeathed by the will is an accretion to the 10,000*l*. which the testator covenanted to bring into settlement. As Mr. Hunt pointed out, the settlor is the same person in each case. Henry Thomas Hickman was the person who covenanted to settle the sum of 10,000*l*. He was the person who made the will bequeathing to his trustees the sum of 20,000*l*. to be handed over by his trustees to the trustees of the settlement to be held by them on the trusts of that settlement, and he declared that the sum of 20,000*l*. was in addition to the sum of 10,000*l*. covenanted to be settled by him. Although a provision referring to the fund as being in addition

(20) [1945] Ch. 158, 164.
(21) [1929] 1 Ch. 740.
(22) [1920] 1 Ch. 99.
(23) [1910] 1 Ch. 329.
(24) 7 Hare 236.

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to other funds is not regarded as conclusive by Russell J. in *In re Campbell's Trusts* (25), yet in the present case it shows that the testator is treating the 20,000*l.* and the 10,000*l.* as one fund.

In these circumstances the 20,000*l.* follows the destination of trusts which were effectively declared by the settlement, and under the settlement there is no doubt that the trust in favour of Lord Playfair's son was fully effective. He had an indefeasible interest, and that passed to his estate. Therefore the 20,000*l.* goes upon the same trusts, in the event that has happened, as the 10,000*l.* and as the wife's trust fund under the marriage settlement of 1888.

[His Lordship then held, on the true construction of Lord Playfair's will, which, though raised on the summons, does not call for report, that the 20,000*l.* passed to Lady Playfair and was now held upon trust to be paid or transferred to her personal representatives as part of her estate.]

Declaration accordingly.

Solicitors: *Golding, Hargrove & Palmer; Field Roscoe & Co.; Stevens & Bolton, Farnham, Surrey; Burton, Yeats & Hart for Winterbotham, Ball & Gadsden, Stroud.*

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(25) [1922] 1 Ch. 551, 562.

WYNN-PARRY J.

1950

June 8.

C. A.

1950

June 28; *July* 5.

Singleton and Jenkins L.JJ.

KORNER *v.* H. KORNER & CO. LIMITED.

[1947 K. 99.]

Costs—Statement of claim containing different causes of action against different defendants—Judgment for plaintiff against one defendant—Action dismissed against other defendants—Objection to taxing master's certificate—How costs apportionable.

In an action by a plaintiff against his brother and seven other defendants, the statement of claim contained, in certain paragraphs, a cause of action against the brother different from that against the other defendants, which was set out in the remaining paragraphs. The court held that the plaintiff succeeded against his brother and ordered his brother to pay the costs of the action against him, but dismissed the action against the other defendants with costs.

The taxing master, in his certificate, departed from the general principle adopted in cases of this kind, namely, that, where a number of defendants are represented by the same solicitors and counsel, and some of them are successful, each defendant who is successful is entitled to an equal proportion of the costs of the defence, and he ordered that the plaintiff should pay in the case of each defendant such part of the fee for instructions for brief and counsels' fees on brief as might be attributable to his defence. The defendants, other than the brother, contended that the general rule should be applied.

Held, that, while the general rule was a rule of thumb which it was convenient to apply in ordinary cases, there was no authority which compelled the court to apply it in every case even though it would result in injustice; and that it was not apt for application in the instant case, having regard to the different defences which were raised, and to the fact that the plaintiff had succeeded on the main issue.

Ellingsen v. *Det Skandinaviske Compani* [1919] 2 K. B. 567, considered.

Per curiam: the rule of practice (see *Kelly's Directories Ld.* v. *Gavin & Lloyd* [1901] 2 Ch. 763, per Byrne J. at p. 767) whereby, when the order as to costs in an action has been drawn up, there can be no further reference to the judge who made it, is not in the public interest. Where difficulty arises over the interpretation of an order as to costs great trouble and expense would be saved if either party were able to go back to the judge, even after the order had been drawn up.

SUMMONS.

An action was brought by Henry Korner against H. Korner & Co. Ld., a private company, his brother Emil Korner, and six other defendants. The action was for specific performance of an agreement in writing between the two brothers to form a private limited company. Further claims against the plaintiff's brother and the other defendants were set out in the remaining paragraphs of the statement of claim. At the conclusion of the hearing Romer J. gave judgment in favour of the plaintiff against his brother, but dismissed the action against the other defendants.

The directions as to the payment of costs contained in the order made in the action of May 5, 1948, are fully set out in the observations and rulings of the taxing master.

In due course the plaintiff and the defendants, other than Emil Korner, brought in their respective bills with a view to taxation. A preliminary question arose as to the principle on which the costs payable by the plaintiff to those defendants should be taxed. They submitted to the taxing master that the whole of their costs, including instructions for brief and counsel's fees, should be dealt with on the basis that they should have an aliquot part of the total costs of the defendants according to their number, namely, that they should have

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seven-eighths, including seven-eighths of those particular items, instructions for brief and counsel's fees.

The taxing master took a different view. In his observations and rulings, dated February 17, 1950, in answer to the objections of the defendants to the ruling which he made on the construction of the order of May 5, 1948, he stated as follows: " I have " been requested by the defendants in this action to construe "the order herein as to costs and thereby enable the parties, if " so advised, to lay preliminary objections before me in " accordance with the practice outlined in *In re Donaldson* (1). " The cause of action against the defendant Emil Korner was " quite different from those against the other defendants. The " defendants who were represented by the same firm of solicitors " delivered three separate defences. The plaintiff succeeded " against the defendant Emil Korner only. Romer J. " made the following order for taxation:—' And it is ordered " ' that the defendant Emil Korner do pay to the plaintiff his " ' costs of the action against such defendant (other than the " ' costs of the motion heard on June 13, 1947), such costs to " ' be taxed by the taxing master, and it is ordered that the " ' parties do pay their own costs of the said motion. And it is " ' ordered that this action against the defendants other than " ' the defendant Emil Korner do stand dismissed out of this " ' court with costs other than their costs of the said motion " ' to be taxed by the taxing master and paid by the plaintiff " ' to the said defendant '. It will be observed that the order as " to taxation is in a somewhat unusual form and I am of opinion " that the numerous cases on construction of orders as to taxa- " tion are of little help on the construction of this order.

" I construe the order to mean:—The plaintiff recovers all " necessary costs of obtaining his relief against the defendant " Emil Korner. In practice under the present order, I am of " opinion that the plaintiff should get: (a) his general costs of " action, such as summons for directions, term fees etc.; " (b) all costs solely appertaining to his claim against Emil " Korner; (c) such part of the fee for instructions for brief and " counsel's fee on the brief as may be attributable to the " plaintiff's claim against Emil Korner, as if Emil Korner had " been the sole defendant. A taxation on these principles will " of course entail a somewhat difficult question of apportionment " for the taxing master.

" If I am right in my construction of the order as regards " costs payable by the defendant Emil Korner, it follows that the " defendants other than Emil Korner will get (a) seven-eighths " general costs of action; (b) any costs solely appertaining to

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(1) (1884) 27 Ch. D. 544.

"their defences; (c) such part of the fee for instructions for "brief and counsel's fees on the brief as may be attributable to their defences. This, of course, as in the case "of the plaintiff's costs, will cause a difficult question of "apportionment.

"I can see no justification in these defendants' claim to "receive seven-eighths of the 'instructions for brief' and "'counsel's fees'. Although all the defendants, including Emil "Korner, were represented in the action by the same solicitors, "the defendants other than Emil Korner delivered separate "defences. The main relief was sought and obtained by the "plaintiff against Emil Korner; the relief sought against the "other defendants was merely ancillary to the claim against "Emil Korner. I overrule this objection".

The defendants, other than Emil Korner, took out a summons seeking an order that the objections lodged on their behalf to the taxation of costs in the action under the order dated May 5, 1948, might be allowed and that it might be referred back to the taxing master to vary his certificate accordingly.

Gallop K.C. and *Dare* for the applicant defendants. The defendants to the action claim that their objections to the taxing master's decision should be allowed. There is a well-established principle in cases of this sort, and it is unsatisfactory that the taxing master should substitute an allocation which departs from the usual general principle.

[They referred to *Ellingsen* v. *Det Skandinaviske Compani* (2) and *In re Colquhoun* (3).]

Montgomery White K.C. and *J. V. Nesbitt* for the respondent plaintiff. The case for the defendants fails in limine, because they have not established whether the retainer has been joint or several. In any event, they severed in delivering their defences. [They referred to *Ellingsen* v. *Det Skandinaviske Compani* (2).] The whole question of what is to be allowed for briefs is a matter for the taxing master. The court cannot interfere with his discretion. [They referred to *In re Allen* (4)].

In the cases, which have been cited, it is not suggested that different defences were raised.

Gallop K.C. replied.

WYNN-PARRY J. [after stating the facts:] Without going so far as the taxing master in describing the relief sought against the other defendants as merely ancillary to the claim against the defendant Emil Korner, I am of the opinion that the cause of action on which the plaintiff succeeded against Emil Korner was a different cause of action from that on which the plaintiff failed against the other defendants. It is clear from a perusal of the statement of claim and of the separate defences of the first defendants, the company, on the one hand, and that of the remaining seven defendants on the other, that it was unnecessary for their defence that the plaintiff should fail in his main claim, the claim against the defendant Emil Korner; for their defences proceeded upon the basis that, of the transactions between the plaintiff and the defendant Emil Korner which were material to that part of the case on which the plaintiff succeeded, they knew nothing at any material time. They subscribed for their shares in good faith; without any knowledge of any irregularity or of anything which would prevent the allotment and issue of the shares to them from being valid; and on the footing that the resolutions complained of were properly passed at properly convened meetings. It is a mere fortuitous circumstance that they succeeded in the end on a technical flaw in the plaintiff's position, namely, the circumstance that he was not shown to be a shareholder of the company.

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(2) [1919] 2 K. B. 567.
(3) (1854) 5 De G. M. & G. 35.
(4) (1879) 11 Ch. D. 244.

In those circumstances the question which I have to determine is whether the defendants are right in saying that what has been conveniently described as a rule of thumb should apply, and that, as regards instructions for brief and counsel's fees, the defendants should be given seven-eighths of their fees; or whether, on the other hand, the taxation should proceed on the basis which the master has indicated in his observations.

The underlying principle as regards the awarding of costs appears in a passage in the judgment of Scrutton L.J., which was the judgment of the court, in *Ellingsen* v. *Det Skandinaviske Compani* (5), where he said: "The principle of allowance of "costs is that the successful party is to be recompensed the "liability he has reasonably incurred in defending himself".

Complications arise where there are several defendants and the action succeeds as regards one or more of the defendants, but fails as regards others. It is no doubt established by the authorities that in such cases a rough-and-ready rule is to be applied, namely, that the defendants who are successful and in whose favour a plaintiff is ordered to pay costs will each recover an equal part of the total costs according to the number of defendants on the record: see *Griffiths* v. *Jones* (6); *Starling* v. *Cozens* (7); and *In re Colquhoun* (8). But the authorities, so far as they have been referred to at this hearing, in which that rule has been applied, are all authorities in which the plaintiff was pursuing the same cause of action against all the defendants.

(5) [1919] 2 K. B. 567, 569.

(6) (1835) 2 C. M. & R. 333.

(7) (1835) 2 C. M. & R. 445.

(8) 5 De G. M. & G. 35.

The rule has from time to time been criticized, and suggestions have been made that some new rule should be evolved to take its place. No new rule has in fact been brought into operation at all, either as the result of inanition or because, in the particular type of case in which it has to be applied, nobody has been able to think of a better rule. But it is, in my judgment, a rule which should be limited to the type of case in which hitherto it has been applied, and should not be extended; for where, as in the present case, the unsuccessful defendant is concerned in defending a cause of action with which the successful defendants are not concerned, and where, as in this case, much the greater part of the costs is clearly attributable to the issues between the plaintiff and the unsuccessful defendant, the application of the so-called rule of thumb would necessarily, I think, operate unjustly. If in the present case, in addition to separate defences being delivered, separate briefs had been delivered on behalf of the defendant company and of the individual defendants other than the defendant Emil Korner, no argument in favour of the rule of thumb could have been developed on this summons.

I am unable to see any answer to the submission put forward by Mr. Montgomery White on behalf of the plaintiff that the position of the plaintiff ought not to be made any worse by the circumstance that only one brief was in fact delivered on behalf of all the defendants.

There being this clear distinction between the facts of this case and the facts of all those cases in which the rule which I have been considering has been applied, I feel no temptation to apply that rule. It has, of course, this limited application, that, as the taxing master proposes, the successful defendants will get seven-eighths of the general costs of the action, that is, of all those costs which have been incurred in relation to matters done on behalf of the defendants generally and not done on behalf of one defendant more than on behalf of the others; and it will have the result of producing substantial justice between the parties. The application is dismissed.

J. L. D.

The defendants, other than Emil Korner and the defendant company, appealed.

Gallop K.C. and *Dare* for the defendants. It is submitted that the judge was wrong in his approach to this question. Where there is one bill of costs, each of the successful defendants is entitled to an equal share of the costs. The question is whether there is any power to vary the application of that rule. The authorities show that the rule must be applied unless the trial judge orders otherwise.

[They referred to *Griffiths* v. *Jones* (9); *In re Colquhoun* (10); *In re Allen* (11); and *Ellingsen* v. *Det Skandinaviske Compani* (12).]

The question here is what is the effect of Romer J.'s order. Effect must be given to it on its true construction. The master has no jurisdiction to separate the issues and not to give to the defendants their proper proportion of the costs of preparing the brief and counsel's fees: see *Kelly's Directories Ld.* v. *Gavin & Lloyds* (13); *Bush* v. *Rogers* (14).

Montgomery White K.C. and *J. V. Nesbitt* for the plaintiff. The principle to be applied is that stated in *Ellingsen* v. *Det Skandinaviske Compani* (12), namely, that the successful party is to be recompensed for the liability which he has reasonably incurred in defending himself. The general rule that each defendant gets an equal share of the costs of the defence is only applicable where all put forward the same defence. The rule is not applicable where separate briefs are delivered or where there are different defences. The order of Romer J. should be looked at as a whole. He treated this case as being in effect two actions, one against Emil Korner and the other against the remaining defendants.

Gallop K.C. in reply.

Cur. adv. vult.

July 5. SINGLETON L.J., reading his judgment, stated the facts and continued:—All the defendants, except the company and Emil Korner, appeal against the order of Wynn-Parry J. All the defendants were represented by the same firm of solicitors, though three separate defences had been delivered. The claim of the defendants is that they are entitled to a taxation on the basis that they shall have seven-eighths, that is one-eighth each, of the items "instructions for brief" and "counsel's fees", which form the most substantial items in the bill of costs. They base this claim (*a*) on that part of Romer J.'s order which reads: "And it is ordered that this action against the defendants "other than the defendant Emil Korner do stand dismissed out "of this court with costs other than their costs of the said motion "to be taxed by the taxing master and paid by the plaintiff to "the said defendants", and (*b*) on what is described as a rule of thumb that, where a number of different defendants are represented by the same solicitors and some of them are successful, each defendant who is successful is entitled to an equal proportion of the costs of the defence.

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(9) 2 C. M. & R. 333.

(10) 5 De G. M. & G. 35.

(11) 11 Ch. D. 244.

(12) [1919] 2 K. B. 567.

(13) [1901] 2 Ch. 763.

(14) [1915] 1 K. B. 707.

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This rule has been the subject of discussion in a number of cases from 1935, and in *Ellingsen* v. *Det Skandinaviske Compani* (15) it was said by this court to be too well established to be disturbed by a decision of this court. The judgment of the court prepared by Scrutton L.J. and delivered by Atkin L.J. contains this passage: "Kelly C.B. in *Burridge* v. *Bellew* (16) "states that there is no difference between the practice in "Chancery and at common law. If there has been a joint contract between the solicitor and his clients, each client is liable "for the whole costs; and if there were separate contracts, each "will be liable for his own portion of them; and as pointed out "by Amphlett B. in the same case (17), the fact that after "separate retainers the defence is conducted jointly does not "make the liability joint. As the principle of allowance of costs "is that the successful party is to be recompensed the liability "he has reasonably incurred in defending himself, if he is only "liable to his solicitor for half of certain joint items he cannot "be allowed the whole of them, even though by some separate "agreement he has made himself liable for the other half, "primarily the liability of another and unsuccessful defendant".

This rule, a rule of thumb, is no doubt convenient in an ordinary case; but I do not think that it can be said that it must be applied in every case. Regard must be had to the nature of the case and to the nature of the defences raised to the same claim. In the present case there were three separate defences on the file, though at the trial the defendants were represented by the same solicitors and counsel. The main contest, the real fight, was between the plaintiff and the unsuccessful defendant, Emil Korner. That entailed a lengthy inquiry into what was the agreement between them, and into the questions raised by paras. 9 to 14 of the defence of Emil Korner, in which paragraphs defences of estoppel, waiver and the like are raised. Neither the defendant company nor any of the other defendants raised these matters: their defences were, as counsel put it, more of a stonewalling character. Yet, if the claim of these defendants is right, each will be entitled to one-eighth of the fee allowed for instructions for brief and of counsel's fees on that contest, though they did not raise such matters and though the plaintiff succeeded on them against the defendant who did raise them. That cannot be right. It is not disputed that it would result in injustice against the plaintiff.

I do not know of any authority which compels the court to follow the rule which I have mentioned in every class of case, and even if to follow it would result in injustice. To do so would be to fly in the teeth of the generally accepted principle as stated in *Ellingsen's* case (18) "that the successful party is to be "recompensed the liability he has reasonably incurred in defend-"ing himself". Wynn-Parry J. thought the authorities in which the rule has been applied to be all authorities in which the plaintiff was pursuing the same action against all the defendants. That may be a somewhat narrow view. At the same time, I agree with him that the rule ought not to be extended. I regard it as something convenient to be applied in an ordinary or straightforward case. I do not think it apt in any degree for application to this case, having regard to the different defences which were raised and to the fact that the plaintiff succeeded on the main issue, an issue in which only one of the defendants was involved.

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(15) [1919] 2 K. B. 567, 569.

(16) (1875) 32 L. T. 807, 812.

(17) 32 L. T. 807, 813, 814.

There is, however, another and perhaps more compelling reason for adopting this view, and that arises from the wording of the order itself. It is not right to look only at that part of the order which concerns the successful defendants' costs: the order as a whole must be considered. When that is done, it becomes quite clear that Romer J. treated this case really as though there were two actions in one. I observe from the transcript that sixteen and a half pages were occupied by the statement of facts and the judge's reasons for his judgment against Emil Korner, and that one page suffices to show why the other defendants are entitled to judgment against the plaintiff. The judgment itself decrees specific performance of the agreement by the defendant Emil Korner, and later states "And it is "ordered that the defendant Emil Korner do pay to the plaintiff "his costs of the action against such defendant". That is intended to dispose of all the costs in the action between the plaintiff and the defendant Emil Korner. It is not merely a case of judgment for the plaintiff against one defendant with costs and judgment for the other defendants against the plaintiff with costs. The judge, having made the order that the defendant Emil Korner should pay to the plaintiff his costs of the action against that defendant, provided for the costs of the successful defendants, and that part of the order must be read as limited by what has gone before. To my mind the order as drawn is of itself sufficient to render inapplicable the rule relied on by the appellants. For these reasons I am of opinion that this appeal should be dismissed.

I would add a word. It is said that when the order has been drawn up there can be no further reference to the judge who made it; and this appears to be the position as stated by Byrne J. in *Kelly's Directories Ld.* v. *Gavin and Lloyds* (19), where he said: "In the present case I have an order clearly directing the

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(18) [1919] 2 K. B. 567, 569.

(19) [1901] 2 Ch. 763, 767.

"defendant Gavin to pay the plaintiffs their costs of this action, "and I cannot mould or reframe that order now; the proper time "to ask for the insertion of some words distinguishing these "extra costs, or to object to the form of the proposed order, was "at the trial, or later, at the actual drawing up of the order, "when the defendant, as I understand, attended; it is too late "for any alteration now. In my opinion the taxing master has "taken a correct view of what this order means, and I cannot "interfere, and I therefore dismiss this summons with costs".

I cannot help feeling that when an order as to costs is in question great trouble and expense would be saved if either party were able to go back to the judge, even after the order had been drawn up, if there appeared to be ambiguity or uncertainty in the terms of the order. It is not possible to have every eventuality in mind all the time, and, after all, costs are in general in the discretion of the judge. It is more than two years since judgment was given in this case, and the parties are still fighting as to the interpretation of the order as to costs and as to the basis on which those costs should be taxed. If it had been possible to refer the matter back to Romer J. the whole dispute might have been settled within ten minutes, and I have no doubt as to what the decision would have been. An alteration in the rules to bring about such a means of solving a question of this kind would remove what appears to me to be a burden on litigants, and it would simplify the task of taxing masters and of judges. I do not think it in the public interest that the matter should remain in the state in which it is. In my opinion this appeal should be dismissed.

JENKINS L.J. I agree.

Appeal dismissed.

Solicitors: *Rubinstein, Nash & Co.; Fairchild, Greig & Co.*

B. A. B.

VAISEY J.

1950

June 20; *July* 6.

In re 102–107 FETTER LANE, LONDON. SOLICITORS' LAW STATIONERY SOCIETY, LIMITED *v.* WAR DAMAGE COMMISSION.

[1950 S. 572.]

War damage—Repeated damage to same hereditament—" Not total loss " —Intended rebuilding not in original form—Value payment—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 10, *sub-ss.* 2, 5; *s.* 11, *sub-s.* 1; *s.* 13, *sub-s.* 1 (*b*); *s.* 16, *sub-ss.* 1, 2, 4—*War Damage (Increase of Value Payments) Order,* 1947 (*St. R. & O.*, 1947, *No.* 390).

A freehold hereditament was thrice damaged by enemy action. As it was not intended to reinstate it in its original form a cost-of-works payment could not be made in respect of it, although the War Damage Commission classified it as " not total loss ", and the commission exercised their discretion to make a value payment under s. 13 of the War Damage Act, 1943. The difference between a value payment under that section and an ordinary value payment is that an ordinary value payment has to be ascertained under the rules laid down under s. 10 of the Act, and is necessarily a fixed amount carrying interest at 2½ per cent. a year payable when the payment is discharged; while a value payment under s. 13 is not a fixed amount but a discretionary amount with a maximum limit of the amount at which an ordinary value payment would have been calculated.

The commission issued notice of their determination to pay, under s. 13, 42,000*l.*, computed as provided in s. 10 of the Act as modified by s. 13, sub-s. 1 (*b*), and representing the difference between 62,000*l.* (the value of the hereditament in its state before damage) and 20,000*l.* (its value in its state after damage). At the bottom of the notice were the words: " Important: attention is drawn to the notes " overleaf "; and the first " note overleaf " was: " Interest at the " rate of 2½ per cent. per year (less income tax) will be paid on the " amount of the value payment from the last notified date of damage " until the date of payment ". The freeholders gave notice of motion for an order that that determination should be set aside in so far as it determined that interest was payable from the date of damage last notified, and for a declaration that it was payable from the date of damage first notified, or from such other date as the court should think fit.

Held, (1.) that a payment under s. 13 of the War Damage Act, 1943, was a value payment properly so describable, and carried a right to interest accordingly, although it was a value payment of a peculiar and special kind; (2.) that, assuming—without deciding—that a larger sum for interest (i.e., interest from a date earlier than July 18, 1944) could have been claimed if no mention of interest had been made in the determination, the determination was validly made under s. 13 fixing the amount at 67,200*l.*, plus 1,680*l.* a year interest from July 18, 1944 (these figures being based on the full permitted increase under s. 11 of the Act), even though that was not the maximum amount of interest which might have been awarded under the section.

MOTION.

On May 10, 1941, March 24, 1944 and July 18, 1944, the freehold hereditament known as 102–107 Fetter Lane, London, and owned by the Solicitors' Law Stationery Society Ld., was damaged by enemy action, the damage done on the first occasion being the most severe. On December 8, 1948, a letter was written to the War Damage Commission, detailing the proposed rebuilding of the hereditament which was not to be in its original form. The commission answered that that would not be "reinstatement" of the hereditament, and that, although their classification of the hereditament was "not total loss", they could not make a cost-of-works payment in respect of it. On April 1, 1949, the company applied to the commission to exercise their discretion to make a value payment under s. 13 of the War Damage Act, 1943.

On December 6, 1949, the commission issued notice of their determination to make a payment of 42,000*l.* under that section. The notice stated that the amount of the payment had been computed by reference to prices current at March 31, 1939, as provided in s. 10 of the Act, as modified by s. 13, sub-s. 1 (*b*), and that it represented the difference between 62,000*l.* the value of the hereditament in the state in which it was before damage, and 20,000*l.*, its value in its state after damage. At the bottom of the notice were the words, "Important: attention is drawn to the "notes overleaf"; and the first note stated, "interest at the rate "of 2½ per cent. per year (less income tax) will be paid on the "amount of the value payment from the last notified date of "damage until the date of payment".

On February 2, 1950, the company gave the commission notice of this motion by which they asked for an order that the commission's determination should be set aside so far as it determined that the interest was payable from the date of damage last notified (but not otherwise) and for a declaration that interest was payable at 2½ per cent. from the date of damage first notified, or from such other date or dates as the court thought fit.

The commission, in their statement of case delivered on March 28, 1950, stated that the full permitted increase (under the combined effect of s. 11 of the War Damage Act, 1943, and the War Damage (Increase of Value Payments) Order, 1947) of 60 per cent. on the amount of 42,000*l.* would be paid in addition,

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with interest at 2½ per cent. on the total amount from July 18, 1944 (1).

The question of law on the motion was from what date or dates interest on the payment was payable on the true construction of the relevant provisions of the War Damage Act, 1943, the company contending that it was payable from the date of damage first notified or, alternatively, was payable in respect of the war damage occurring on each occasion, to be determined separately.

Milner Holland K.C. and *Granville Slack* for the company. The payment in the present case is undoubtedly a value payment

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(1) War Damage Act, 1943, s. 10, sub-s. 1: "Subject to the provisions "of this Part of this Act, the amount "of a value payment shall be an "amount equal to the amount of the "depreciation in the value of the "hereditament caused by the war "damage, that is to say, the amount "by which the value of the hereditament in the state in which it was "immediately after the occurrence of "the damage is less than its value "in the state in which it was "immediately before the occurrence "of the damage".

Sub-section 2: "For the purpose "of computing the amount of a value "payment, the value of a hereditament in any state shall be ascertained by reference to prices current "at the thirty first day of March, "1939 . . .".

Sub-section 5: "Interest at the "rate of 2½ per cent. per annum shall "accrue on a value payment from the "time of the occurrence of the war "damage, and shall be payable when "that payment is discharged".

Section 11, sub-s. 1: "If, when "the discharge of value payments "generally or in substantial volume "has become permissible, it appears "to the Commission that, having "regard to any circumstances arising "since the passing of the War "Damage Act, 1941, the amounts of "any such payments computed on "the basis of a valuation made "by reference to prices current "at thirty first day of March, "1939, are inadequate, the Commission shall make a report to the "Treasury stating that they are of "that opinion, the circumstances to "which they have had regard in "forming it, and the deductions "which they draw therefrom; and, "on receipt from the Commission of "any such report, the Treasury shall "consider the report, and shall have "power by order to direct that the "amounts of value payments shall, "either in all cases or in such classes "of cases as may be specified in the "order, be increased by a sum equal "to such proportion of the amount "computed as provided by this Act "as may be specified in the order".

Section 13, sub-s. 1: "Where the "appropriate payment in respect of "war damage to a hereditament "would apart from this provision be "a payment of cost of works, if the "Commission are satisfied that it is "the wish of all the owners of . . . "the hereditament . . . that the "damage or any part of it should "not be made good, or if they are "satisfied that the circumstances are "such that the damage or any part of "it will not in fact be made good, "they may, notwithstanding any previous determination of the kind of "payment to be made in respect of "the damage to the hereditament, "make a payment or payments in "respect thereof as follows and of "such amounts respectively, not "exceeding the following, as they "may think fit, that is to say—(*a*) "in respect of the damage so far as "made good, a payment of cost of "works of an amount equal to so "much of the proper cost of the under s. 13, sub-s. 1: see also the War Damage (Increase of Value Payments) Order, 1947, para. 5.

Interest under s. 10, sub-s. 5, of the Act runs from the occurrence of the damage, and as if the damage had all occurred on the earliest occasion. If, as in the present case, the earlier damage is substantial and the later trifling, it is wrong to make interest run from the later date.

The scheme of the Act up to s. 12 is that a cost-of-works

"works executed for the making good "thereof as falls within the permissible amount; and (*b*) in respect of "the damage so far as not made "good, a value payment of an "amount computed in other respects "as provided by s. 10 of this Act, "subject to the modification that, if "any works the subject of a payment "under this section have been "executed, the depreciation in value "of the hereditament shall be determined by reference, as regards its "state after damage, to the state in "which it would have been immediately after the execution of all "those works if they could have been "and had been executed immediately "after the occurrence of the "damage".

Section 16, sub-s. 1: "Where a "developed hereditament, being or "including a developed hereditament "which has already sustained "(whether on a single occasion or on "two or more occasions) war damage "not being such that a value "payment is to be made in "respect thereof, sustains on a "subsequent occasion war damage "such that a value payment would "fall to be made if a determination "were taken in relation to all the "war damage under paragraph (*a*) of "sub-s. 1 and sub-s. 2 of s. 7 of this "Act, with the substitution for the "reference in the said sub-s. 2 to the "form in which the hereditament "existed immediately before the "occurrence of the damage of a reference to the form in which it existed "immediately before the earliest "occasion, the Commission may determine that a single value payment "shall be made in respect of all the "war damage as if it had all occurred on the earliest occasion, to the "exclusion of any other payment in "respect of any of it. . . ".

Sub-section 2: "Where a value "payment is to be made in respect of "war damage sustained (whether on "a single occasion or on two or more "occasions) by a developed hereditament, any war damage sustained by "the hereditament on a subsequent "occasion shall be taken into account "in determining the amount of that "payment as if that damage had "occurred on the earliest occasion, "and no separate payment shall be "made in respect thereof".

Sub-section 4: "Subject as afore-"said, the references in ss. 7, 8 and "10 of this Act to war damage shall "be construed as references to war "damage occurring on a single "occasion, and accordingly the nature "and amount of the payment to be "made in respect of war damage "occurring on each of two or more "occasions shall, subject as aforesaid, "be determined separately".

The War Damage (Increase of Value Payments) Order, 1947: ". . . 2. In this Order (*a*) 'the Act' "means the War Damage Act, 1943; "(*b*) 'the Commission' means the "War Damage Commission".

"5. In any case in which a "value payment is payable under "the provisions of s. 13 of the "Act (which provides for the payments to be made where a partial "damage to land is not made good) "the amount mentioned in paragraph "(*b*) of sub-s. 1 as the maximum "amount which the Commission may "pay in respect of the damage so far "as not made good shall be increased "by a sum equal to sixty per cent. "thereof".

payment is to be made unless there is a total loss. Section 13 introduces the case of a value payment where there is not a total loss. There are references in the Act itself to this payment under s. 13 as being a value payment: see, for example, ss. 61 and 63.

If s. 16, sub-s. 2, of the Act does not apply to the present case, s. 16, sub-s. 4, applies to it. Either all the damage should be considered to have occurred on the earliest occasion, or the damage should be apportioned among the three occasions. The one course that ought not to be taken is that which the commission have taken.

Rowe K.C. and *Denys Buckley* for the commission. The company's case depends on the proposition that the payment here is a value payment. It is not: it is a payment sui generis. The commission have a discretion to decide whether there shall be any payment at all and, if they decide that there shall, a discretion to decide also its amount. If, in such a case, the amount of a cost-of-works payment, if it fell to be made, would be less than the amount of a value payment, the commission have a discretion to pay the smaller sum.

As a matter of law, s. 13 in itself does not give any right to interest, and s. 10, sub-s, 5, is not incorporated into it. Strictly, therefore, the commission need not pay any interest at all. If they do, however, it should run from the date of the last occurrence, and that they are quite willing to pay. It would be quite impossible to apportion it among the three occasions.

Milner Holland K.C. in reply. The contention that this is not a value payment is ill-founded, and, in the mouth of the commission, a little astonishing, for they themselves refer to it as a value payment in the notes on the notice of determination. It is certainly not a payment sui generis. One of the reasons why this value payment is being made is because planning considerations prevent the reconstruction of the building in its original form. A cost-of-works payment cannot be made: therefore the payment which is being made is a value payment and is properly so called. It would be quite possible to apportion the interest over the three occurrences.

Cur. adv. vult.

July 6. Vaisey J. read the following judgment:—The points which arise for my decision were said to be as follows: (1.) Is a payment made under s. 13 of the War Damage Act, 1943, a "value payment" upon which interest accrues under s. 10, sub-s. 5 of the Act? (2.) If so, in a case (such as the present) where there have been several occasions of war damage to the hereditament, does that interest run from the date of the first of those occasions, or from the date of the last of those occasions, or must there be some kind of apportionment by reference to the dates of all the occasions?

The company ask me to say that interest runs from the first of the occasions (that is to say, May 10, 1941). They state, as is undoubtedly the fact, that by far the greater part of the damage occurred on that day. The commission contend (*a*) that in strictness no interest is payable, but admit (*b*) that they are willing to pay it as from the third and last of the occasions (July 18, 1944) in the circumstances of the present case. There was a second occasion, the date of which is March 24, 1944. Each of the parties would naturally prefer me to hold that the principle of apportionment should be applicable rather than that the contention of the other party should prevail. The company submit that it would be difficult, although not impossible, to apply that principle. The commission suggest that it could not be done at all.

The question is entirely one of the construction of the Act, through the tortuous windings of which I have once more been conducted under the expert guidance of counsel.

The amount involved is large. The payment on which the interest (if any) has to be calculated is 42,000*l.*, increased by 60 per cent. under the War Damage (Increase of Value Payments) Order, 1947, to 67,200*l.* The annual interest on that sum at 2½ per cent. is 1,680*l.* The difference between what the company claim and what the commission are prepared to pay is about 5,370*l.*

I think that a payment under s. 13, such as we have here, is one kind of a value payment, and may properly be described as a value payment, although it is undoubtedly a value payment of a peculiar and special kind; a value payment, one may say, with a difference. It is called a value payment in the section itself, sub-s. 2 beginning with these words: "In the case of a "value payment made in exercise of the power conferred by this "section". It is so described in ss. 61 and 63 of the Act, and also in the War Damage (Increase of Value Payments) Order, 1947. It is likewise so described in the notice of determination from which the company is appealing. The omission of any reference to the section in s. 22, sub-s. 1 (*b*) points to the same conclusion. With the exception of sub-s. 4, I think that s. 16 of the Act is not material to the question which I have to decide.

The difference between an ordinary value payment and what I may call a s. 13 value payment is in substance this: an ordinary value payment is an amount which must necessarily be ascertained under and according to the code of rules laid down in s. 10 of the Act. It is, notionally at any rate, a fixed amount, and when once the right to an ordinary value payment has been established, the amount of it can and must be calculated without

VAISEY J.

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any room for variation either in the way of addition or deduction, and the amount so calculated must in such a case carry interest at the rate of 2½ per cent. per annum payable when the payment is discharged: s. 10, sub-s. 5 of the Act. I think that the interest falls to be calculated from the time of the occurrence of the war damage, if there was but one occasion, or probably by the method of apportionment to which I have already alluded if there were more occasions; but I need not so decide, for, in my judgment, the point does not really arise in the present case. The s. 13 value payment is not a fixed amount, but a discretionary amount with a maximum limit of the amount at which an ordinary value payment would have been calculated: see s. 13, sub-s. 1 (*b*) of the Act.

The notice of determination against which the company appeals must be read as a whole. It is described as a determination of the appropriate payment under s. 13, and by it the commission give notice that, in exercise of the powers conferred upon them by the section, they have determined that the payment should be the sum of 42,000*l.* This was increased by the 60 per cent. to 67,200*l.* True it is that they go on to say that they have computed that amount exactly as though it had been a case of an ordinary value payment, which looks as though the maximum amount permissible under the section were being awarded; but, at the foot of the form, attention is drawn to the notes on the back of it, which are headed " Important " and are described as notes " relating to the determination overleaf "—that is, on the other side of the sheet—and the first of those notes is in the following words: " Interest at the rate of 2½ per " cent. per year (less income tax) will be paid on the amount of " the value payment from the last notified date of damage to the " date of payment ".

Assuming, without deciding, that a larger sum in respect of interest, that is to say, interest from an earlier date than the last notified date, namely, July 18, 1944, could have been claimed if no mention of interest had been made in the determination appealed from, I think that the determination was validly made in this case under s. 13 fixing the amount at 67,200*l.* plus interest from July 18, 1944, even though that was not the maximum sum of interest which might have been awarded under the section.

It is quite clear to me that what the commission have intended the company to have is 67,200*l.* plus 1,680*l.* a year interest from July 18, 1944, and not 67,200*l.* plus a larger sum for interest, that is to say, interest calculated from some earlier date or dates; and, to put the matter in another way, if the company were justified in their contention that it was the larger amount of interest which should have been awarded, the commission would be equally justified in saying that if the interest or any part of the interest were to be calculated from an earlier date or dates, they would be giving the company more than they intended to give them in exercise of the discretion vested in them by the section, and that the matter could and should be re-opened to enable the necessary adjustments to be made.

The result is that this application fails and must be dismissed with costs.

Declaration accordingly.

Solicitors: *Lee & Pembertons; Treasury Solicitor.*

K. R. A. H.

In re FRERE DECD.

KIDD AND ANOTHER *v.* FARNHAM GROUP HOSPITAL MANAGEMENT COMMITTEE AND OTHERS.

[1949 F. 2134.]

WYNN-PARRY J.

1950

July 6, 7.

Will—Construction—Gift to hospital "if still at my death run on a "voluntary system and not taken over by the State"—Whether condition imported into residuary devise—Whether nationalized hospital a charity—National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81), *s.* 59.

The testator, by his will dated March 10, 1941, directed his trustees in the following terms: "To the following hospitals if still "at my death run on a voluntary system and not taken over by the "State, namely: to the Fleet and District Hospital six thousand "pounds. . . . To the same hospital three hundred pounds to build "a library for the hospital . . .". After numerous other bequests he directed: "Any residue of my estate I give to the Fleet and "District Hospital for endowment purposes".

On July 5, 1948, the National Health Service Act, 1946, came into operation, and the Fleet and District Hospital was taken over under s. 6 of that Act. The testator died on January 15, 1949. It was conceded that the condition attaching to the specific gifts operated, and that the gift of 6,000*l.* and the other gift therefore failed. On a summons taken out to have determined, among other things, the validity of the gift of residue—

Held, (1.) that, on the true construction of the will, the words of the residuary gift were not qualified by the words preceding the specific gifts and the gift therefore, if otherwise good, took effect; (2.) that, having regard to s. 59 of the National Health Service Act, a hospital taken over by the Minister of Health under ss. 6 and 7 of the

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Act did not cease to be a charity, and the gift of the residuary estate was therefore a good charitable bequest, and took effect as such.

In re Morgan's Will Trusts [1950] Ch. 637 and *In re Deans' Will Trusts* (1950) 66 T. L. R. (Pt. 1) 728 applied.

ADJOURNED SUMMONS.

The testator, John Edward Frere, made his will on March 10, 1941. Having appointed executors, and given certain directions and various bequests, the testator gave and devised all the remainder of his property to his trustees on trust for sale. After payment of his funeral and testamentary expenses, debts and duties, he directed payment thereout of a number of legacies and then proceeded as follows: " To the following hospitals if still at " my death run on a voluntary system and not taken over by the " State namely: to the Fleet and District Hospital six thousand " pounds for investment in stock or stocks of the British Govern- " ment and to apply the income to provide (*a*) one hundred " pounds a year as an X-ray deposit fund to be called 'Frere " 'X-ray Fund'; (*b*) fifty pounds a year for extra comforts for the " nursing staff; (*c*) the balance for a free bed for ex-service men " to be called 'Frere bed'. Any surplus yearly income may " in the discretion of the executive committee be applied for " the general benefit of the hospital. To the same hospital " three hundred pounds to build a library for the hospital and " such of my books as shall be approved as suitable by my " executors. To the London Hospital one thousand pounds to " endow one or more 'Frere' children's beds ".

He continued by giving a number of legacies to various bodies including the Royal Air Force Benevolent Fund, the British Sailors' Society, the Royal Lifeboat Institution, the Fleet Cricket Club, the Fleet Football Club, and a legacy to the Fleet Urban District Council for the purpose of erecting a certain memorial, and other legacies. The clauses of the will were not numbered. The testator directed that all legacies should be free of duty and that a legacy to a person dying in his lifetime should lapse, and provided machinery for abatement if his estate should be insufficient to pay all the legacies he had given. Then he provided: " Any residue of my estate I give to the Fleet and District " Hospital for endowment purposes ".

By the first codicil to his will dated August 22, 1941, so far as material, he revoked the legacy of 1,000*l.* to the London Hospital to endow one or more " Frere " children's beds; directed that his residence at Fleet and his personal chattels as defined by s. 55 (x) of the Administration of Estates Act, 1925, should be excluded from the gift and devise of his residuary estate; and gave and devised that residence and his personal chattels to the London

Hospital so that the property and contents should be used as a rest home for the nursing staff. He gave to the same hospital the sum of 1,000*l.* to form an endowment fund for the maintenance of the property for that purpose, and directed that the gifts and devise should be free of duty.

He added the following proviso: "Provided that if at my "death the hospital shall have ceased to be run on a voluntary "system and shall have come under State control no one of the "said gifts or devise to the hospital shall take effect and in lieu "thereof I direct that such gifts and devise shall take effect for "such charitable purpose or purposes as my trustees after consul-"tation if possible with former members of the board of governors "of the hospital shall decide to secure if possible the retention "of the property for some good and charitable purpose and I "further separately provide that if after my death the hospital "shall cease to be run on a voluntary system and shall be taken "under State control the benefit of the said gifts and devise to "the hospital shall immediately before the taking over by the "State cease and determine and shall go and be applied and "transferred to such charitable purpose or purposes as the majority "of the then members of the board of governors of the hospital "shall decide with the object if possible of retention for some "good and charitable purpose".

The testator died on January 15, 1949, and the will and codicils were duly proved at the Principal Probate Registry on February 25, 1949. On the appointed day, July 5, 1948, under the National Health Service Act, 1946, the property of the Fleet and District Hospital was taken over under s. 6 of that Act and its other property under s. 7. The activities of the hospital were now conducted by the Farnham Group Hospital Management Committee, who acted as the management committee for a group of hospitals including that in question. The London Hospital was designated a teaching hospital and was so treated for the purposes of ss. 6 and 7 of the Act.

It was conceded that as regards the Fleet and District Hospital the condition upon which the gift of 6,000*l.* was made had come into operation and that that gift did not take effect. So far as the gift and devise in the first codicil to the London Hospital was concerned, those who were now managing the activities of that hospital and were responsible for its property did not desire to have the residence or the endowment fund transferred so that the property could be used and the fund applied as the testator intended. It was contended by counsel for the first defendants that in any event the proviso in the first codicil operated. In the result that was not disputed, and therefore the gift over under that codicil took effect.

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The question on the summons relevant to this report was whether the gift of residue was valid.

L. J. Morris Smith for the plaintiffs, executors.

Denys Buckley for the South-Western Metropolitan Regional Hospital Board, the Farnham Group Hospital Management Committee, the Ministry of Health and the Attorney-General. It is conceded that the hospitals in question were not, at the testator's death, run on a voluntary system but were taken over by the State. Accordingly the specific gifts to them in the will fail and fall into residue to the gift of which these conditions do not apply. There are numerous gifts and directions in the will between the gift to the Fleet and District Hospital and the gift of residue, to which these conditions cannot apply. The language of the will cannot be strained to import this condition into the residuary gift, therefore the gift of the residue is valid and unaffected by the condition. There is a body identifiable as the Fleet and District Hospital, and conducting the same activities; the only difference is in the management. A similar question was before Roxburgh J. in *In re Morgan's Will Trusts* (1). This is a gift for endowment purposes, but it is none the less a valid gift: s. 59 of the National Health Service Act, 1946 (2).

V. M. Pennington for the London Hospital was not interested in arguing this question.

Oliver R. Smith for Charlotte Emily Ash, one of the next-of-kin. The use of the word endowment distinguishes this case from *In re Morgan's Will Trusts* (3). The testator did not intend this residuary gift to take effect if the specific gift failed. One cannot, grammatically, read the original condition into the residuary gift, but the testator's intention can be implied, as the words used in the residuary gift show that the same donee is intended as in the specific gift. The testator cannot have intended to deprive the hospital of the specific gift if it were nationalized, and at the same time to give it more by a residuary gift.

The purposes for which the Fleet and District Hospital were carried on are no longer charitable. Hospitals since the National Health Service Act came into force are no longer charities: they are self-supporting: see *Needham* v. *Bowers* (4). A gift for medical purposes is not charitable if it includes non-charitable objects: *In re Osmund* (5). Since the National Health Service came into operation, all are in effect in the same position as the lunatics in *Needham* v. *Bowers* (6), who paid their fees. It is immaterial whether people who frequent hospitals are in need or not; it does not matter whether the hospitals make a loss or not: they merely exist to give medical services. It is not a question of poverty at all.

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(1) [1950] Ch. 637.

(2) National Health Service Act, 1949, s. 59 sub-s. 1: " . . . a Hospital Management Committee shall "have power to accept, hold and "administer any property upon trust "for purposes relating to hospital "services or to the functions of the ". . . Committee under Part II of "this Act with respect to research." Sub-section 2: "Part II of the "Mortmain and Charitable Uses Act, "1888, and the Mortmain and "Charitable Uses Act, 1891 . . . "shall not have effect with respect "to any assurance . . . to any such ". . . Committee of land or of personal estate to be laid out in the "purchase of land".

(3) [1950] Ch. 637.

Buckley [replying on the question whether nationalized hospitals are charitable]. The question is whether the relief of infirmity is charitable even without any element of poverty. That does not mean that a nursing home carried on as a commercial activity is charitable, which was the kind of case considered in *Needham* v. *Bowers* (6). That kind of case is wholly distinguishable from institutions which take patients irrespective of means.

It is clear from s. 59 that the legislature intended gifts to hospitals and for their endowment to continue. A hospital is in the same position as the armed forces of the Crown: although they are paid for by the Exchequer, they can receive gifts: *In re Driffill* (7). The provision of hospital services and the provision of defence services are the same in that both are public services, and come within the fourth heading laid down by Lord Macnaghten in *Commissioners for the Special Purposes of the Income Tax Acts* v. *Pemsel* (8). The fact that a gift is for general public purposes does not mean that it is not charitable. [Counsel referred to *In re Roadley* (9), *In re Hillier* (10), *In re Deans' Will Trusts* (11), and *In re Morgan's Will Trusts* (12), on the question of relief of infirmity.] In *Pemsel's* case (8) Lord Herschell said that hospitals were charitable irrespective of poverty. They are still open to everybody as they were before the National Health Service Act. It is immaterial, on the question whether they are still charities, that they are not now paid for by individuals but by insurance under the Act.

WYNN-PARRY J. stated the facts substantially as above set out, and continued:—The question at issue is the effect of the short residuary disposition. Mr. Buckley contends that on the true construction of the will the residue is given without any such condition as is attached in the case of the earlier gifts in the will to the Fleet and District Hospital and the London Hospital

(4) (1888) 21 Q. B. D. 436.
(5) [1944] Ch. 206.
(6) 21 Q. B. D. 436.
(7) [1950] Ch. 92.
(8) [1891] A. C. 531, 583.
(9) [1930] 1 Ch. 524.
(10) [1944] 1 All E. R. 480.
(11) (1950) 66 T. L. R. (Pt. 1) 728.
(12) [1950] Ch. 637.

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respectively. He points out that between the earlier gifts and the residuary gift there are, first of all, a number of further legacies to some of the recipients, and certain directions. Therefore, he says there is no justification for reading the residuary gift as subject to any such condition as is imposed in the case of the earlier gifts. It is, of course, to be observed that the object of the testator as regards the earlier gifts to the two hospitals was to indulge his charitable instincts. He emphasizes that in the first codicil. In both the earlier gifts in the will and in the codicil he expressly provides that, as regards the two hospitals in the will and the London Hospital in the codicil, the gifts are only to be effective if the hospitals shall not have come under State control. Can it be said that there is an indication there that the testator intends that, if the hospitals are taken over by the State for the purposes of his will, they shall cease to be regarded as charities? If the construction for which Mr. Buckley contends is correct, the extraordinary result follows that the very institution which in the earlier part of the will is deprived of the limited legacy of 6,000*l.* by the operation of the condition, obtains under the residuary gift not only 6,000*l.*, but any balance of the residue.

With considerable reluctance, I feel driven to the conclusion that I cannot find a sufficient justification to enable me to import into the residuary bequest by necessary implication the condition which is imposed in the case of the earlier gifts to the two hospitals. It seems to me that the only way in which that could possibly be done would be by coming to the conclusion in construing the earlier gifts that the testator has established his own vocabulary and has shown, with sufficient clarity to allow the court to act on it, that, for the purposes of his will, the taking over by the State of that hospital results in that hospital's ceasing to be a charity. But, upon consideration, I do not see that I should be justified in so construing the testator's will. Therefore, with considerable reluctance, as I have said, I must give effect to the words of the residuary gift as I find them, unqualified by the words preceding the earlier gifts, and hold, as a matter of construction, that it is a good residuary bequest.

There remains the interesting question whether or not, on the basis that the gift of the residue was otherwise good, the gift should not fail on the ground that the Fleet and District Hospital has ceased to be a charity. The force of that submission lies in this, that the gift of the residue is for endowment purposes; that it is a gift of the residue as a capital sum upon trust to apply the income in perpetuity; and that it is therefore a gift which can only be good if it is charitable. Upon the evidence it appears to me to be satisfactorily established that, so far as identity is concerned, there is a body to answer the description "The Fleet

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"and District Hospital"; and the evidence satisfies me that the activities which were previously being carried on by the hospital before the appointed day are still being carried on. It seems to me that, having regard to s. 59 of the National Health Service Act, 1946, and having regard further, to the two recent cases, *In re Morgan's Will Trusts* (13) and *In re Deans' Will Trusts* (14), it is not open to me to hold that this is not a good charitable disposition of the residuary estate. The fact that the hospital is still to be regarded as a charity seems to me implicit in the reasoning of Roxburgh J. in *In re Morgan's Will Trusts* (13); and, further, it appears to me that in *In re Deans' Will Trusts* (14) Harman J. has in effect held that a hospital does not cease to be a charity merely because of the coming into effect of the National Health Service Act.

For these reasons, therefore, I come to the conclusion that the gift of the residuary estate is a good and valid gift to which effect should be given.

Declaration accordingly.

Solicitors: *Steavenson & Couldwell, for Nash & Vann, Fleet; The Solicitor, Ministry of Health; The Treasury Solicitor.*

I. G. R. M.

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(13) [1950] Ch. 637.

(14) 66 T. L. R. (Pt. 1) 728.

DOLLFUS MIEG ET COMPAGNIE S.A. *v.* BANK OF ENGLAND.

[1948 D. 1692.]

WYNN-PARRY J.

1950

July 19, 20.

Procedure—Parties—Adding defendants—Interest akin to a proprietary right in subject-matter of action—R. S. C., 1883, *Ord.* 16, *r.* 11.

The Bank of England held, for safe custody, sixty-four numbered bars of gold, which had been looted by the Germans from a French bank which was holding them on behalf of the plaintiffs in the action, a French company. The bars were recovered in Germany, and lodged with the Bank of England by the Governments of the United Kingdom, the United States, and France for safe custody pending their ultimate disposal.

The plaintiffs issued a writ against the bank, claiming delivery of the bars, an injunction restraining the bank from parting with possession of them otherwise than as directed by the plaintiffs, and (alternatively) damages.

The bank applied by motion to have the writ set aside and all subsequent proceedings stayed, on the grounds that the bars were in the possession or control of the depositor governments, and that the action impleaded two foreign sovereign states which declined to submit to the jurisdiction. On this motion, Jenkins J. made an order as prayed.

On appeal to the Court of Appeal, further evidence was given that, since the issue of the writ in the action, thirteen of the bars had been sold by the mistake of a subordinate official, although the bars had been segregated pending the receipt of directions from the governments. On that evidence, the Court of Appeal reversed the order of Jenkins J.

It was desired to appeal to the House of Lords, and the Governments of the United States and France now applied by motion under Ord. 16, r. 11, to be added as defendants in the action in order to make an independent presentation of their case before the House. It was contended for the applicants, and admitted by the bank, that the bank would be embarrassed in conducting an appeal in which it would have to protect both its own interests and those of the applicants, as it might be that the mistaken disposal of the thirteen bars would result in the bank's being under a liability both to the plaintiffs and to the applicants.

Held, (1.) that there was jurisdiction to make the order prayed, as the applicants had a direct interest in the subject-matter of the action and a right nearly akin to a proprietary right therein, and as the true test was what would be the result on the subject-matter if the applicants' right could be established.

Vavasseur v. *Krupp*, (1878) 9 Ch. D. 351, applied.

Norris v. *Beazley*, (1877) 2 C. P. D. 80; *McCheane* v. *Gyles* (*No.* 2), [1902] 1 Ch. 911, and *Moser* v. *Marsden*, [1892] 1 Ch. 487, distinguished.

(2.) That it would be a right exercise of the court's discretion to make the order, as, in view of the bank's embarrassment in arguing the appeal, the applicants could properly be considered to be parties "whose presence before the court may be necessary in order to "enable the court effectually and completely to adjudicate upon and "settle all the questions involved in the cause or matter" within the meaning of the rule, those words being wider in scope than the words "parties who ought to have been joined".

PROCEDURE SUMMONS.

In the concluding stages of the second world war, the Allied armies found and seized a large quantity of gold which had been looted by the Germans. As a result of treaty arrangements, a tripartite commission, consisting of the Governments of the United States of America, the Republic of France and the United Kingdom, was set up to obtain custody of the gold, and eventually to dispose of it among the claimants who might establish their claims in accordance with the treaty provisions. The commission, in the course of the discharge of their functions, caused to be shipped to this country and deposited with the Bank of England sixty-four bars of gold marked in such a way as to be identifiable as bars of gold looted by the Germans from the plaintiffs. The plaintiffs, discovering this circumstance, asserted their claim to the bars and issued the writ in this action against the bank in which they claimed delivery up of the sixty-four bars of gold, or damages for their detention.

The defendants applied by motion to set aside the writ and all subsequent proceedings on the ground that the gold bars were, through them, in the possession of the sovereign foreign states, members of the commission. Jenkins J. made an order as asked, setting aside the writ and all subsequent proceedings (1).

On the plaintiffs' appeal to the Court of Appeal (2), fresh evidence was put in by the bank to the effect that, notwithstanding that in answer to a request on behalf of the commission, the bank had segregated the whole of the sixty-four bars, yet, after the issue of the writ, by an act of inadvertence on the part of a subordinate officer of the bank, thirteen bars had been moved and disposed of in the ordinary course of business. On that evidence, the Court of Appeal allowed the plaintiffs' appeal, but gave leave to the defendants to appeal to the House of Lords. The Governments of the United States and the Republic of France applied to the House of Lords for leave to be joined as defendants in the action. The House made no order on that application, but adjourned the matter to enable the applicants, if so advised, to apply to the Chancery Division to be joined; and further directed that the further hearing of the matter in the House of Lords should not proceed until the application had been finally determined. The applicant governments accordingly took out this summons under Ord. 16, r. 11 (3).

Sir Hartley Shawcross A.-G., and *Denys Buckley* for the applicants. The two governments desire to argue their own case before the House of Lords, and for this purpose seek to be joined as defendants. The erroneous disposal of the thirteen bars has placed the bank in an embarrassing position; it may be that they are liable both to the plaintiffs and to the applicants, and they cannot effectively argue both the applicants' case and their own before the House.

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(1) [1949] Ch. 369.

(2) [1950] Ch. 333.

(3) Rules of the Supreme Court, Ord. 16, r. 11: ". . . The court or a "judge may, at any stage of the pro"ceedings, either upon or without the "application of either party, and on "such terms as may appear to the "court or a judge to be just, order that "the names of any parties improperly "joined, whether as plaintiffs or as "defendants, be struck out, and "that the names of any parties, "whether plaintiffs or defendants, "who ought to have been joined, or "whose presence before the court "may be necessary in order to enable "the court effectually and completely "to adjudicate upon and settle all the "questions involved in the cause or "matter, be added".

This is a proper case in which to make an order; the applicants claim possession or control of the gold through the bank, and could have been joined as defendants in the first instance. *Vavasseur* v. *Krupp* (4) governs this case in principle; in that case a foreign sovereign was allowed to intervene, in order to protect his property which was in the hands of a bailee within the jurisdiction.

Cross K.C. and *J. R. Lee* for the bank. The defendants support this summons. Their argument before Jenkins J. was on the footing that the sixty-four bars were in the vaults of the bank, and were returnable in specie to the depositing governments. In view of the disposition of the thirteen bars, it is submitted that the applicants should be separately represented on appeal.

Sir Andrew Clark K.C. and *R. O. Wilberforce* for the plaintiffs. There is no jurisdiction under the rule to add the applicants as defendants: jurisdiction does not arise unless the proposed new parties either (i) ought to have been joined in the first instance, or (ii) must necessarily appear to enable the court to adjudicate. Neither branch of the rule is satisfied by a contention that they could argue the case better than the existing defendants.

Alternatively, the limited discretion arising out of the jurisdiction will not be exercised at the instance of persons not already parties except in these classes of case: (a) a representative action; (b) where a proprietary right of the applicant is directly affected, and (c) in an action for specific performance, where the applicant has a direct interest in the performance of the contract: see the notes to Ord. 16, r. 1 in the Annual Practice. Only (b) can be in question in this case. It is further laid down in the same notes that a plaintiff cannot be compelled to proceed against persons whom he does not wish to sue.

Vavasseur v. *Krupp* (5) is distinguishable from the present case in two vital respects: first, the goods were the legal property of the applicant, the Mikado; whereas in the present case the applicants made no proprietary claim to the gold, but merely assert that they have possession or control through their bailees; secondly, it seems clear that the plaintiff assented to the joinder of the Mikado, hoping that he would be bound by the order of the court.

The proposition that a plaintiff cannot be compelled to join persons whom he does not wish to sue—against whom he does not seek relief—is exemplified by *Norris* v. *Beazley* (6), *Moser* v.

(4) (1878) 9 Ch. D. 351.

(5) 9 Ch. D. 351.

(6) (1877) 2 C. P. D. 80.

Marsden (7), *Hood Barrs* v. *Frampton* (8), and *McCheane* v. *Gyles* (*No.* 2) (9). These cases also indicate that the applicants cannot succeed if their interest is only indirect.

The governments are neither necessary nor proper parties to this action. The question in dispute is whether the defendants hold the gold as bailees, in which case it is returnable to the governments in specie; or as bankers, in which case the gold is merged in the general pool held by the defendants. It cannot be said that the mistake made by the defendants will put them in a difficulty, as they have already stated on oath that their duty was to hold the specific bars separately at the governments' disposal. Further, *Wilson* v. *Anderton* (10) shows that the action was properly constituted by suing the bank as bailees; a bailee has no better title than his bailor, and any necessary question of title can be determined in an action against the bailee.

The proposed joinder will cause delay and add to the expense of the action: it is submitted that there is no jurisdiction to make the order; and, if there were, the court ought not to exercise its discretion by making it.

Buckley in reply. The applicants have a substantial interest in the subject-matter of the action; if they had applied to be joined at the outset, the court would certainly have granted the application. If the defendants fail in their appeal to the House of Lords, they will be open to attack both by the plaintiffs and by the applicants; a most undesirable and embarrassing situation. No delay or expense to the plaintiffs will be caused by the proposed joinder; the only result will be that the applicants and not the defendants will present the main argument on the appeal.

The decision in *Vavasseur* v. *Krupp* (11) should be considered to cover the proposition that the absolute right of a foreign sovereign to the possession or control of things within the jurisdiction is not to be canvassed in the courts here: a government has a right to intervene to protect that right. To sum up: jurisdiction to make the order exists, because the presence of the applicants is necessary to enable the matter effectively to be adjudicated upon. The court must have before it the effective parties on all questions which arise; here, the question of immunity is fundamental to the case. There was jurisdiction to make the joinder initially, and that jurisdiction can be exercised now. There being jurisdiction, the court will have regard to the general convenience. There will be no substantial hardship occasioned to the plaintiff, while the applicants are directly affected by the relief claimed.

(7) [1892] 1 Ch. 487.

(8) [1924] W. N. 287.

(9) [1902] 1 Ch. 911.

(10) (1830) 1 B. & Ad. 450.

(11) 9 Ch. D. 351.

Wynn-Parry J. The general rule is, I think, accurately stated in the notes to Ord. 16, r. 1, in the Annual Practice in these words: "Generally in common law and chancery matters a "plaintiff who conceives that he has a cause of action against "a defendant is entitled to pursue his remedy against that "defendant alone. He cannot be compelled to proceed against "other persons whom he has no desire to sue."

In *Norris* v. *Beazley* (12), the defendant in an action on a bill of exchange against the acceptor sought to add the name of a company as defendants under Ord. 16, r. 13, the rule to which r. 11 corresponds, upon the grounds that "it was alleged "by the defendant that the acceptance was given for the purchase "money of a ship which he had agreed to purchase of the "plaintiffs; that in entering into the agreement for such purchase he had acted as a trustee for the company, to whom "the ship was afterwards conveyed in pursuance of the agreement, and that the plaintiffs made fraudulent representations "with regard to the ship, by reason of which the company had "been put to useless expense, which they claimed to recover "from the plaintiffs."

The court (Lord Coleridge C.J., Denman and Grove JJ.) refused the application. Lord Coleridge C.J., having considered the wording of the rule and in particular the last words of it, said (13): "It seems to me to be correctly argued that those "words plainly imply that the defendant to be added must be a "defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that "it was never intended to apply where the person to be added "as defendant is a person against whom the plaintiff has no "claim, and does not desire to prosecute any. It seems to me "that this application is answered, and that it was not intended "that persons in the position of this company should be added "as defendants, merely for the convenience of another defendant "between whom and the company there may be questions which "will afterwards have to be settled. It seems to me that it is "the more important to construe this rule strictly, because it is "obvious that, in many cases, if the defendant's contention is "right, its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their "actions persons against whom they do not seek to proceed, "and to mix up their rights, as against one person, with questions "of a highly complicated nature arising between themselves and "others." Denman J. said (14): "I am quite clear, however, "that the court ought not to bring in any person as defendant

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(12) 2 C. P. D. 80.

(13) Ibid. 83, 84.

(14) 2 C. P. D. 80, 85.

"against whom the plaintiff does not desire to proceed, unless "a very strong case is made out, showing that in the particular "case justice cannot be done without his being brought in."

Again, in *McCheane* v. *Gyles* (*No.* 2) (15), a single defendant, who was a trustee, sued for breach of trust desired to bring in the legal personal representative of a woman who had been his co-trustee, she being resident in Ireland. A third-party notice, by which he claimed a contribution from her estate, and an order giving leave to serve it on the legal personal representative in Ireland were set aside by the Court of Appeal, but without prejudice to an application by the defendant under Ord. 16, r. 11, to add the legal personal representative as a defendant to the action. Buckley J. held that the legal personal representative ought not to be added as a defendant against the plaintiff's wish. He said (16): "The cestui que trust, who "is the plaintiff in these proceedings, says 'There were two "'trustees, John Cronyn and the defendant Gyles. They com"'mitted a breach of trust, and were under a joint and several "'liability in respect of it. Gyles is liable; I elect to sue him "'alone.' The plaintiff is not bound to sue both the trustees." His Lordship then considered the wording of the rule, and a number of authorities, and proceeded: "Looking at the rule you "must, in order to say that a person who is not a party ought "to be added, find either that he 'ought to have been joined', "or that his 'presence before the court may be necessary in "'order to enable the court effectually and completely to "'adjudicate upon and settle all the questions involved in the "'cause or matter.' I cannot hold that the plaintiff ought to "have joined Mrs. Cronyn as a defendant, and her presence is "not necessary to enable the court to decide whether Gyles is "liable for a breach of trust. Moreover, if Mrs. Cronyn were "joined as a defendant and the plaintiff did not make any "allegation against her, she might ask to be dismissed from the "action."

Those two cases are examples of the general rule, and it will be observed that both decisions were based on the ground that in the circumstances of each of them the court had no jurisdiction to make the order asked for. But there are certain exceptions to the general rule, conveniently divided in the Annual Practice in the note to Ord. 16, r. 1, into three classes, and prefaced, in my view accurately, with the words: "Generally "speaking, intervention can only be insisted upon in three classes "of case"; and the three classes are, first, a representative action where the person seeking to intervene is one of a class

(15) [1902] 1 Ch. 911.

(16) Ibid. 914.

whom the plaintiff claims to represent and the intervener is unwilling to be so represented. In such a case he can insist upon being added as a defendant. The second class is where the proprietary rights of the intervener are directly affected by the proceedings; and the third class comprises actions for specific performance of contracts where third parties have an interest in the question of the manner in which the contract should be performed.

The applicants here, strictly speaking, do not come within any of the three classes. The first and third classes, clearly, are not applicable. As regards the second, the applicants, at any rate so far as regards the purposes for which they desire to be joined as defendants, do not seek to set up any proprietary rights in the sense in which that phrase was used in *Vavasseur* v. *Krupp* (17). In that case, a foreign sovereign, the Mikado of Japan, bought in Germany shells made there but said to be infringements of an English patent. The shells were brought to this country in order to be put on board a ship of war, which had been built for the Mikado in this country, as ammunition for the guns of that ship. The patentee obtained an injunction against the agents of the foreign sovereign, as the persons in whose custody the shells were, restraining him from removing the shells. The Mikado then applied to be made a defendant in the suit. Both the Master of the Rolls and the Court of Appeal held that, notwithstanding the injunction, he ought to be free to remove the shells.

In the course of his judgment, James L.J. said (18): " It " is an undoubted and admitted fact that the Mikado of Japan, " who is a sovereign prince, bought in Germany a certain " quantity of shells, which shells were lawfully made in Germany, " although they were, as alleged, made upon the same principle " as something which is the subject of a patent in this country. " Those shells were bought by the Mikado for the purpose of " his government. He brought them into this country on the " way to Japan, and he asks to be allowed to remove them from " this country, that is to say, he asks that he shall not, by reason " of something which was done between the plaintiff and some " other persons, be interfered with in his removal of them to his " own country. It seems to me that to refuse him that leave " would be a very dangerous proceeding."

James L.J. then turned to the plaintiff's objections: " The " plaintiff says, ' True it is that these shells were your property; " ' you had brought them to this country in transitu to Japan, " ' and you had no doubt a right so to bring them. But some " ' persons in this country, either with or without your authority

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(17) 9 Ch. D. 351.

(18) Ibid. 354.

" '—with your authority it may be, but at all events having " 'possession of these things as your agents—were minded to " 'make, and did make, a use of these shells which was inconsistent with our patent, that is to say, they were making a " 'profitable use of them.' If they were doing so, then they are " liable in an action for damages, and the plaintiff may recover " any damages that he may be entitled to. But that does not " interfere with the rights of the sovereign of Japan, who now " asks to be allowed to take his property. It was his property. " It is now in the shape in which it was when he lawfully " bought it in Germany, where it was lawfully made, and he asks " to be allowed to take it out of this country in that shape." Indeed, through the rest of his judgment he emphasized the point; and again, at the end of his judgment, the Lord Justice made it quite clear that he was resting his decision on what he described as the undoubted and admitted fact that the property in question was the property of the Mikado, the intervener.

On the other hand, as I have already mentioned, the description of the cases in the Annual Practice is prefaced by the words " generally speaking ". The authorities furnish instances of cases when intervention will be allowed and when it will not; and from those authorities the general rule embracing the three classes in question has been evolved; but in no case has the court attempted to lay down in an exhaustive statement all the cases in which the court will allow or refuse applications for the joinder of new defendants. On one side of the line is *Moser* v. *Marsden* (19), which establishes that an indirect interest on the part of an intervener is not sufficient. In that case the plaintiff, the patentee of a machine, brought an action against the defendant for using the machine, which he alleged was an infringement of his patent. The maker and patentee of the defendant's machine applied to be added as a defendant, alleging that a judgment in the action would injure him and that the existing defendant would not efficiently defend the action. The application was refused by the Court of Appeal, reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster.

Lindley L.J., having referred to Ord. 16, r. 11, said (20): " In order properly to understand the rule we must look at the " whole of it. It begins by saying, ' No cause or matter shall " ' be defeated by reason of the misjoinder or non-joinder of " ' parties '—that is the key to the whole section: if the court cannot decide the question without the presence of other parties, " the cause is not to be defeated, but the parties are to be added " so as to put the proper parties before the court." Later he said: " Can it be said that the rule prevents the plaintiff from

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(19) [1892] 1 Ch. 487

(20) [1892] 1 Ch. 487, 490.

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"proceeding against a defendant without having to litigate with "everybody who may be in any way affected, however indirectly, "by the action? It appears to me that it does not. The counsel "for the applicant grounded his argument on the allegation "that Montfort's interest [he was the proposed intervener] "would be affected by the decision in this action. It is true that "his interest may be affected commercially by a judgment "against the defendant, but can it be said that it would be "legally affected? Can we stretch the rule so far as to say "that whenever a person would be incidentally affected by a "judgment he may be added as a defendant? No case has "been cited that goes so far as that: *Vavasseur* v. *Krupp* (21) "and *Apollinaris Company* v. *Wilson* (22) are the nearest to "the present case. But in both those cases the proceedings "affected the property of persons not before the court. I can "understand the application of the rule where the property of a "third party is affected. He may well say, 'I am not to be "'deprived of my property in my absence.' But this case does "not come up to that."

On the other side of the line is *Vavasseur* v. *Krupp* (21), to which I have already referred, which establishes that a proprietary right of the proposed defendant in the subject-matter of the action is sufficient. The question here is on which side of the line does this case fall. For the purposes of this application, the applicants do not assert a title to the property in question, and therefore it cannot be asserted that they have a proprietary right, as that phrase is used in *Vavasseur* v. *Krupp* (21). What they assert is, that if they can establish that through the present defendants, the Bank of England, they have possession or control of the property in question, then, by virtue of the doctrine of immunity which applies to foreign sovereign states, two results might well follow: first, the plaintiffs must fail to obtain any order from this court in their favour; and, secondly, the applicants will retain the possession and control over the remaining bars of gold, and will be able to dispose of them. In other words, although the applicants do not assert title to the bars of gold, the result of a successful intervention by them would be that, as between the plaintiffs and themselves, they would, for all practical purposes, be the owners. It seems to me that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if that right could be established. That is the approach which I have made. Viewing the matter in this way, it is impossible, in my judgment, to say that the applicants have only an indirect interest of the nature which fell to be considered in *Moser* v. *Marsden* (23). They appear to me to have something more, namely, a right, which, although it may arise indirectly by the invocation of the doctrine of immunity, and through the present defendants as bailees, nevertheless results in a direct interest in the subject-matter of this action, and is a right nearly akin to the proprietary right which was under consideration in *Vavasseur* v. *Krupp* (24).

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(21) 9 Ch. D. 351.

(22) (1886) 31 Ch. D. 632.

There is no authority directly bearing upon the point; but, on the analysis which I have made of the nature of the applicants' interest in the matter, I have come to the conclusion that I ought not to say that I have no jurisdiction to entertain the application on the short ground which Sir Andrew Clark put forward, namely, that the applicants could not show a proprietary right, and therefore, did not come within the second of the three classes specified in the Annual Practice; but that I am concerned with a right of such a nature as, upon an application by applicants in the position of the present applicants, should result in an order that they be joined as defendants, provided that it can be shown that in their absence the claim to the right will not effectually be put forward.

In order to accede to the application, I have to be satisfied that they are either persons who ought to have been joined as defendants, "or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". As regards the first limb, it cannot be said that at the institution of the action they were necessary parties. The action as it stands was properly constituted by suing the Bank of England as bailees; and, if any authority be wanted for that proposition, it is provided by *Wilson* v. *Anderton* (25). Does the case, then, fall within the language of the alternative provision which I have read? I do not consider it necessary in the circumstances to pause to inquire whether, if this application had been made at an early stage in the action, it would have been successful.

As has emerged from what I have said, no difficulty was experienced in the early stages of the action in dealing, in their absence, with the point which the applicants desire to argue; and had it not been for the matters disclosed in the fresh evidence which was brought before the Court of Appeal it is clear that this application would never have been considered necessary. The rule is wide enough to allow the court to entertain an application at any stage of the proceedings, and I can see no reason,

(23) [1892] 1 Ch. 487.

(24) 9 Ch. D. 351.

(25) 1 B. & Ad. 450.

on the facts before me, for saying that there can be any objection to the application from the point of view of the stage of the proceedings at which it is made. The crux of the matter appears to me to be this: is the result of the further evidence such that I can now justifiably say that the presence of the applicants before the court is necessary to enable the court " effectually and com" pletely to adjudicate upon " this question, which up to now has been argued on behalf of the applicants by the defendant bank?

Sir Andrew Clark, for the plaintiffs, urged that the absence of the applicants will not prejudice them, and that there is little substance in the submission, both by the bank and the applicants, that the bank will be so embarrassed in the further conduct of this part of the case as to make it necessary that the applicants should be joined. He stressed quite legitimately his submission that to allow the applicants to be joined at this stage will only cause the plaintiffs further delay, and may increase the costs which they themselves may have to bear. On the other hand, Mr. Buckley, in his reply, pointed out that, at any rate on one view of the matter, the bank might find itself liable to the applicants for the value, approximately 300,000*l.*, of the sixty-four bars of gold. I need not say more upon that point than this, that I am not prepared to disregard that submission as having no foundation. I think it a risk which, without inquiring further into the matter, I ought to take into consideration in deciding whether or not to exercise my discretion in the applicants' favour. If I take that submission into account, then the result is that I have grounds for being satisfied that the bank now finds itself, in prosecuting the appeal in the House of Lords on behalf of the applicants, very seriously embarrassed. Is that enough to entitle me to exercise my jurisdiction under the rule?

It is to be observed that the words of the rule on which I am asked to rely, " or whose presence before the court may be " necessary in order to enable the court effectually and completely " to adjudicate upon and settle all the questions involved in the " cause or matter ", are alternative to the earlier words " that " the names of any parties, whether plaintiffs or defendants, who " ought to have been joined "; that therefore they must be intended to extend the jurisdiction of the court; and that it is not necessary, in order to invoke that jurisdiction under the latter words of the rule, to show that the intervener ought to have been joined. I think that those words confer on the court a wide jurisdiction; and, having regard to the review of the cases which I have made, it is a jurisdiction which I ought not to treat as cut down more than I must do by the guidance which I find from those cases. I find nothing in those authorities to prevent my taking the view that there is a general discretion in the court, if it thinks right, having regard to all the circumstances, to bring

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in an intervener in order that the questions involved in the action may be completely adjudicated upon and settled.

On terms which I shall mention, I propose to allow this application, finding nothing in the authorities which would prevent my doing so, and taking the view, with all the circumstances in mind, that it is the proper, and indeed the only satisfactory, course to take in the circumstances. I shall order the applicants to pay the plaintiffs' costs of this application in any event. If the plaintiffs desire to appeal, I shall give leave. If they do appeal, I shall say nothing more as to costs or other terms. If, however, the plaintiffs decide not to appeal, then I shall put the applicants on the further terms, that they shall take, and join with the plaintiffs in taking, all steps which they can to ensure that a motion is brought before this court by the applicants asking for the same relief as was asked for before Jenkins J., and that, this court having pronounced on that matter, it shall be taken to the Court of Appeal with a view to the matter being disposed of by this court and the Court of Appeal before the end of these sittings.

Order accordingly.

Solicitors: *Treasury Solicitor; Freshfields; Slaughter & May.*

F. R. D.

YATES (INSPECTOR OF TAXES) *v.* STARKEY.

VAISEY J.

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July 17, 18.

Revenue—Income tax—Allowances—Divorce Court order for children's maintenance—"Annual sum . . . less tax, in trust for . . . the . . . "children"—Validity—Construction—Settlor entitled to claim allowances—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 2—*Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 4.

A decree of divorce was made against a taxpayer on the petition of his wife, who was awarded the custody of the three children of the marriage. By an order of the Probate, Divorce and Admiralty Division of July 16, 1946, the taxpayer was ordered to pay to his former wife as from December 10, 1945—the date of the decree absolute—" an annual sum of 100*l.*, less tax, in trust for each of " the three children . . . the respondent to claim child allowances " . . .". The wife, as guardian of the children, preferred repayment claims on their behalf, on the basis that the annual sums were income of the respective children. The claims were allowed on the facts before me, for saying that there can be any objection to the application from the point of view of the stage of the proceedings at which it is made. The crux of the matter appears to me to be this: is the result of the further evidence such that I can now justifiably say that the presence of the applicants before the court is necessary to enable the court "effectually and com- "pletely to adjudicate upon" this question, which up to now has been argued on behalf of the applicants by the defendant bank?

Sir Andrew Clark, for the plaintiffs, urged that the absence of the applicants will not prejudice them, and that there is little substance in the submission, both by the bank and the applicants, that the bank will be so embarrassed in the further conduct of this part of the case as to make it necessary that the applicants should be joined. He stressed quite legitimately his submission that to allow the applicants to be joined at this stage will only cause the plaintiffs further delay, and may increase the costs which they themselves may have to bear. On the other hand, Mr. Buckley, in his reply, pointed out that, at any rate on one view of the matter, the bank might find itself liable to the applicants for the value, approximately 300,000*l.*, of the sixty-four bars of gold. I need not say more upon that point than this, that I am not prepared to disregard that submission as having no foundation. I think it a risk which, without inquiring further into the matter, I ought to take into consideration in deciding whether or not to exercise my discretion in the applicants' favour. If I take that submission into account, then the result is that I have grounds for being satisfied that the bank now finds itself, in prosecuting the appeal in the House of Lords on behalf of the applicants, very seriously embarrassed. Is that enough to entitle me to exercise my jurisdiction under the rule?

It is to be observed that the words of the rule on which I am asked to rely, "or whose presence before the court may be "necessary in order to enable the court effectually and completely "to adjudicate upon and settle all the questions involved in the "cause or matter", are alternative to the earlier words "that "the names of any parties, whether plaintiffs or defendants, who "ought to have been joined"; that therefore they must be intended to extend the jurisdiction of the court; and that it is not necessary, in order to invoke that jurisdiction under the latter words of the rule, to show that the intervener ought to have been joined. I think that those words confer on the court a wide jurisdiction; and, having regard to the review of the cases which I have made, it is a jurisdiction which I ought not to treat as cut down more than I must do by the guidance which I find from those cases. I find nothing in those authorities to prevent my taking the view that there is a general discretion in the court, if it thinks right, having regard to all the circumstances, to bring in an intervener in order that the questions involved in the action may be completely adjudicated upon and settled.

On terms which I shall mention, I propose to allow this application, finding nothing in the authorities which would prevent my doing so, and taking the view, with all the circumstances in mind, that it is the proper, and indeed the only satisfactory, course to take in the circumstances. I shall order the applicants to pay the plaintiffs' costs of this application in any event. If the plaintiffs desire to appeal, I shall give leave. If they do appeal, I shall say nothing more as to costs or other terms. If, however, the plaintiffs decide not to appeal, then I shall put the applicants on the further terms, that they shall take, and join with the plaintiffs in taking, all steps which they can to ensure that a motion is brought before this court by the applicants asking for the same relief as was asked for before Jenkins J., and that, this court having pronounced on that matter, it shall be taken to the Court of Appeal with a view to the matter being disposed of by this court and the Court of Appeal before the end of these sittings.

Order accordingly.

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July 17, 18.

Revenue—Income tax—Allowances—Divorce Court order for children's maintenance—" Annual sum . . . less tax, in trust for . . . the . . . " children " — Validity — Construction — Settlor entitled to claim allowances—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 2*—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21*—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 4.

A decree of divorce was made against a taxpayer on the petition of his wife, who was awarded the custody of the three children of the marriage. By an order of the Probate, Divorce and Admiralty Division of July 16, 1946, the taxpayer was ordered to pay to his former wife as from December 10, 1945—the date of the decree absolute—" an annual sum of 100*l.*, less tax, in trust for each of " the three children . . . the respondent to claim child allowances " . . .". The wife, as guardian of the children, preferred repayment claims on their behalf, on the basis that the annual sums were income of the respective children. The claims were allowed by the revenue authorities. The taxpayer claimed that he was entitled to the benefit of the allowances in respect of the children. He contended that the court had no power under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937, to create a trust, and that, no trust being therefore created, the children had no income of their own and he was entitled to claim the allowances under s. 21 of the Finance Act, 1920, as amended. Alternatively, if a trust were created, the income should, by virtue of s. 21 of the Finance Act, 1936, be treated as the income of the taxpayer.

Held, (1.) that the order of July 16, 1946, was within the competence of the court, and was one to which no exception could be taken in substance or in form, and which operated to create a trust in favour of the three children: *Stevens* v. *Tirard* [1940] 1 K. B. 204, distinguished. (2.) That the order created a trust in consequence of which income was paid to, or for the benefit of, the children; that the trust was therefore a "settlement" within the meaning of s. 21 of the Finance Act, 1936; that the taxpayer was a "settlor" within the meaning of s. 21 of the Act of 1936, in that he was a person by whom a trust was indirectly created, notwithstanding that it was done under the compulsion of an order of the court; and that he was therefore entitled to claim the child allowances: *Hood-Barrs* v. *Inland Revenue Commissioners* (1946) 176 L. T. 283, applied.

CASE stated by Kent Commissioners for the General Purposes of the Income Tax Acts.

At a meeting of the commissioners held at the county court of Dartford on March 16, 1949, a taxpayer, one Dennis William Frederick Starkey, appealed against his coding for income tax purposes, as determined by the Inspector of Taxes under Part II of the Income Tax (Employment) Regulations, 1944 (St. R. & O., 1944, No. 251), as amended, for the years ending respectively April 5, 1947; April 5, 1948; and April 5, 1949. The ground of his objection was that further allowances were due to him in respect of his three children. The taxpayer was the respondent in divorce proceedings brought by his wife, who was granted a decree of divorce, which was made absolute on December 10, 1945, and the custody of the children of the marriage. By an order of the Probate, Divorce and Admiralty Division made on July 16, 1946, he was ordered to pay or cause to be paid to his former wife, "as an interim provision until further order, as "from December 10, 1945, an annual sum of 100*l*. less tax, in "trust for each of the three children . . . the respondent to claim "child allowances . . .".

The sums specified in the order were duly paid less tax, and the wife as guardian of the children had preferred repayment claims on their behalf, on the basis that the annual sums were income of the respective children. The claims were allowed by the revenue authorities.

The taxpayer contended that the court had no power under ss. 190 and 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937 (1), to create a trust in favour of the children, and that no trust was therefore created. The children accordingly had no income of their own, and he was entitled to claim allowances under s. 21 of the Finance Act, 1920, as amended by s. 24 of the Finance Act, 1940.

The taxpayer contended, alternatively, that, if a trust had been created, the sums payable under it ought, by virtue of s. 21 of the Finance Act, 1936 (2), be treated as his income.

The inspector of taxes contended: (i) that the order of July 16, 1946, created a trust in favour of the children; (ii) that s. 193, when considered with s. 10, sub-s. 4, of the Act of 1937, was wide enough to authorize the creation of a trust; (iii) that even if the order were not properly made it was effective to create a trust until set aside; (iv) that the payments made under it were the income of the children in their own right notwithstanding s. 21 of the Finance Act, 1936; (v) that the taxpayer was not entitled to claim child allowances under s. 21 of the Finance Act, 1920; and (vi) that the words "the respondent to claim "child allowances" only meant that if at any time a claim for child allowances should become competent, the taxpayer was the person designated by the order as entitled to claim the benefit of it.

The general commissioners held that the order created a trust in favour of the three children, but that under s. 21 of the Finance

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(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, sub-s. 2, as amended by s. 10, sub-s. 4 of the Matrimonial Causes Act, 1937: "The "court may, if it thinks fit, on any "decree of divorce . . . order the "husband . . . to secure for the benefit "of the children such gross sum of "money or such annual sum of money "as the court may deem reasonable, "and the court may for that purpose "order that it shall be referred to one "of the conveyancing counsel of the "court to settle and approve a proper "deed or instrument to be executed "by all necessary parties:"

(2) Finance Act, 1936, s. 21, sub-s. 1: "Where, by virtue or in con- "sequence of any settlement to which "this section applies and during the "life of the settlor, any income is "paid to or for the benefit of a child "of the settlor in any year of assess- "ment, the income shall . . . be "treated for all the purposes of the "Income Tax Acts as the income of "the settlor for that year and not as "the income of any other person."

Section 21, sub-s. 9, defines "settle- "ment" as including "any disposi- "tion, trust, covenant, agreement, "arrangement or transfer of assets" and "settlor" as including "any "person by whom the settlement was "made or entered into directly or in- "directly, and in particular (but "without prejudice to the generality "of the foregoing words of this "definition) includes any person who "has provided or undertaken to pro- "vide funds directly or indirectly for "the purpose of the settlement . . ."

Act, 1936, the income of each child under the trust must, for income tax purposes, be treated as that of the taxpayer, who was entitled to claim the child allowances.

The inspector of taxes appealed.

Upjohn K.C., *J. H. Stamp* and *R. P. Hills* for the inspector of taxes.

John Clements for the taxpayer.

VAISEY J. stated the facts and continued:—The first question which was raised before the commissioners was whether it was within the powers of the court to make provision for the children in the form of a trust. When I look at sub-s. 3 of s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, I feel no doubt that such an order was within the competence of the court, and that no exception can be taken to it either in point of substance or in point of form.

Upon that point, therefore, I have come to the conclusion that the order did create, and operated as having created, a trust in favour of each of the three children. On this part of the case I was referred to a decision of the Court of Appeal in *Stevens* v. *Tirard* (3). That case, however, in my judgment, was different from this, and affords very little assistance to me on this occasion. There the order was not that the sums should be held in trust for the children, but that they should be paid to the mother of the children for their maintenance and education; and, although there are some expressions of opinion in the case which might seem to throw doubt upon the competence of the court to declare a trust, I am myself of opinion that those observations in no way preclude me from reaching the conclusion at which I have arrived on the first point.

The next question which I have to solve arises under s. 21 of the Finance Act, 1936, which is a long section, the marginal note to which is: " Provisions as to income settled on children ".

[His Lordship read s. 21, sub-s. 1, and certain definitions in sub-s. 9 of s. 21 of the Finance Act, 1936.]

In the first place I think that the 100*l.* a year payable under this order is income which is paid to or for the benefit of a child of the taxpayer. Indeed, of that there can be no doubt, and I think that, apart from the section, that would be income of that child.

The question then arises whether it becomes that child's income by virtue, or in consequence, of a settlement. It must be remembered (regard being had to the definition clause) that the expression " settlement " includes " any trust ". It seems to me that this order does, as I have already held, create a trust, and it creates a trust by virtue or in consequence of which the income is paid to or for the benefit of the child; and I think that there can be no doubt that the trust is a " settlement " within the meaning of the section.

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(3) [1940] 1 K. B. 204.

The final step which has to be taken is this, and it is one as to which I am bound to say that I feel a good deal of hesitation: the question which remains for decision is whether the taxpayer is a " settlor ". It is suggested, first of all, that the expression " settlement " limits and controls, and throws light upon, the word " trust ", so that the definition of " settlement " must be read as though the word " trust " which appears in it is to be regarded as something of the character of a trust in the nature of a settlement. Against that method of construing the definition I have the authority of Lord Greene M.R. in *Hood-Barrs* v. *Inland Revenue Commissioners* (4). The matter in issue in that case was whether there was a " transfer of assets ", and Lord Greene M.R. commented on the argument that that expression must be in some way limited because it had to be brought under the general idea of a settlement. He said (5): " Such a coven-" ant "—that is to say, a covenant for the transfer of assets—" bears no resemblance whatsoever to anything which, in the " ordinary sense of the word, could be described as a settlement." But he nevertheless held that the expression could not be limited upon any such principle.

The next question is, in what sense the taxpayer, who was a party to the order in question, was a " settlor ", and in particular whether he was a " settlor " within the meaning of this definition. I was much impressed by the argument that the settlement was the creation of a trust, and that the settlor, or the originator of the trust, must be necessarily a person who acts voluntarily and of his own volition. Certain possible consequences of the contrary view were pointed out to me with great force by Mr. Upjohn, but in my judgment the settlor was in this case a person by whom the settlement (or in this case the trust) was made (or in this case created) directly or indirectly, and not the less so because he was doing it under the compulsion of an order of the court.

I think that there may be many cases in which a man may be said to act voluntarily in one sense, and involuntarily in another. The taxpayer submitted to this order; it was not a consent order, but an order which was made upon him, and which he was obliged to carry out; and it seems to me, on the whole, that the taxpayer was a person by whom a settlement was indirectly made, or by whom a trust was indirectly created, and that he

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(4) (1946) 176 L. T. 283.

(5) Ibid. 291.

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clearly comes within the subsequent words which define a "settlor" as a person who has provided or undertaken to provide funds directly or indirectly for the purposes of the settlement.

As I have said, I think the point a doubtful one; but, on the whole, it seems to me that the conclusion at which the commissioners arrived was right. They said: "We have come to the "conclusion that the order of the court dated July 16, 1946, "created a trust in favour of the three children, but under s. 21 "of the Finance Act, 1936, the income of each child under the "trust must for income tax purposes be treated as the income "of the [taxpayer] who is in consequence entitled to the child "allowances".

This last point was merely a sequel to the conclusion which the commissioners reached, and I cannot see my way to depart from that conclusion. I dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; James Turner & Son.*

I. G. R. M.

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July 26, 27.

Somervell, Singleton and Jenkins L.JJ.

Referred to. MONKLAND v. JACK BARCLAY LD. [1951] 2 K. B. 252

HARTWELLS OF OXFORD, LIMITED v. BRITISH MOTOR TRADE ASSOCIATION.

[1950 H. 2522.]

Trade and industry—Motor trade—Sale of motor cars—Dealer's contractual obligations to waiting customers—Dealer ordered by trade association to sell only on certain conditions absent from contract with customers—Application for injunction.

From January 1 to August 15, 1946, orders for motors could be placed without restriction and large numbers were ordered from the plaintiffs, as dealers, under contracts by which the plaintiffs undertook to make delivery within a reasonable time. On August 15 the defendant Association, of which the plaintiffs and other dealers were members, introduced by their rules a scheme by which dealers were required to obtain from any purchaser of a car from them a covenant not to sell the car within a specified time. Under the Association's rules any member committing a breach could be placed on the stop list, with disastrous results in the case of any dealer member. A difficulty arose by reason of some purchasers who had ordered cars before the covenant scheme was introduced refusing to enter into the covenant; and in June, 1950, a purchaser recovered damages from a dealer refusing to make delivery of a car in those circumstances. In view of this the plaintiffs wrote on July 6 to give notice to the Association that they proposed to sell cars in strict rotation although a purchaser, who had not previously agreed to do so, refused to sign the covenant. In reply they were warned that for such a breach of the rules they might well be placed on the stop list. The plaintiffs therefore brought proceedings for an injunction to restrain the Association from placing them on the stop list for such a breach.

There was in evidence the contract form of the Ford Company, used on sales of cars to dealers, by which the company reserved the right to terminate the contract with a dealer who committed a breach of the rules of the Association and to cease to supply him if placed on the stop list. The same provisions were contained in most, if not all, manufacturers' contracts with dealers.

Held, that, in view of the provisions in manufacturers' contracts with dealers, the plaintiffs would be unable to supply a car to any purchaser refusing to enter into the covenant; and therefore that the plaintiffs were under no risk entitling them to the injunction asked for.

Per Somervell L.J. If the issue ever arose between a man who placed an order in 1946 for a motor car and a dealer who, without anything in the nature of the Ford contract, claimed to be entitled, while cars were in short supply, to deliver cars in priority to persons needing cars in order to carry out the essential duties of the State, a provision authorizing this might well be implied in the contracts made in 1946.

APPEAL from Danckwerts J.

The plaintiffs, Hartwells of Oxford, Ld., were dealers in motor cars, and the defendants, British Motor Trade Association, were founded with the objects of encouraging, promoting and protecting the interests of the motor trade and safeguarding the purchasing public. The plaintiffs and other dealers were members of the Association. The control on the sale of cars imposed during the war ceased on December 31, 1945. In 1946 between January 1 and early in August the plaintiffs entered into a large number of agreements for the sale of motor cars under which the plaintiffs were to use their best endeavour to deliver within a reasonable time. On August 15, 1946, the Association introduced a scheme under which dealers were not to sell or deliver cars to any purchasers without obtaining from each purchaser a covenant not to dispose of the new car without the consent of the Association for a period of six months, afterwards increased to twelve months. Dealers were to do everything required for the purpose of enforcing the covenant scheme. The contracts of purchase entered into before August 15 naturally did not contain any such provision. It was over these contracts that difficulty arose, some of the purchasers being unwilling to enter into covenants against selling the new cars.

This placed the plaintiffs and other dealers in a great difficulty especially because, owing to shortage of cars, a number of those agreed to be sold in this period had not yet been delivered.

By r. 12 (6) of the rules of the Association: "No member "shall do any act which may impede the Association, its officials or "members, in securing observance of the Association's objects."

By r. 12 (9): "No member shall sell or deliver a new motor "car or new commercial vehicle to any person without obtaining "from him a covenant duly executed in a form appropriate to the "transaction approved and supplied by the Association for the "purpose of enforcing the covenant scheme."

Rule 13 contained provisions for putting persons in default on the stop list; and a member whose name was placed on the stop list was to be automatically suspended; and r. 14 (1) provided: "No member of the Association shall supply, directly "or indirectly, any new or used trade goods . . . to, or have "trade relations in respect of any new or used trade goods . . . "with, any person whose name is placed upon the stop list . . ."

The difficulty which had arisen emerged clearly in *Monkland* v. *Jack Barclay, Ld.* (1), where the defendants, who were dealers, had refused to supply the plaintiff with a new Bentley motor car unless he entered into the covenant required by the covenant scheme, although the car had been ordered before August 15, 1946. The plaintiff brought proceedings for damages and on June 30, 1950, Humphreys J. awarded 1,500*l.* damages to the plaintiff on the ground that the defendants had not used their best endeavour to deliver the car within a reasonable time. After that decision the present defendants felt concerned as to their position, and on July 6, 1950, wrote the following letter to the Association: "In view of a recent High "Court decision we have been considering in what order we "should deliver new cars to our customers in the future and have "decided to adopt the following course. All orders for new cars "received and accepted by us, whether before or after the date "when the covenant scheme came into force, will in future be "completed by us in strict rotational order, that is to say, the "customer who placed his order first will be the first to receive "delivery of the particular make of car he has ordered, irrespective of whether he is prepared to sign a deed of covenant or not "(except where he has expressly agreed so to do when giving "the order) or whether he requires the car for his own use or for "immediate resale. Moreover we do not intend to alter our list "in any way to give priority to some customers, such as doctors, "who are in more urgent need of cars than other customers as we

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(1) [1950] W. N. 387.

" are advised that we are not entitled to discriminate in this " manner."

To that letter the Secretary to the Association replied: " The " proposals you put forward indicate a course of conduct that " would be contrary to the objects and rules of the Association. " I must advise you that if you commit a breach of the rules, " the matter will be referred to the Price Protection Committee " which, if it finds that a breach of the rules has been committed, " may insert your name upon the Association's stop list."

In this position the plaintiffs brought an action against the Association on July 10, 1950, claiming an injunction to restrain the Association from taking any steps with a view to having the plaintiffs placed on the stop list or from taking any other steps to prevent the plaintiffs from allocating cars to their customers in the manner set forth in the letter of July 6, 1950; and they moved for an interim injunction in similar terms.

Danckwerts J. held that, although the plaintiffs unfortunately found themselves liable upon contracts which were in conflict through no fault of theirs, it was impossible to grant an injunction to restrain the Association from exercising their legal rights. The motion was treated as the trial of the action. The plaintiffs appealed.

There was evidence before the court as to the form of the contract which Ford Motor Company required dealers to enter into on obtaining new cars from them; and of a letter dated June 16, 1950, sent by that company to the dealers aimed at securing sales of new cars in the order desired by the Government. There was also evidence that the Ford agreement was in a form similar to that used by other manufacturers of cars and that a letter in the same form as that referred to above was sent by other manufacturers to dealers. Details of the Ford contract and letter so far as material are contained in the judgment of Somervell L.J.

Shelley K.C. and *H. J. B. Brewis*, for the plaintiffs. These proceedings for an injunction were asked for by reason of Humphreys J.'s decision in *Monkland* v. *Jack Barclay, Ld.* (2) which, it is suggested, shows that if the plaintiffs refuse to supply a motor car ordered by a customer before the covenant scheme came into operation unless he signs the covenant, they will be liable for breach of contract. Further, the plaintiffs have been advised that if they do not deliver cars to their customers in strict rotation they will be committing a breach of contract and that they are not entitled to discriminate in favour of doctors or other persons who have a priority claim under the letter issued by all manufacturers to dealers. That is because under their contracts of sale they are bound to deliver within a "reasonable "time". It would be a breach of that obligation to prefer one customer to another instead of delivering in rotation: see the observations of Lord Herschell L.C. in *Hick* v. *Raymond* (3). It would be to introduce a new principle into the law of contract for the plaintiffs to discriminate between customers on the ground of public policy.

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(2) [1950] W. N. 387.

It might be well to clear up the form of injunction being asked for by not referring to the letter of July 6, 1950, and so making the injunction less wide. What is asked for is an injunction against taking any step to put the plaintiffs on the stop list by reason only of their delivery of cars to customers pursuant to agreements of sale dated before August 15, 1946, in strict order according to the dates of these agreements without requiring each customer to sign the covenant to retain the car for a specified time or, without having regard to the need of the customer for a new car. Unless delivery is made in strict order the plaintiffs will be committing a breach of covenant as shown by Humphreys J.'s decision.

[Singleton L.J. The court ought not to consider hypothetical cases. We do not know that the delivery of the cars in strict order will result in the plaintiffs' being put on the stop list. Nor do we know that delivery must be in strict order.]

There is nothing hypothetical about the matter and, if the plaintiffs were put on the stop list, they would be put out of business. It is said by the Association that the plaintiffs are not in any dilemma, first, because the only cars they will have available to allocate to the contracts entered into are cars supplied under an obligation that the purchasers shall enter into the contract. Secondly, it is said that, even if the contract of sale entered into involved supplying one customer before another lower down the list having a greater need, that would be contrary to public policy and the customer could not insist on delivery. And thirdly that, even if the plaintiffs are in a dilemma, that is their misfortune and the rules they have subjected themselves to as members of the Association leave them no choice but to comply.

[Somervell L.J. The position might be put differently. The Association must be treated as saying to the plaintiffs: "You "think you must carry out contracts for sale of cars in order but "we think otherwise. You must trust us to act reasonably."]

That would be reasonable were there not very large sums of money involved. The fact that 1,500*l*. damages was awarded in *Monkland's* case (4) shows this. Further, if the plaintiffs are put on the stop list, manufacturers are under agreement to supply nothing to them. Humphreys J. disregarded the obligation between the dealers and the Association and the liability of the dealers to be put on the stop list with disastrous results. He said this had nothing to do with the plaintiff. The issue here comes down to the fundamental question what is a reasonable time for carrying out a contract.

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(3) [1893] A. C. 22.

(4) [1950] W. N. 387.

[JENKINS L.J. What the seller does is to agree to do his best. If he gets a car subject to imposing a contract, then it is not available to a purchaser who will not enter into the contract.]

If the court took the view that the dealer could not rightly be sued for failing to deliver a car to the customer unless he signed the contract against parting with the car for twelve months, the plaintiffs would know where they were.

[SINGLETON L.J. If the plaintiffs do all they can to meet an order they are not in breach, and that is very different from the position in *Monkland's* case (5).]

The only evidence before the court other than the form of contract used by Fords in supplying their cars to dealers is the letter explaining the Government's policy. If the contracts of sale entered into involve supplying in rotation, it seems hopeless to say that the agreement to supply in rotation is not enforceable on grounds of public policy. It is submitted that, in view of the dangerous position as shown by *Monkland's* case (5), the injunction asked for should be granted. Further, the rules of the Association cannot force the plaintiffs to commit illegalities.

[SINGLETON L.J. I am not satisfied that to comply with the rules of the Association would force the plaintiffs to commit a breach of law.]

Surely that follows from the decision in *Monkland's* case (5).

Pritt K.C. and *Guy Aldous*, for the defendants. The problem and dilemma are clear and the dealers are perfectly reasonable in wanting to know how they stand. The Government on the other hand want to know whether without legislation the dealers can conduct the business of selling cars as the Government wish. We do not wish to say that it is a matter of public policy if what is required can be done without reliance on public policy. It is contended that there is no ground for granting the injunction asked for because the plaintiffs are not in the dilemma suggested. *Hick* v. *Raymond* (6) is authority for all it is sought to submit. Reliance is placed on contracts for sale of cars entered into being for delivery in a reasonable time. For this purpose strict order of delivery is not necessary. If reasonable time for delivery depends on the circumstances affecting both vendor and purchaser,

(5) [1950] W. N. 387.

(6) [1893] A. C. 22.

in actual fact the person who decides when to deliver is the dealer, though it does not take the matter out of the hands of the court, who would say what the proper time for delivery was.

[SINGLETON L.J. The danger of this is that the result may be an action for damages.]

It is difficult to see any way out of that. But a breach of the agreement to deliver within reasonable time cannot arise so long as the manufacturer of the particular car says he will not make delivery to the dealer unless the covenant is obtained from the purchaser which he is unwilling to give. That covers a great deal of the facts, as that is the attitude taken up in the agreement required by most manufacturers to be entered into by dealers. The manufacturers say they are doing their best to help the Government and send the dealers cars only on the footing that they contract to enforce the covenant scheme against purchasers. It would involve a breach if a manufacturer's car were supplied to a purchaser by a dealer without obtaining the covenant, and the dealer would never get another car from that manufacturer. A difficulty might arise if a dealer had agreed to supply a car on a particular date. But that is seldom done and the dealer would at most say he would use his best endeavours. Further, in considering what was a reasonable time, consideration of the public needs must be taken into account as a matter of public policy, and it would be contrary to public policy to allow the customer to enforce an express term in a contract that the customer should be supplied in rotation according to the date when he placed the order: see *Egerton* v. *Lord Brownlow* (7) and *Hilton* v. *Eckersley* (8). On all these grounds the appeal should be dismissed.

Shelley K.C. replied.

SOMERVELL L.J. Although the subject-matter of this appeal is perhaps a little complicated and some points raised are difficult, we have all come to a conclusion in the matter, and as the parties desire the decision of this court this term no useful purpose would be served by reserving judgment and putting our decisions, which I think we can clearly express today, in perhaps rather better terms. [His Lordship stated the facts down to the introduction of the covenant scheme, and continued:] There was, therefore, a period (which has been called in argument the interregnum) between the end of the statutory permit scheme and the appearance of the rule of the Association bringing in the covenant scheme, and this appeal is concerned with orders placed with the plaintiffs during that period. We have before us a specimen of the form which the customer signed. I think the only provision referred to was No. 2: "The Seller will use his best endeavours "to secure delivery of the goods on the date agreed, but he shall "not be liable for any damages or claim of any kind, which may "arise in case of delay." Some argument was based on that clause, but I do not think it is maintainable, because no date ever was agreed. Therefore I think that clause is inoperative, and the contract remains one for delivery within a reasonable time. That form of contract, of course, contains no reference to the covenant.

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(7) (1853) 4 H. L. C. 1.

(8) 6 E. & B. 47.

Subsequently to the rule coming into operation, the plaintiffs, in common with other dealers, introduced a form of order under which the customer undertook to sign a covenant against resale. We have a form of such a covenant before us under which the owner covenanted with the Association and (as a separate covenant) with the dealer that he would not within a period initially of six months, later of twelve months, "without the "consent in writing of the Association which consent shall not be "unreasonably withheld use the said vehicle or permit the same "to be used for any purpose whatever other than for the private, "professional or trade purposes of the Owner so that (without "prejudice to the generality of the foregoing) the Owner shall not "during the said period without the consent in writing of the "Association sell, give, pledge, hire (whether by way of hire-"purchase or otherwise) or otherwise deal with the said vehicle "in any manner whereby the property therein is or may be "transferred to any other person."

In the first place, however, we are concerned with the orders placed in the interregnum. But we are also concerned, as will appear, with orders placed after the interregnum, having regard to the broad issue that has emerged here: for the Association are seeking to enforce, not only the covenant scheme, but also through the manufacturers and dealers a scheme by which the needs of individual customers for motor cars are considered. The plaintiffs' contention is that under their contracts, whether made during the interregnum with no reference to the covenant, or made after the interregnum with reference to the covenant, they are bound to have regard only to the dates on which those orders were placed, and that the principle of "first come first served" must be applied to their contracts.

That is broadly how the issue arises. The first point argued by Mr. Pritt was that this was wrong. First, he submitted that in law there is no such general principle applicable to those who sell articles as that they must supply the man who gives his order on Monday before the man who gives his order on Tuesday. Secondly, he said that in the circumstances of this trade, at all material times, no such right to be dealt with in rotation could be implied. In fact he submitted that the implications must be

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the other way. I will come back to that later and say what my view is, but before I do so I will continue with the history of the case, because I think this case should be disposed of on another point that Mr. Pritt put second. We have before us an agreement made between the Ford Motor Company, Ld., and the plaintiffs. It was common ground that this settled the legal position as between the parties at the material date, and was in a similar form to agreements made by other manufacturers with dealers.

By cl. 1: "The manufacturer during the term of this agree-"ment agrees to sell and the dealer agrees to buy cars, commercial "vehicles, chassis and parts (hereinafter unless specifically named "called 'the products') upon the terms and conditions hereinafter "provided." Cl. 20 provides: "Nothing contained in this agree-"ment imposes upon the manufacturer any obligations to accept "any order for any of its products from the dealer or to deliver "any of its products to the dealer." A further clause which I should read at this stage is cl. 30: "The dealer agrees that "during the currency of this agreement he shall be and remain "a Member of the British Motor Trade Association and shall be "bound by and observe the objects, bye-laws and rules of the "said Association in force from time to time. In the event of "any breach by the dealer of any object bye-law and/or "rule of the British Motor Trade Association such act shall also "constitute a breach of this agreement and notwithstanding and "in addition to any other provision hereof the matter may be "dealt with by the British Motor Trade Association in accordance "with the rules of the said Association."

I will refer next to a letter of June 16, 1950, written before the judgment of Humphreys J., which led to the present proceedings. In this letter the Ford Motor Company, Ld., wrote to dealers, including, I gather, the plaintiffs, and, after referring in opening paragraphs to public policy and what the Government desire, they said: "The Ministry of Supply consider it essential "that each case should be studied in detail by dealers before "delivery is arranged and allocations to you are conditional upon "this action being taken." The letter goes on: "The delivery "sequence must be as follows:" Then a scheme is set out of what may be called priorities in which the first are doctors sponsored by the British Medical Association, and midwives sponsored by the Ministry of Health. The letter then goes on to say something which, I think, is important: "It is imperative that "you should take the greatest care to ascertain your customer's "need, condition of present transport and other material circum-"stances, in order that you may be fully armed with all relevant "facts to enable you properly to exercise the discretion entrusted "to you. If, however, you feel you have entered into contractual "obligations which run counter to this directive, you should refer "the details of the order to us."

So far as I understand, the plaintiffs, with other dealers, were carrying out this scheme until there was a decision of the High Court by Humphreys J. in a case in which the plaintiff sued the defendants, Jack Barclay, Ld., for delivery of a Bentley motor car. The company refused to deliver it, as appears from the judgment, on some of the grounds raised in the present appeal. Humphreys J. decided in favour of the plaintiff and gave him damages, and that case is under appeal. Thereupon the plaintiffs wrote to the secretary of the Association on July 6, 1950. [His Lordship read the letter and the secretary's reply.]

The rule as to the stop list there referred to is: "The "Secretary shall compile and maintain a record known as 'The "'Stop List' containing the names of all persons placed upon "the Stop List under the provisions of these rules." Then r. 14 says: "No member of the Association shall supply, directly or "indirectly, any new or used Trade Goods (or, in a particular "case the specified goods) to, or have trade relations in respect "of any new or used Trade Goods (or, in a particular case the "specified goods) with, any person whose name is placed upon the "Stop List except under a contract already existing which the "member is, by law, obliged to fulfil." That, I think, would indicate that being placed on the stop list would probably put a dealer out of business.

I should have read before, because I think it important, r. 3, sub-r. 5, which deals with membership: "Any person elected to "membership of the Association shall be supplied with a copy of "these Rules and shall be deemed to have agreed to be bound "by them." Then r. 28 provides: "These rules may be "amended by a two-thirds majority of the Council, not less than "ten being present in person; Provided that no amendment by "the Council shall come into operation until fourteen days after "notice thereof has been posted to members." So that there are the rules and provisions for their amendment, and, of course, so long as anybody remains a member of the Association he is bound by the rules as they are at the moment. The Price Protection Committee referred to in the letter from the secretary to the plaintiffs is dealt with in r. 17, which sets out its constitution; and r. 20 provides that any person aggrieved by the decision of the Price Protection Committee shall have a right of appeal to an appeal committee appointed by the Council. I need not go into any details; it is the normal sort of procedure that one finds in the rules of bodies of this kind.

It was after the letters had passed between the plaintiffs and the secretary to the Association that the plaintiffs issued their writ claiming an injunction "to restrain the Association . . . from "taking any steps with a view to having the plaintiffs' name "placed on their stop list or from taking any other steps to "prevent the plaintiffs from allocating new cars to their customers "in the manner set forth in the letter of the 6th day of July, "1950." Mr. Shelley contends that as regards orders placed in the interregnum the plaintiffs must deliver in rotation while seeking to obtain the covenant if possible, and that, after that date, though he agrees the covenant must be insisted on, the plaintiffs must deliver in rotation. He claims that the plaintiffs are being put in this dilemma: "We have entered into a lot of "contracts which have this construction, and if we are not "allowed to do what is stated in our letter we shall be sued by a "large number of people and may have to pay heavy damages. "Therefore we are, or should be, entitled to an injunction against "the Association to prevent their setting the Price Protection Committee stop list procedure in motion." I think that the effect of the amendment which Mr. Shelley asked leave to make to the injunction claimed is as I have just stated, though I did not read the actual words. Mr. Shelley therefore, in my view, has to show that the plaintiffs are in danger or being sued for breach of contract if they carry out the rules of the Association, because if they are not breaking their contracts no trouble will arise. That is the first point. But in my view this case falls to be decided on the second point taken by Mr. Pritt, though I will say a word or two about the first point before I finish.

Under the order form current during the interregnum, the plaintiffs have undertaken to take reasonable steps to obtain a car and to deliver it within a reasonable time. A reasonable time for delivery cannot arise so long as they are unable to obtain the car ordered; and the suppliers, the Ford Motor Company (and we were told, other suppliers) are saying to them: "We will not "let you have a car for any of your customers unless in dealing "with your customers you carry out the rules of the Association"; and one of the rules of the Association is that each customer should sign a covenant not to part with a car delivered to him within a year. The suppliers are also imposing a condition, which they are, in my view, entitled to impose, in the broad terms of the letter of June 16, 1950, as to considering each individual case and dealing with it.

This appeal, of course, depends, and inevitably depends, on the contractual position and the rights and obligations as between the plaintiffs' customers and the plaintiffs. Clearly those rights cannot be finally determined, so far as the customers are concerned, in these proceedings. This decision would not make res judicata any issue that might arise between a customer and the plaintiffs. Indeed, there may be special circumstances in cases

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which have not in any way been brought to our attention today. In *Monkland* v. *Jack Barclay, Ld.* (9) there were some very special circumstances which, when that case goes to appeal and is decided, may or may not be relevant as distinguishing it from the ordinary type of case that Mr. Shelley has put before us. What we have certainly to decide is whether Mr. Shelley shows that the plaintiffs are in such jeopardy as to entitle them to an injunction. I think that the Ford agreement and the letter which I have referred to, prima facie at any rate, would afford a good answer to the type of claim which he is contemplating and on which his application to the court is based.

Cl. 32 (d) of the Ford agreement provides: " The manufacturer " shall have the right instantly to terminate this agreement . . . if " the dealer shall at any time appear on the stop list of the " British Motor Trade Association or if he sells or offers for sale " or supplies directly or indirectly the manufacturer's products " to any person or firm or any employee of any person or firm " whose name appears on such stop list." That being so, I think Mr. Shelley's claim for an injunction fails, and, that being Mr. Pritt's strongest point, I think it is right to decide this case on that point.

A great deal of argument was devoted—I am not complaining in any way—to what I may call the contractual position under a contract of this kind having regard to the circumstances, but disregarding the fact that the supplier is now saying: " Unless " you will enforce this scheme you will not get any cars ". If I have taken a right view of those documents that point does not arise. This is one of those happy cases where counsel on both sides rely on the same authority, and it is the well-known authority of *Hick* v. *Raymond* (10), which decided that a reasonable time under a contract for unloading a ship, or indeed for other purposes, depends on the circumstances prevailing at the time. It cannot be said: " Ordinarily you take a week to unload this ship, and " therefore if you exceed a week necessarily you are in default ". The man who has undertaken to unload the ship is entitled to say: " There was a strike on, and I could not get any workmen for such " and such a time ". Mr. Shelley relies on the fact that Lord Herschell, after stating that general principle, does say that of course the delay must not be due to any act or default on the part of the respondents. Mr. Shelley says that to carry out the scheme, giving a doctor or a midwife priority over a man who wants to buy a car merely to resell, or a man who merely wants a new car for pleasure, or perhaps merely wants a better car to replace one that is in quite reasonable running order, is an act or default on the part of the dealer within the words of Lord Herschell.

(9) [1950] W. N. 387.

(10) [1893] A. C. 22.

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What I would say first is that Lord Herschell was, to my mind, plainly not directing his mind to the issue that has arisen in this case as between the plaintiffs and the Association when he was referring to the act or default of the respondents. I quite agree the substance of the decision has relevance, but I am quite certain that Lord Herschell had in mind the ordinary case where, say, a defendant had failed to take reasonable steps to engage workmen, or to engage stevedores, though he knew the ship was coming along at a certain time, or he took men from one ship to unload another ship because he thought it would pay him to unload that ship first. That was the type of circumstance which I think Lord Herschell had in mind. If the issue ever arose—it may arise in the *Monkland* case (11)—as between a man who placed an order in 1946 for a motor car and a dealer who, without anything in the nature of the Ford contract to rely on, claimed to be entitled, while cars were in short supply, to deliver cars in priority to persons needing cars in order to carry out duties essential to the State, a provision authorizing this might well be implied in the contracts made in 1946. Of course, when once there were more motor cars than customers, the question would solve itself. But I do not find it necessary to express any opinion on that. As we, in effect, have not to deal with rights as between customers and dealers, there being no customer before us, I think it desirable that, if there is a narrower ground on which the appeal can be decided, we should not express opinions on the wider issues involved.

That applies with even greater force to a third point taken by Mr. Pritt. He submitted that even if there were an express term in a contract that the customer should be supplied in rotation according to the date when he placed his order, it would in present circumstances be contrary to public policy to allow the customer to enforce that term or condition. He quoted to us statements on that general subject from the speeches in *Egerton* v. *Lord Brownlow* (12). But I find it unnecessary to express any opinion on that point, because the point with which I first dealt disposes of this appeal.

Danckwerts J. disposed of the application before him on a somewhat different ground. I think he took the view that if the plaintiff has entered into a contract with a customer and is a member of the Association and bound by its rules which compel him either to break a term of his contract with his customer or to break the rules of the Association, then, although he has put himself in an unfortunate position, that would not entitle him to an injunction against the Association.

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(11) [1950] W. N. 387.

(12) 4 H. L. C. 1.

I would say in conclusion that we are deciding this issue as between these parties on the evidence before us. Of course, if circumstances change—if, for instance, the Association were to threaten other action which Mr. Shelley's clients thought was not in accordance with the rules, or as regards which on other grounds they thought they could ask for the interference of the court, Mr. Shelley's clients would be entitled to come back to the court. We are concerned only with the facts and circumstances as they are put before us. I do not dissent from the reasons which Danckwerts J. gave for his decision, but I prefer to rest my view that the appeal should be dismissed on the grounds I have stated.

SINGLETON L.J. I agree. The plaintiffs, who are well-known dealers in motor cars, are anxious to know what their position is, and for that reason they started this action claiming an injunction. That injunction as claimed was, as my Lord has said, in wide terms, much wider than Mr. Shelley put it when he asked for an amendment this morning. The British Motor Trade Association publish a little book in which their rules appear, and before their rules they state their objects: "The "objects of the Association are to encourage, promote and protect "the interests of the motor trade and safeguard the purchasing "public against unfair treatment and discrimination, and for this "purpose (a) to take such steps as may be deemed expedient to "prevent price cutting or price inflation of trade goods." Everyone agrees that in taking the steps which they have taken they seek to promote the good of the motor trade, and that they are seeking to act in accordance with public policy and the public weal. That being so, after a judgment given in the King's Bench Division, a position arose which caused the plaintiffs to write the letter of July 6 to the Association, which brought in reply the letter of the following day in which the Association's secretary says: "I must advise you that if you commit a breach of the "rules the matter will be referred to the Price Protection Com-"mittee which, if it finds that a breach of the rules has been "committed, may insert your name upon the Association's stop "list." I am not surprised that that letter was sent, in view of the wide terms of the letter of July 6. The plaintiffs thereafter brought this action.

We are hearing and deciding this appeal upon the evidence before us and upon nothing else. The case as put to us at first was that the plaintiffs were in the position either of being put on the stop list by the Association or of committing breaches of contract, which would involve them in claims for hundreds of thousands of pounds damages. I am not satisfied, for myself, that that is the true position on the evidence before this court. It may be that the plaintiffs will have actions for breach of contract against them; it is impossible to say without knowing the terms of each order which has been given to them and which they have accepted. Before us it was stated that their contracts for the supply of motor cars to customers were all on the same form. The two provisions said to be of importance are cll. 1 and 2: "1. The purchaser agrees to the 'Conditions of Sale' of "the manufacturers of the car as incorporated in the lists issued "by them. 2. The seller will use his best endeavours to secure "delivery of the goods on the date agreed, but he shall not be "liable for any damages, or claim of any kind, which may arise "in case of delay." There was no date agreed, and so it is said that the duty of the plaintiffs in this action was to deliver the car in a reasonable time. Mr. Shelley said that if they did not deliver cars in rotation they would have claims made against them for damages for breach of contract which they could not well meet.

I confess I was attracted by the argument of Mr. Pritt in reply that, when one has to consider whether or not delivery under a contract of this kind, or of any kind, is given within a reasonable time, one must calculate the reasonable time by regard to all the circumstances of all the parties to that contract, and furthermore that in the circumstances of this case it could not be said that a reasonable time had elapsed if the manufacturer of the motor car can say, and does say, without any breach of contract that he will not deliver except on conditions which the customer is unwilling to accept. My Lord in the course of his judgment referred to the form of agreement between the Ford Motor Co. Ld. and dealers who enter into arrangements for the supply of motor cars with them, and we were told that other manufacturers of motor cars have the same kind of agreement. It seems to me that, having regard to that agreement—I do not refer to it in detail—if a customer has in the interregnum given an order for a Ford motor car to the plaintiffs, they may well have a defence by reason of the fact that they are only able to obtain delivery of a Ford motor car on the terms of that agreement; for it is open to the Ford Motor Co. to say: "We will not deliver to you unless you comply with these terms "or conditions, and we will not deliver to you unless your customer says he will enter into the covenant". If the plaintiffs in such circumstances have actions for damages for breach of contract brought against them, there may well be an answer to those claims, on the material before this court. There may be other considerations of which I know nothing, but it is not shown in this case that the plaintiffs' position is as awkward as we were at first led to think it would be if they did not succeed in getting an injunction.

Furthermore, as far as I see, the injunction asked for would not really help the plaintiffs. They would, indeed, be no better off if the manufacturers still refused to supply them with a car except upon the terms of the agreement between them; so the injunction, if granted, would not help them. That is another reason, as I think, why the court should not grant it. I am inclined to think that the granting of an injunction would make confusion worse confounded, and I do not think that it would help the plaintiffs. For those reasons I, too, think that this appeal ought to be dismissed.

JENKINS L.J. I agree and have very little to add. The plaintiffs are asking the court to interfere with the domestic procedure of an Association of which the plaintiffs themselves are members, and to whose rules the plaintiffs have subscribed. It therefore behoves them to show, and to show with reasonable clearness, that what is proposed to be done by the Association will inflict some actionable wrong on the plaintiffs, notwithstanding that it is done in accordance with the express provisions of those rules. Mr. Shelley for the plaintiffs put the proposition of law on which he relied in two ways. First, he said, the plaintiffs became members of the Association before 1946, and no doubt then agreed to be bound by the rules of the Association for the time being in force. But, he said, their agreement so to be bound must be held subject to an implied term that the plaintiffs were not by any retrospective alteration of the rules to be compelled to commit breaches of contracts lawfully entered into by them before such alteration and involving no infringement of the rules as they stood at the time when those contracts were entered into. On that submission he founded the contention that by putting the plaintiffs on the stop list the Association would be committing a breach of the implied term. Secondly, he said that if it were within the power of the Association under the rules to compel the plaintiffs to commit a breach of contract in circumstances such as these, then the rules to that extent were void as being contrary to public policy.

Of those two submissions the first is the stronger, and I confess that I personally am attracted by it, although it is unnecessary for the purposes of this case to express any decided opinion. Thus to some extent I part company with the learned judge, because he decided the case on the footing that the plaintiffs could not comply with the present rules without committing breaches of the contracts entered into before the new rule was passed; but even so he felt it impossible to interfere. I am, as at present advised, disposed to think that, if it were clearly shown that breaches of antecedent contracts would inevitably be involved in complying with the rules as they now stand, then the proper course for the court to take might well be to grant an injunction. However, on the evidence before us

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I entirely agree with my Lords that the plaintiffs have failed to show that it is not possible for them to comply with the rules of the Association as they now stand without committing breaches of the contracts in question. My Lords have stated fully the reasons for that conclusion, as to which I only wish to add this:—Clause 2 of the Terms and Conditions of Sale in the plaintiffs' form of order, it will be remembered, provides: "The Seller will use his best endeavours to secure delivery of "the goods on the date agreed, but he shall not be liable for any "damages or claim of any kind, which may arise in case of "delay." It has been said that, as no delivery date is mentioned, that clause means no more than that delivery shall be in a reasonable time. With diffidence, I venture to suggest that this view of cl. 2 overlooks the fact that, after all, this was a contract for the sale of goods not yet in existence and to be made by a third party over whom the vendor had no control. Reading cl. 2 with that in mind, I think there is force in the words, "the "Seller will use his best endeavours to secure delivery of the "goods," even though no date for delivery is fixed. I think the effect of it is that the seller is to use his best endeavours to procure delivery of the goods by the manufacturers in a reasonable time, but is not to be liable for any delay. Construing the clause in that way, it seems to me to be reasonably plain, when one comes to look at the plaintiffs' agreement with the Ford Company, that the plaintiffs without any breach of contract could refuse to deliver to a given purchaser any vehicle supplied by the Ford Company on conditions requiring (in effect) that the particular car must be delivered to some other purchaser, perhaps a purchaser who in fact placed his order at a later date than the first-mentioned purchaser. In that state of affairs there never would have been a vehicle available to fill the particular order, and the disappointed purchaser could not, in my view, contend with success that any breach of contract had been committed by the plaintiffs in failing to appropriate the car in question to his order, for that car would never have been delivered except upon terms, in effect, that it was not to be sold to the disappointed purchaser.

Accordingly, I agree that on the facts in evidence in this case the plaintiffs have failed to make out their claim, and, therefore, that the appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal.

Solicitors: *Ludlow, Head & Walter; Osmond, Bard & Westbrook.*

H. C. G.

ACHESON *v.* RUSSELL.

[1949 A. 2937.]

VAISEY
J.

1950

July 19, 20.

Will—Gift of entailed interest in settled land—Whether sufficient specific reference to property—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 176, *sub-s.* 1.

A testator, at the date of his will (after 1925) and of his death, was entitled to farm K. as to a one-third undivided share in fee simple and as to two-thirds as tenant in tail in possession. By his will he gave " all my one-third share and all other my estate " and interest in the family property at K. and in the proceeds of " sale thereof " to M.

The Law of Property Act, 1925, provides by s. 176, sub-s. 1: " A tenant in tail of full age shall have power to dispose by will, " by means of a devise or bequest referring specifically either to " the property or to the instrument under which it was acquired " or ~~to en~~tailed proper~~ty gener~~ally—(*a*) of all property of which " he is tenant in tail in possession at his death; and (*b*) of money " (including the proceeds of property directed to be sold) subject " to be invested in the purchase of property, of which if it had been " so invested he would have been tenant in tail in possession at his " death; in like manner as if, after barring the entail, he had " been tenant in fee-simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any " such disposition by will, such property shall devolve in the same " manner as if this section had not been passed ".

On the hearing of a summons to determine whether the will effectively disposed of the testator's entailed interest to M.,

Held, that, in order to satisfy the section, there need not be a completely accurate and detailed description; that the words of the will constituted a sufficiently specific reference to the testator's entailed interest in two-thirds of the property; and that that interest accordingly passed to M.

Roberts v. *Roberts* (1884) 13 Q. B. D. 794 and *Campbell's Trustees* v. *Adamson* 1936 S. C. (H. L.) 31 distinguished.

ADJOURNED SUMMONS.

The testator, John Sheen Downes, made his will in 1941 and died in 1947. At both dates he was entitled to a freehold farm known as the Manor Farm at Kytes Hardwick, in the County of Warwick, as follows: as to one equal undivided third share in fee simple in possession, and as to the other two equal undivided third shares as tenant in tail general in possession. By his will the testator made the following provision: " I give devise and " bequeath all my one-third share and all other my estate and " interest in the family property at Kytes Hardwick and in the " proceeds of sale thereof to " the first defendant.

Since the death of the testator the trustees for sale under the statutory trusts affecting the property had sold it. One-third of the proceeds had been paid to the first defendant, as representing the one-third share to which the testator was absolutely entitled, and the remaining two-thirds was retained and held by the trustees pending the decision of the present question. By the Law of Property (Entailed Interests) Act, 1932, the latter sum was deemed to be held for an entailed interest corresponding to the former interest in the two-thirds of the property itself.

The question for decision was whether the will effectively disposed of the testator's entailed interest in two-thirds of the property under and by virtue of s. 176, sub-s. 1, of the Law of Property Act, 1925.

Elverston for the trustee.

Hubert A. Rose for the first defendant. The testator's language is a sufficient reference for the purpose of the statute, which does not require a detailed description. By s. 205, "property" is defined as including "any interest in property"; and the testator has referred to his interest.

J. A. Brightman for defendants interested on the failure of the gift. There is no specific reference to the property in question, which is the two-thirds share in Kytes Hardwick. There is a specific reference to the one-third freehold share; the rest is a general reference. In *Campbell's Trustees* v. *Adamson* (1), the House of Lords held that general words of disposition do not cover property which must be "expressly bequeathed". In *Roberts* v. *Roberts* (2), which concerned a question arising under the Bills of Sale Act, 1878, it was held that an inventory was necessary to satisfy the expression "specifically described". [VAISEY J. "Reference" is a much weaker word than "description". The words of the testator identify no property, because there can be an inquiry as to what his other interest was. "Id certum est quod certum reddi potest".] In that case, it will be the inquiry, and not the testator's language, which identifies the property. It cannot be treated as a falsa demonstratio, because the testator has demonstrated nothing: it is a mere vague general expression.

VAISEY, J. This is a short point, on which there appears to be as yet no direct authority.

The question is whether the devise in the testator's will "refers specifically" (within the meaning of the section) to the property of which the testator was tenant in tail in possession at his death? "The property" must, I think, for this purpose be, not the Manor Farm, but two undivided third shares in the Manor Farm. Can it be said that those two undivided shares are "specifically referred to"? The argument for a negative answer to that question points out that the first-mentioned "one-third" is obviously the one-third in which the testator's interest was absolute—I agree with that—and that the "other estate and "interest" is not quantified, and therefore not "specified" or specifically referred to. It was admitted, however, that if it had been quantified incorrectly—*e.g.*, by being called nine-fifteenths instead of ten-fifteenths—the case might have been treated as one of a false demonstration. In my judgment, however, the reference is in fact specific. The testator refers to his "other estate and interest"; and note that the words are in the singular, not in the plural. Id certum est quod certum reddi potest; and it is a matter of no difficulty to render certain the "other estate and interest" of the testator in the property. I am not sure that the reference to the family property itself might not be sufficient, for the object of the section, and of the form in which it is cast, must surely be to avoid any risk of a disentail being effected by inadvertence or involuntarily. A specific reference need not, in my judgment, be a completely accurate and detailed description. Indeed, there is little difference between reference and allusion. What the testator is, in effect, saying is "I own one-third of the property, and I have also another estate and another interest in it; I am now disposing of the entirety". The other view, that the reference is not specific, seems to pay too little regard not only to the expressed intention of the testator, but also to the probable intention of the Act, and to be of too technical a nature to commend itself to me.

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(1) 1936 S. C. (H. L.) 31.

(2) (1884) 13 Q. B. D. 794.

Two cases were cited. In *Roberts* v. *Roberts* (3) it was held that the chattels in a bill of sale are not "specifically described" as required by s. 4 of the Bills of Sale Act, 1878, unless there is something in the nature of an inventory of them; but I think that a specific description requires far more particularity than a specific reference. In *Campbell's Trustees* v. *Adamson* (4) the House of Lords decided that general words of disposition in a will do not cover property which has to be "expressly bequeathed". There again the words are different. Neither of these authorities seems to me to be really in point.

I will make a declaration confirming the title of the first defendant.

Declaration accordingly.

Solicitors: *Reynolds & Co. for Hobourn & Co., Woburn; Reed & Reed for Large & Major, Leamington; Barnett, Tuson & Co.*

F. R. D.

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(3) 13 Q. B. D. 794.

(4) 1936 S. C. (H. L.) 31.

Affirmed on different grounds. C.A.
[1951] 1 All E.R. 494.

DANCKWERTS J.

1950

June 21, 23; July 7.

In re BLAND-SUTTON, DECD.
NATIONAL PROVINCIAL BANK, LD. *v.* THE MIDDLESEX HOSPITAL.

[1949 B. 3659.]

Will—Construction—Gift to hospital for department of medical school—Effect of nationalization—If hospital "nationalized" then to Royal College of Surgeons of England—Whether charitable institution—Customs and Inland Revenue Act, 1885 (48 *&* 49 *Vict. c.* 51), *s.* 11—*National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 8, *sub-s.* 1 *and s.* 15, *sub-s.* 1.

A testatrix by her will dated January 13, 1943, directed her trustee to pay the income of her residuary estate in each year to the treasurer or other proper officer of the Middlesex hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology. The will provided that the gift should fail if the institute ceased to be carried on as a pathological research institution, if its name should be changed, if "the Middlesex hospital" should become "nationalized or . . . pass into public ownership" or if the bank should at any time become unable lawfully to apply the income for the "purposes aforesaid". The will directed that the fund should in any of these events go over, both as to capital and income, to the Royal College of Surgeons of England absolutely for the general purposes of the college. At the date of the will, the Bland-Sutton Institute formed part of the Middlesex hospital medical school. On July 5, 1948, as a result of the coming into force of the National Health Service Act, 1946, the premises of the Middlesex hospital, which was designated a teaching hospital for the purposes of the Act, vested in the Minister of Health and the endowments of the hospital vested in a board of governors appointed by him and therefore subject to his control. The medical school was excepted from these provisions and its property, including the buildings comprising the Bland-Sutton Institute, vested in a governing body set up and incorporated under s. 15 of the Act, pursuant to a scheme submitted by the former governor of the school to the University of London,

Held, that none of the events upon which the gift to the institute was to fail had occurred inasmuch as: (*a*) the institute continued its work as a pathological research institute and its name had not been changed; (*b*) for the purpose of the defeasance clause in the will, the "Middlesex hospital" had not been "nationalized" or passed into "public ownership" because in that clause "the "Middlesex hospital" meant the whole of the hospital, and, though the premises and endowments of the hospital had vested in the Minister or were subject to his control, the property of the medical school was vested in and controlled by an independent governing body and had not therefore been nationalized or passed into public

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

ownership; and (*c*) the bank had not become unable lawfully to apply the income of the fund for the "purposes aforesaid", which on the true construction of the clause meant the purposes of the Bland-Sutton Institute.

Per curiam:—The gift over to the Royal College of Surgeons did, not offend against the rule against perpetuities, for the college was a charity established for the charitable purpose of promoting and encouraging the study and practice of the art and science of surgery. The benefits which surgical practitioners derived from the activities of the college were merely incidental.

Christ's Hospital v. *Grainger* (1849) 1 Mac. & G. 460; *Inland Revenue Commissioners* v. *Forrest* (1890) 15 App. Cas. 334; and *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [1932] 1 K. B. 149, 172, applied.

In re Royal College of Surgeons of England [1899] 1 Q. B. 871, distinguished.

ADJOURNED SUMMONS.

By her will, dated January 13, 1943, a testatrix who died on February 10, 1943, appointed the National Provincial Bank, Ld., to be her executor and trustee. After giving certain annuities and other bequests, she directed her trustee to hold her residuary estate, described as the "endowment fund" on trust for sale upon "the following charitable trusts for so long as the "law shall permit"; first, to provide out of the income for a research scholarship and, secondly, "to pay the residue of the "income of the endowment fund in each year to the treasurer "or other proper officer of the Middlesex hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology "now carried on in connexion with the said hospital. . . . "Provided always that should the Bland-Sutton Institute . . . "cease to be carried on as a pathological research institution or "should its name be changed or should the Middlesex hospital "become nationalized or by any means pass into public ownership or should the bank at any time become unable lawfully to "apply the income of the endowment fund for the purposes "aforesaid then and in any of the said events the bank shall "thereupon pay and transfer the endowment fund both as to "capital and the income thereof to the Royal College of Surgeons "absolutely for the general purposes of the said college".

The Bland-Sutton Institute of Pathology was part of a medical school which, until July 5, 1948, was a department of the Middlesex hospital. The school had been opened in 1835 by subscriptions raised for the purpose, not by hospital funds, though it was carried on in buildings erected in the hospital gardens. The Middlesex hospital was incorporated in 1836, the school remaining an unincorporated body working with the hospital but having a separate existence until 1896. In 1896, it was amalgamated with and became part of the hospital under a scheme adopted by the weekly board of governors of the hospital.

Under that scheme the hospital took over the property and liabilities of the school and the school became a department of the hospital. It had a separate council of governors. Theoretically the school council was under the control of the board of governors of the hospital, but in practice, the government of the school was left to the school council, and the accounts of the school were kept separate from the accounts of the hospital. In 1900, on the reconstitution of the University of London, the Middlesex hospital medical school became a school of the university, where university students might take their training, and the university became the examining body of the school and made grants to the school; but the legal position of the school was not otherwise affected. Until 1914, the school possessed no pathological department, but in 1913, Sir John Bland-Sutton (who had been associated with the hospital or the school since 1886) provided a sum of money to build an institute of pathology. Extensive alterations were made in the school buildings, and the institute was opened in 1914 under the name of the Bland-Sutton Institute of Pathology.

Under the National Health Service Act, 1946, the Middlesex hospital was designated as a teaching hospital, but the medical school became a separate legal entity retaining the school buildings, including those appropriated to the institute, and having a governing body constituted under s. 15 of the Act (1), which thereby became a body corporate. The Bland-Sutton Institute of Pathology continued to function under the same name and as part of the medical school.

The Royal College of Surgeons is a corporation formed under a number of royal charters. The first of these, a charter of 1800, incorporated the college upon the dissolution of the former statutory corporation, formed in 1745 upon the separation of the barbers and the surgeons of London. The first charter incorporated the college under the name of the " Royal College of " Surgeons in London " and recited that " it is of great conse" quence to the common-weal of this Kingdom that the art and " science of surgery should be duly promoted " and that " the

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(1) National Health Service Act, 1946, s. 15, sub-s. 1: " If any general " medical school of the university of " London . . . is not incorporated at " the passing of this Act, the govern" ing body of the school shall, within " a period of six months from the " passing of this Act, prepare and " submit to the governing body of the " said university a scheme, to take " effect on the appointed day, for con" stituting a new governing body of " the school, which shall be a body " corporate with power to hold land " without licence in mortmain and for " conferring powers and imposing " duties on that body and otherwise " for the future management and con" trol of the school ".

" establishment of a college of surgeons will be expedient to the " due promotion and encouragement of the study and practice of " the said art and science ". There were seven further charters in 1822, 1843, 1852, 1859, 1888, 1899 and 1926. By that of 1843 the name of the college assumed its present form; and some contained recitals similar to those in the first charter. Except in the recitals, the charters did not contain any statement of the objects or purposes of the corporation.

The activities and amenities of the college (as described by a former president) are as follows: The college has (1.) a biological museum, which is open to all medical men and medical students and to members of the public in certain circumstances; (2.) a library which is used by those engaged in surgical research and by post-graduate students attending courses of instruction in the college; (3.) laboratories for surgical research in the college and a research farm at Downe in Kent; and (4.) scientific departments of anatomy, pathology, physiology and experimental research, each with a professor at its head. The college arranges statutory and commemorative lectures on various aspects of surgery. Prizes are awarded by the college in connexion with various surgical subjects in order to stimulate the advancement of knowledge in selected aspects of surgery. The college also conducts post-graduate teaching by means of lectures or classes which are attended by some 1,000 students a year. The college carries out the administrative work of the Imperial Cancer Research Fund and it provides accommodation for a joint secretariat for a number of surgical and medical societies. Further, the college provides residential accommodation for about twenty-four post-graduate students and research workers.

Examinations are conducted by the conjoint board of the Royal College of Physicians in London and the Royal College of Surgeons of England. This board was set up shortly after the Medical Act, 1886, came into operation to examine for the qualifications of L.R.C.P., M.R.C.S., and for diplomas in specialized subjects. In addition, the college conducts examinations, through the administrative machinery of the conjoint board, for its own fellowship and for its own fellowship in dental surgery and its licentiate in dental surgery. The examinations held by the conjoint board are recognized as qualifying examinations, as well as those held by the medical faculties of universities, for the registration of medical practitioners under the Medical Acts.

Further, the college is concerned to maintain standards of competence and honour in surgical practitioners and has powers to defend its fellows, members and licentiates, though in practice discipline is maintained by the general medical council established by the Medical Acts. The registration of practitioners is a matter for the registrar of the general medical council.

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This summons was taken out by the National Provincial Bank, Ld., as executor and trustee of the will to have determined first, how the endowment fund should be applied as from July 5, 1948, having regard to the effect of the National Health Service Act, 1946, on the Middlesex hospital, and, secondly, whether the executory gift over in favour of the Royal College of Surgeons of England was valid.

N. S. S. Warren for the National Provincial Bank, Ld., the executor and trustee of the will.

S. Pascoe Hayward K.C. and *R. W. Goff* for the council of the Middlesex hospital medical school. The gift over to the Royal College of Surgeons of England on failure of the gift to the Middlesex hospital medical school is prima facie void. The rule in *Christ's Hospital* v. *Grainger* (2) only applies where a gift over is made to charity. A gift over to an individual cannot be valid even if the gift it follows is a gift to a charity, for that might involve dealing with property outside the perpetuity period. A body incorporated by royal charter is on the same footing as an individual for it can do what it likes with its property except where that property is impressed with a trust. Counsel referred to *Miley* v. *Attorney-General* (3). On the true construction of the testatrix's will, the property given over to the college is not impressed with any sort of trust and, subject only to the risk of having its charter revoked, the college can deal with the property as it chooses. It is admitted that *In re Royal College of Surgeons of England* (4), is against the argument on this point.

If, contrary to this submission, the property is earmarked with a trust, it is a trust partly for a non-charitable object, for *In re Royal College of Surgeons of England* (4) has decided that the college has two main objects: the first is to promote the science of surgery; that is a valid charitable object. [Counsel referred to *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (5).] The second object is the promotion of the science of surgery, and in *In re Royal College of Surgeons of England* (4) the court held impliedly that the promotion of the practice of surgery is a non-charitable object. The promotion of the practice of surgery necessarily involve benefits to practitioners. It must be distinguished from encouraging improvements in the technique of surgery. The gift to the college has not been appropriated by the will to either of these two objects: it is for the general purposes of the college and that leaves the college free to devote

(2) (1849) 1 Mac. and G. 460.

(3) [1918] 1 I. R. 455.

(4) [1899] 1 Q. B. 871; 4 T. C. 344.

(5) [1932] 1 K. B. 149.

all the fund to the non-charitable object if it so chooses. It is true that *In re Royal College of Surgeons of England* (6) may not be a binding decision as to the meaning of "charitable purpose" in the ordinary chancery case as it is a decision for the purposes of a particular statute, the Customs and Inland Revenue Act, 1885 (7), but the finding of the court that the college has two main objects is binding; and the second object, as defined in the bye-laws of the college, is not a charitable object. *In re Royal College of Surgeons of England* (6) has been followed in relation to the Royal College of Surgeons of Ireland, in *Miley* v. *Attorney-General* (8). [Counsel referred also to *Inland Revenue Commissioners* v. *Scott* (9) and *Society of Writers to the Signet* v. *Inland Revenue Commissioners* (10).]

It is arguable that the holding of professional examinations is a third main object of the college and that it is not a charitable object. Under the Medical Acts no person can be registered as a practitioner unless he has a recognized qualification. Therefore awarding such qualifications must be for the benefit of practitioners. Professional bodies are not necessarily charitable. In *General Medical Council* v. *Inland Revenue Commissioners* (11) the council was held not to be charitable because it was not established solely for charitable purposes, though no doubt the public interest was the paramount object. The Royal College of Surgeons does much charitable work but many of its activities, taking account as is proper not only of what it does, but what it can do, are properly described as professional and social. The primary object of the college is the promotion of professional interests.

On the construction of the will, it is submitted that the gift fails for uncertainty. Complete clarity is vital in a clause of defeasance, and it is not certain here whether any of the events on which the gift over is expressed to take effect have occurred. It is a question of degree whether there is sufficient public control of the hospital to amount to nationalization, for, under the National Health Service Act, 1946, the medical school has become a separate body and is not subject to public control. Further, the "Middlesex hospital" as used in the will, means the whole of the hospital, and, as some of the hospital assets

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(6) [1899] 1 Q. B. 871; 4 T. C. 344.

(7) By the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 3, the following property was exempted from duty: "Property which, or the "income or profits whereof, shall be "legally appropriated and applied for "any purpose connected with any "religious persuasion, or for any "charitable purpose, or for the promotion of education, literature, science, "or the fine arts".

(8) [1918] 1 I. R. 455.

(9) [1892] 2 Q. B. 152, 165.

(10) 1886, 14 Rettie 34; 2 T. C. 257.

(11) (1928) 13 T. C. 819.

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have vested by virtue of s. 8, sub-s. 2 (*a*) (12), in the governing body of the medical school, incorporated under s. 15, and as that is not a nationalized body it is impossible to say that the hospital as a whole has been nationalized or has passed into public ownership. Finally it is submitted that the obvious intention of the testatrix was to benefit the Bland-Sutton Institute, which in spite of the National Health Service Act, 1946, was still carrying on the same work as before and in the same premises.

Sir Andrew Clark K.C. and *L. J. M. Smith* for the Royal College of Surgeons of England. One or more of the events specified in the clause of defeasance has or have occurred, and the gift over to the Royal College of Surgeons takes effect. The clause is not void for uncertainty, for it is simple for the court to decide whether a body has been nationalized or has passed into public ownership. These are well-known terms. It is submitted that, as a result of the National Health Service Act, 1946, the Middlesex hospital has become nationalized and has passed into public ownership, for the buildings and equipment have vested in the Minister of Health and the endowments in the new board of governors free from trusts.

As a matter of construction, the gift was made to the Middlesex hospital to be applied for the benefit of the institute because it was part of the hospital. The gift is intended to be effective only so long as the institute remains part of the hospital. It is not simply for the maintenance and benefit of the institute. Consequently, if payment cannot be made to the treasurer or other proper officer of the hospital as directed by the will, and it cannot, because that officer no longer exists, the gift fails.

The cause of defeasance having occurred, the gift over in favour of the Royal College of Surgeons takes effect, provided that the college is a " charity " as defined by Lord Macnaghten in *Commissioners for the Special Purposes of the Income Tax Acts* v. *Pemsel* (13). If it is not a charity, it is conceded that, on the authority of *In re Bowen* (14), the gift over fails.

In re Royal College of Surgeons of England (15) is not a binding decision as to the meaning of " charity " in the ordinary chancery sense, or as to the present nature of the objects of the

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(12) By s. 8, sub-s. 2: " All " property . . . held . . . solely for " the purposes of any such school, not " being property already vested in the " bodies hereafter in this section men- " tioned . . . shall, on the appointed " day, be transferred by virtue of this " Act—(*a*) in the case of a general " medical school of the university of " London . . . to the governing body " of that school; . . . and shall vest " in the said governing body by " virtue of this Act ".

(13) [1891] A. C. 531, 583.

(14) [1893] 2 Ch. 491.

(15) [1899] 1 Q. B. 871.

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college. The decision in that case was for the purpose of a particular statute and it is clear from one of the reports (16) that the evidence then before the court differs from that which is now available. The evidence is that surgery is a practical science and that it is impossible to promote the science, which is admittedly a charitable object, without promoting the practice. The objects of the college are indissolubly linked so that they are really one and not two as found in the earlier case. In *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (17), a collateral and subsidiary benefit to the members of the institution did not prevent the court from holding that the institution was charitable. It is important not to confuse the objects of the college, which it is submitted are charitable, with the objects of persons in joining it. In *Society of Writers to the Signet* v. *Inland Revenue Commissioners* (18), many of the members no doubt joined solely for their own protection. Acceptance of fees or carrying on trading is not necessarily inconsistent with the existence of a charity: *Brighton College* v. *Marriott* (19).

Denys Buckley for the Attorney-General.

Cur. adv. vult.

July 7. DANCKWERTS J. [reading his judgment, stated the facts and continued:—] It is claimed by the Royal College of Surgeons that by reason of the changes brought about on July 5, 1948, by the National Health Service Act, 1946, one or other of the events mentioned in the will has occurred and the gift over to the Royal College of Surgeons has taken effect. Against this claim, it is said that the Royal College of Surgeons is not a charity, and, therefore, the gift over fails on the principle of *In re Bowen* (20). I propose to consider this question first.

The testatrix describes the trusts of the endowment fund as "charitable trusts". It is not clear that this description includes the executory gift to the Royal College of Surgeons absolutely for the general purposes of the college, but in any case the view that may have been taken by the testatrix does not conclude the matter: *In re Hummeltenberg* (21).

[His Lordship referred to the characteristics of the Royal College of Surgeons of England as shown by the charters, and continued:—] Mr. Pascoe Hayward raised the point, so that it might be available if the matter should proceed further, that a corporation formed by royal charter is able to deal with its property as freely as an individual and is therefore unfettered by any trust, charitable or otherwise; but, in view of certain observations or assumptions to the contrary in the cases to which I shall have to refer, he did not argue the point at length.

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(16) (1899) 4 T. C. 344.
(17) [1932] 1 K. B. 149, 166.
(18) (1886) 14 Rettie 34; 2 T. C. 257.
(19) [1926] A. C. 192, 199.
(20) [1893] 2 Ch. 491.
(21) [1923] 1 Ch. 237.

[His Lordship referred to the evidence as to the activities of the college, described above, other than the holding of examinations and the maintenance of discipline, and continued:—] It seems to me that all of the above-mentioned activities fall within the ambit of charity in the ordinary sense of that term. [Having referred to the examinations held by the college and by the college conjointly with the Royal College of Physicians in London, he continued:—] These examinations are not conducted primarily as a source of revenue, but do in fact produce revenue so as to make the examinations self-supporting and produce surpluses which are devoted to scientific activities. But the mere making of a profit is not inconsistent with the existence of a charity if the profits are employed for the charitable purposes of a charity, even though such profits may be liable to income tax: *Brighton College* v. *Marriott* (22). It is admitted that the college endeavours to secure competence and high standards of honour in surgical practitioners and as a corollary feels bound to take and retain powers to defend and protect its fellows, members and licentiates. But it appears that discipline in practice is maintained by the general medical council established by the Medical Acts, and the registration of practitioners is a matter for the registrar of the general medical council. In practice, since the Medical Act, 1886, came into force no person has been entitled to be registered unless he has passed a qualifying examination in medicine, surgery and midwifery, which includes the examinations held by the conjoint board as well as those held by the medical faculties of universities. But the college has no monopoly rights in the licensing of surgical practitioners and the law does not in general terms prohibit any person from practising medicine or surgery, though it is an offence to pretend to be registered under the Medical Acts.

The position of the college has been considered by the Court of Appeal in *In re Royal College of Surgeons of England* (23), which concerned a claim by the college to be exempt from the tax imposed on corporate and unincorporate bodies by s. 11 of the Customs and Inland Revenue Act, 1885. The exemption in question is: "property which or the income or profits whereof, "shall be legally appropriated and applied for any purpose con- "nected with any religious persuasion, or for any charitable

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(22) [1926] A. C. 192, 199–201.

(23) [1899] 1 Q. B. 871; 4 T. C. 344.

"purpose, or for the promotion of education, literature, science, "or the fine arts". The court apparently had less extensive evidence before it as to the objects, purposes, and activities of the college than that provided by affidavit in the present case. The argument before the court proceeded entirely on the question whether the property or income of the college was appropriated for the promotion of science, and the judgment of the court (delivered by Romer L.J.) was entirely devoted to the consideration of this aspect, except that he observed (24), that "such property would not come "within any of the exemptions from duty mentioned in "s. 11 of the Customs and Inland Revenue Act, 1885". It is to be observed, however, that the words "any charitable "purpose" in this section, have, it seems, a narrower meaning than "charitable purposes" in the ordinary legal sense, though I am unable to ascertain in what respect or degree the difference is to be found: see *Inland Revenue Commissioners* v. *Scott* (25).

The court held that the property of the Royal College of Surgeons did not come within the exemption from duty, and the real basis for the decision is to be found in the construction thus put upon the objects of the college by Romer L.J. (26): "The "college has two main objects, each of great importance, in fact, "it would be difficult to say which of the two main functions "imposed on and discharged by the college is the more important. "Neither can be considered as merely subsidiary to the other. "The one may shortly be described as the promotion of the science "of surgery. The other is the promotion and encouragement of "the practice of surgery, including the promotion of the "interests of those practising, or about to practise, surgery "as a profession, and also including the examination of students "and others to qualify for practice or honours in surgery or "kindred subjects." It seems that it was the inclusion in the second of the objects of the college of the promotion of the interests of practitioners that was fatal to the claim to exemption, in the same way that the promotion of the interests of the members of the Society of Writers to the Signet in the exercise of their profession was fatal in the Scottish case of *Society of Writers to the Signet* v. *Inland Revenue Commissioners* (27).

In re Royal College of Surgeons of England has been followed and applied by the Court of Appeal in Ireland, which, in *Miley* v. *Attorney-General* (28), had to consider the claim of the Royal College of Surgeons in Ireland to be a charity. The question arose in regard to the validity of a legacy partly payable out of real estate, and apparently the only evidence before the court as to the nature of the Royal College of Surgeons in Ireland was that contained in the charters which were in somewhat similar terms to those regulating the Royal College of Surgeons of England. The bequest was held not to be for charitable uses, as the promotion of the interests of those practising the profession of surgery (which was treated as being one of the main objects of the college) was not a charitable purpose. Ronan L.J., held further that, as the college was a common-law corporation regulated by charter, a gift simply to the college was, on the principle of *Bowman* v. *Secular Society Ld.* (29), simply a question of property and not of a trust at all. The result was that the legacy to the college was held to be valid. The principle that the advancement of those practising a profession or calling is not a charitable purpose has been applied to bodies which also had charitable purposes in other Irish cases: *Pharmaceutical Society of Ireland* v. *Special Commissioners of Inland Revenue* (30); *Pig Marketing Board* v. *Inland Revenue Commissioners* (31). In *General Medical Council* v. *Inland Revenue Commissioners* (32), the General Medical Council was refused exemption from income tax by the English Court of Appeal as being " a " society formed for professional purposes ". No doubt this principle might be applied to the four Inns of Court or the Law Society. But apparently the ancient Inns of Chancery were purely places of learning, and, therefore, charities, as was held in regard to Clifford's Inn in *Smith* v. *Kerr* (33).

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(24) [1899] 1 Q. B. 882.
(25) [1892] 2 Q. B. 152, 165, 166.
(26) [1899] 1 Q. B. 877.
(27) (1886) 2 T. C. 257.
(28) [1918] 1 I. R. 455.

The terms of the Customs and Inland Revenue Act, 1885, which was the subject of the decision of the Court of Appeal in *In re Royal College of Surgeons of England* (34), require the property or income to be both appropriated and applied for " any " charitable purpose," just as the exemptions in s. 37 of the Income Tax Act, 1918, only apply so far as the income applicable to charitable purposes is applied to charitable purposes only. I am far from suggesting that there is any difference in the legal meaning of charity, whether the question is on a will or for revenue purposes; and, of course, the leading case on the meaning of charity, *Commissioners for the Special Purposes of the Income Tax Acts* v. *Pemsel* (35), is a revenue case. But, in considering whether a particular society is a charity, for the purposes of a gift in a will at least, it would appear that the test is whether the objects of the society are really charitable notwithstanding that the carrying out of the objects of the society may incidentally produce benefits to the members of the society.

(29) [1917] A. C. 406.
(30) [1938] I. R. 202.
(31) [1945] N. I. 155.
(32) (1928) 13 T. C. 819.
(33) [1902] 1 Ch. 774.
(34) [1899] 1 Q. B. 871.
(35) [1891] A. C. 531.

Nor does it appear to be material what are the motives of the members of the society in joining it. Indeed, an impossible investigation into the inner thoughts of the members would seem to be involved in any such consideration, and such a process was rejected (in a revenue case), where the purpose of a society is defined by charter or statute, by Lord Hanworth, M.R., in *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (36), citing the observations of Lord Macnaghten in *Savoy Overseers* v. *Art Union of London* (37).

In the present case the purposes of the Royal College of Surgeons appear to be defined by the charters of the college as "the due promotion and encouragement of the study and practice "of the said art and science". It has been urged by Sir Andrew Clark, supported by the expert evidence, that the art and science of surgery are essentially a practical art and science, and that that art and that science cannot be promoted without actual practice and experience, which can only be carried out by means of a competent body of practitioners, whose labours are intrinsically directed towards the cure or alleviation of the ills of mankind. This argument seems to me to have very great force. It seems to me to be supported by two decisions in regard to another practical science, that of civil engineering: *Inland Revenue Commissioners* v. *Forrest* (38), and *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (39). In the latter of these cases the object of the Institution of Civil Engineers (which was founded in 1818 and was incorporated in 1928) was stated to be "the general advancement of mechanical science and "more particularly for promoting the acquisition of that species "of knowledge which constitutes the profession of a civil "engineer". Among the activities of the institution was the holding of examinations for persons desirous of being admitted as students or elected as members or associate members, the awarding of medals, premiums, prizes and scholarships, the provision of a library, the provision of rooms for lectures on subjects connected with the objects of the institution and the production of certain publications. The by-laws of the institution laid down rules as to professional conduct to be observed by members of the institution. Membership of the institution carried a certain amount of prestige but was not necessary to enable a person to practise as a civil engineer.

It was held by the Court of Appeal that the institution was a body of persons established for charitable purposes only and was exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, that any benefit which enured to the institution's members was merely incidental and subsidiary, and that the activities above-mentioned did not represent a collateral or independent purpose. Romer L.J. (40), said: " Where a society is instituted for a charitable purpose, " it is obvious that the membership of the society may confer " upon its holder personal advantages of considerable value to him " in his profession or in his social standing. He may, for instance, " have an exclusive right to affix to his name a certain designation, " and will be known to the public as a person belonging to the " society. He may have to observe disciplinary rules laid down " with a view to ensuring that he does not bring discredit upon " other members of the society. But in such cases, although the " securing of such advantages to the members may in a sense " be regarded as one of the objects of the society, such object is " merely concomitant or incidental to the real object of the " society; and if that real object be charitable, the society is " established for charitable purposes only ".

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(36) [1932] 1 K. B. 149, 166.

(37) [1896] A. C. 296, 313.

(38) (1890) 15 App. Cas. 334.

(39) [1932] 1 K. B. 149.

It seems to me that those observations apply to the present case, and that unless I am constrained by the decision of the Court of Appeal in *In re Royal College of Surgeons* (41), to hold otherwise, the real object of the college is the promotion and encouragement of the study and practice of the art and science of surgery, and not the interests of surgical practitioners. As has been already observed, that decision of the Court of Appeal was upon a particular statute and was directed to different considerations; and I think that I am at liberty to hold, for the purposes of the present case, that the Royal College of Surgeons is a charity, and I do so hold.

The executory gift over, therefore, in accordance with the principle of *Christ's Hospital* v. *Grainger* (42), does not offend against the rule against perpetuities. But the question which remains to be considered is whether any of the events upon which that gift is to take effect has happened. If the answer is in the negative, the Royal College of Surgeons has not at present become entitled to the endowment fund.

The events mentioned in the testatrix's will are as follows: " Should the Bland-Sutton Institute of Pathology cease to be " carried on as a pathological research institution or should its " name be changed ": it appears that the Bland-Sutton Institute of Pathology is still carried on as a pathological research institution, though through the medium of a new body incorporated under a scheme pursuant to the provisions of the National Health Service Act, 1946, and its name has not been changed. " Should the Middlesex hospital become nationalized " or by any means pass into public ownership or should the bank " at any time become unable lawfully to apply the income of the " endowment fund for the purposes aforesaid " : I should say that, as regards the last alternative event, I take the view that " the " purposes aforesaid " are the maintenance and benefit of the Bland-Sutton Institute of Pathology and not necessarily payment of the residue of the income of the endowment fund to the treasurer or other proper officer of the Middlesex hospital for that purpose.

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(40) [1932] 1 K. B. 172.
(41) [1899] 1 Q. B. 871.
(42) 1 Mac. & G. 460.

In view of the considerable general and possibly uninformed discussion which accompanied the passing of the National Health Service Act, 1946, the popular view may be that the Middlesex hospital has been nationalized and passed into public ownership. But this is a clause providing for a defeasance and therefore it is necessary to see that the terms of the clause are in fact satisfied. It will be necessary to examine the terms of the National Health Service Act, 1946, with some care. For this purpose it is necessary to bear in mind that the Middlesex hospital is " a teaching " hospital " for the purposes of the Act, and that the Bland-Sutton Institute of Pathology was part of a medical school when the Act came into operation on July 5, 1948. Section 1 of the Act provides for the promotion by the Minister of a " comprehensive " health service ". By s. 3, the Minister has to provide certain services. By s. 6 of the Act all the premises (that is, land and buildings) of the hospital and all its equipment, furniture, or other moveable property used in connexion with such premises were transferred to and vested in the Minister of Health free of any trust. By s. 7 all endowments of a teaching hospital were transferred to and vested in the board of governors constituted under s. 11, sub-s. 8 and Part III of Sch. III, that is to say, in a new corporate body, the chairman and members of which are appointed by the Minister, and endowments of other hospitals were transferred to and vested in the Minister. Section 7, sub-s. 10, contains a very difficult and puzzling definition of " endowment ". Section 79, sub-s. 2, provides: " References in this Act to the " purposes of a hospital shall be construed as referring both to the " general purposes of the hospital and to any specific purpose of the " hospital ". But s. 8 provides that " where a medical or dental " school is associated with any hospital to which s. 6 of the Act " applies, nothing in that section or the last foregoing section " shall be taken as affecting any property or liabilities held or " incurred solely for the purposes of that school, and those pur- " poses shall not be deemed to be purposes of the hospital ". That provision plainly takes the property held for the purposes of the medical school of Middlesex hospital (including the Bland-Sutton Institute of Pathology) out of the provisions of ss. 6 and 7 of the

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Act, and the provisions of s. 79, sub-s. 2, of the Act, and also keeps such property outside the provisions of s. 60 of the Act (which concerns trusts authorizing or requiring the trustees to apply capital or income of trust property for the purposes of any hospital to which s. 6 of the Act applies).

Section 8, sub-s. 2, then proceeds to state what is to happen to the property of a medical school: it is to be transferred by virtue of the Act " (a) in the case of a general medical school of " the university of London or any school in the faculty of medicine " of that university which is recognized for dentistry only, to the " governing body of that school " and is to vest in the said governing body by virtue of the Act. Section 15 provides for the governing body, and requires the governing body of any such school which is not incorporated at the passing of the Act within a period of six months from the Act to prepare and submit to the governing body of the university a scheme to take effect on the appointed day (that is July 5, 1948), for constituting a new governing body of the school, which is to be a body corporate with power to hold land without licence in mortmain. The old council of the medical school (which was the governing body of the school and was not incorporated, though it was associated with the Middlesex hospital) accordingly prepared and submitted a scheme to the governing body of London University, by which scheme the government of the school is now vested in the council of the school. This council is, therefore, a body corporate, and the property of the school is vested in it. So far as this body and this property is concerned, it seems to me that it has neither been nationalized nor passed into public ownership. It may be that the new board of governors of the Middlesex hospital are to be regarded as so much the creature of the Minister of Health that in substance it is nationalized, and the property of the hospital (other than that held for the medical school) has become nationalized or has passed into public ownership. But it seems to me that the old Middlesex hospital has not as a whole been nationalized or passed into public ownership; part of its property, and the most relevant part for the purposes of the trusts of the will of the testatrix, that of the medical school, has been transferred to and is in a corporate body, which is not nationalized and is not in public ownership. For the purposes, therefore, of this clause of defeasance (and my decision goes no further than that) I hold that the Middlesex hospital has not become nationalized and has not passed into public ownership.

Has the bank, then, become unable lawfully to apply the income of the endowment fund for " the purposes aforesaid ", that is, the maintenance and benefit of the Bland-Sutton Institute of Pathology? It seems to me that this event also has not occurred. The Bland-Sutton Institute of Pathology and its work continue in existence, though it may be administered by a differently constituted body, and I cannot see anything to prevent the bank's lawfully applying the income of the endowment fund for its purposes. Accordingly, it seems to me that none of the events upon which the executory gift over to the Royal College of Surgeons is to take effect has occurred at present.

Declaration accordingly.

Solicitors: *Withers & Co.; Peake & Co.; Wilde, Sapte & Co.; The Treasury Solicitor.*

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1950
July 24.

In re HONE.

Ex parte THE TRUSTEE *v.* KENSINGTON BOROUGH COUNCIL.

[No. 606 of 1949.]

Bankruptcy—Cheque received by borough council for general rate—Drawer's subsequent bankruptcy on same day—Money actually received by local authority later—Whether property of trustee in bankruptcy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 45, 47, *sub-s.* 1.

On November 4, 1949, a cheque was paid into the banking account of a borough council to the credit of their general rate fund. The account of the drawer was at that time overdrawn. On that date, after 3 p.m., the drawer filed her own petition in bankruptcy and was adjudicated bankrupt. On November 8, 1949, the cheque was honoured by the bank, the proceeds being received by the council on that day.

Held, (1.) that the payment did not take place until November 8, 1949, the date on which the sum was credited to the council; and that it was accordingly an asset of the bankrupt paid away without the authority of the trustee, which the trustee was entitled to recover under s. 45 of the Bankruptcy Act, 1914.

Felix Hadley & Co. v. *Hadley* [1898] 2 Ch. 680 and *Marreco* v. *Richardson* [1908] 2 K. B. 584 distinguished;

(2.) that the sum paid was not the less an asset because it was advanced to the bankrupt by way of overdraft, as it was a sum paid by the bankrupt, which the bank had lent her for that purpose: and

(3.) that the transaction was not protected by s. 47, sub-s. 1, of the Act, as the sum lent by the bank was not an asset acquired by the bankrupt at the time of the lending, *i.e.*, after the adjudication, but a mere decreasing of an existing asset, namely, the security on which the bank made the advance.

The trustee was accordingly entitled to recover from the council the sum in question.

MOTION.

On October 4, 1949, a debtor, the rated owner of certain property in London, was served by post by Kensington Borough Council with a demand note for 55*l.* 5*s.* in respect of the six months rate from October 1, 1949, to March 31, 1950.

On November 3, 1949, the debtor sent the council a cheque for that amount drawn on her account at the bank on which she had arranged to overdraw. The cheque was paid into the council's banking account, to the credit of the general rate fund, at 11 a.m. on November 4, 1949. On that date, after 3 p.m., the debtor filed her own petition in bankruptcy, there being no previous act of bankruptcy. She was made bankrupt at once on her own petition, a receiving order was issued against her, and she was adjudicated bankrupt, all those steps being effected on the same day. On November 8, 1949, the cheque was honoured by the bank, the proceeds being thus received by the council on that day.

The trustee in bankruptcy moved the court for a declaration that the 55*l.* 5*s.* formed part of the property of the bankrupt, divisible among her creditors and vested in the trustee; and for an order on the council to pay that sum to him.

Claude Duveen for the applicant trustee. The date on which the money was paid was November 8, the day on which it was actually paid to the council. The payment, having, therefore, taken place after November 4, the date of the receiving order, is not protected by s. 45 of the Act (1), and the trustee is entitled to repayment of the amount.

Dennis Lloyd and *Muir Hunter* for the council. This transaction is protected by s. 45 of the Act. The money was actually paid at 11 a.m. on November 4, when the cheque was paid into the council's banking account: see *Felix Hadley & Co.* v. *Hadley* (2); *Marreco* v. *Richardson* (3).

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(1) Bankruptcy Act, 1914, s. 45: ". . . nothing in this Act shall "invalidate, in the case of a bankruptcy—(a) any payment by the "bankrupt to any of his creditors ". . . . Provided that . . . the payment . . . takes place before the "date of the receiving order".

Section 47, sub-s. 1: "All transactions by a bankrupt with any "person dealing with him bona fide "and for value, in respect of property . . . acquired by the bankrupt after the adjudication, shall, "if completed before any intervention by the trustee, be valid against "the trustee".

Secondly, the bankrupt being overdrawn, the money paid to the council was not an asset of the bankruptcy. It was not her property, but the property of the bank.

Thirdly, assuming that the money was her property, the transaction was protected by s. 47 of the Act, as the money was not lent to her until after the date of adjudication.

Duveen in reply. It cannot be said that the money was not the bankrupt's money, as the overdraft would be the result of an arrangement between the bank and the bankrupt under which security was given to the bank.

HARMAN, J. [after stating the facts]. Prima facie, if this were a straightforward case of a person with money in the bank and money going out of that banking account after the date of the receiving order, that would clearly be part of her assets paid away to somebody else in defiance of the trustee's rights, and he would be entitled to recover it, but it is said here that there are three reasons why that result does not follow.

First, it is said that in fact, within the meaning of s. 45 of the Bankruptcy Act, this cheque was paid on November 4, or, rather, on November 3, when it was received by the council, and not on November 8, when the money was collected.

Section 45, so far as relevant, is in these terms: ". . . " nothing in this Act shall invalidate, in the case of a bankruptcy " (*a*) any payment by the bankrupt to any of his creditors, . . . " Provided that . . . the payment . . . takes place before the " date of the receiving order". To say that a payment takes place is to use a vile phrase, but I must make the best of it. Did this payment "take place" before the date of the receiving order? On the face of it, clearly not. It took place on November 8, when, for the first time, the Borough of Kensington got the money into their coffers. They were not paid before that date. The fact that it has now become the custom to give a receipt for a cheque without qualification showing that only a cheque has been received cannot, of course, make any difference to that; but Mr. Lloyd drew my attention to two cases which, he said, showed that, under the general law, payment by cheque of a debt or obligation is made when the cheque is handed to the payee, and not on the date when the money is collected, and therefore "payment" within the meaning of s. 45 of the Bankruptcy Act takes place when the cheque is posted, or at latest received by post, and not on the later date.

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(2) [1898] 2 Ch. 680.

(3) [1908] 2 K. B. 584.

The first case is *Felix Hadley & Co.* v. *Hadley* (4). There the defendant sold to the plaintiff company, among other things, " all book and other debts due to the vendor " in connexion with his business at such and such a date, and it was held—and I think inevitably held—that cheques which he had received on that date were not debts due to the vendor in connexion with the business, because he, having received the cheques, on the true construction of that agreement, had received payment of the money.

Byrne, J., however, did make this observation, which is expressly based on his view of the construction of the agreement (5): " I think the true view of this agreement is that where " debts were paid conditionally or unconditionally, then such " debts were not meant to pass to the purchasers. In this case " I think what took place amounted to a conditional payment of " the debt; the condition being that the cheque or bill should " be duly met or honoured at the proper date. If that be the " true view, then I think the position is exactly as if an agree- " ment had been expressly made that the bill or cheque should " operate as payment ".

That, of course, is confined strictly to the construction of that agreement, and, if I may say so with great respect, it was inevitable that the judge should come to that conclusion—the conclusion that it was just the same as if there had been an express agreement that any bills or cheques in his hands should be considered things paid and not moneys due. Therefore, it does not seem to me that that decision helps me at all.

But there is a further decision, said to be of more general import, *Marreco* v. *Richardson* (6), which turned on a question of the Statute of Limitations. In that case there was a handing over of a cheque in part payment. It was a post-dated cheque, but the question which arose was whether the promise to pay the balance to be implied by the part payment by the cheque was the date when the cheque was handed over or the date when the cheque was cashed. Looking at that again, it seems to me that the promise to pay was made on the earlier date, and that it was from that date that the statute must run and not from the later date when the post-dated cheque was in fact honoured.

Farwell, L.J., made certain observations which may be said to be near this case. He said (7): " There is no doubt the " cheque was given in part payment of the debt, and if it was so " given in due time, that is, within six years of the commence- " ment of this action, the case is taken out of the statute; if not,

(4) [1898] 2 Ch. 680.

(5) Ibid. 682.

(6) [1908] 2 K. B. 584.

(7) Ibid. 592, 593.

"the debt is statute-barred". Then he quotes *Pearce* v. *Davis* (8), a case before Patteson, J., and adds: ". . . the pay-"ment is made at the time when the cheque is given, and I "infer from the judgment of Patteson, J., that the giving of a "cheque would support a plea of payment". Then he refers with approval to Byrne, J.'s decision, and adds: "I should "myself prefer to say that the giving of a cheque for a debt is "payment conditional on the cheque being met, that is, subject "to a condition subsequent, and if the cheque is met it is an "actual payment ab initio and not a conditional one". It is therefore said that here the cheque was met and that there was an actual payment ab initio, namely, before the bankruptcy.

I cannot take that view as between the trustee in bankruptcy and the bankrupt. It may be that, as between debtor and creditor, in certain circumstances that might be so. In both the cases the ratio of the decision was that the promise to pay was what counted; but I cannot think that here the council did receive payment when the piece of paper passed to them. They received the money when they were the richer by 55*l*. It is quite true that, having accepted the cheque, they could not have sued for the debt unless and until the cheque was dishonoured. Nevertheless, it was not until the cheque was honoured that they were paid. At that time the receiving order had been made and therefore s. 45, I think, does not apply, because there was no payment before the date of the receiving order.

Next, this point is taken. What the arrangement between this debtor and the bank was, I do not know, but I shall assume that it was for valuable consideration of some sort, namely, a security lodged with the bank, and that she had a right, therefore, to draw against that security. Her account was overdrawn. Therefore, it is said, this money with which the debt was paid was not her money—never was an asset of the bankrupt. The bank paid it, and it was the bank's money and never the bankrupt's. In my judgment, that is not right, for this reason: that a payment by a bank, under an arrangement by which the customer has an overdraft, is a lending by the bank to the customer of the money. It is the customer who pays the money and not the bank. Otherwise, the bank might be able to sue the payees of the cheque for the money, which they clearly cannot do. They have only paid it as agent for the customer just as if she had money there. Therefore, it was a case, in my judgment, of the bankrupt's money.

But it is argued thirdly that, if, on that footing, this was an asset, it was not an asset at the date, November 4, when the bankruptcy began, and therefore s. 47 applies, this being a

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(8) (1834) 1 Mood. & R. 365.

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subsequent transaction for value between the bankrupt and the creditor, and therefore protected. It is said that, under s. 47, this is a transaction by a bankrupt dealing with a person bona fide for value in respect of property acquired by the bankrupt after the adjudication. It is said: "You never had this *55l.* *5s.* "until after the adjudication, because the bank did not lend "it to you till November 8". The answer to that, in my judgment, is that there was an asset of the bankrupt's, namely, the state of her account with the bank and the charge on whatever the security was; and that, by appropriating this money to that payment, the bank merely decreased another asset, namely, the value of the secured property, whatever it was, which the bankrupt had, with which, in other circumstances, her creditors might have been paid.

I therefore hold that s. 47 does not apply either, and that what seemed to be the prima facie view of the case turns out in the end to be the right one, namely, that this was a payment by the bankrupt after the date of the receiving order, and that the trustee is entitled to say, that having been done, that here was an asset of the bankrupt paid away without his authority and which he is entitled to recover. I therefore order the borough council to pay the claimant the sum of *55l.* *5s.*

Solicitors: *Isadore Goldman & Son for the applicant; Pontifex, Pitt & Co. for the Town Clerk, Kensington.*

J. L. D.

WYNN-PARRY J.

1950

July 26.

LEICESTER PERMANENT BUILDING SOCIETY *v.* SHEARLEY.

[1950. L. 1070.]

Procedure—Parties—Summons for possession by mortgagee—Stranger found in possession—Whether to be joined—Form of order—R. S. C., Ord. 55, *r.* 5A.

Payments under the mortgage of a dwelling-house having fallen into arrear, the mortgagees took out a summons for possession under R. S. C., Ord. 55, r. 5A, citing the mortgagor as sole defendant. Later it transpired that the property was in the possession of persons claiming to hold under a furnished tenancy subsequent in date to the legal charge in question, though the charge excluded the statutory power of leasing unless with the mortgagee's consent, and no such consent had been given.

By Ord. 55, r. 5A, of the Rules of the Supreme Court, "Any "mortgagee . . . may take out as of course an originating summons, "returnable in the chambers of a judge of the Chancery Division, "for such relief of the nature or kind following as may by the "summons be specified, and as the circumstances of the case may "require; that is to say. . . . Delivery of possession . . . to the "mortgagee . . . by the mortgagor . . . or by any other person in, "or alleged to be in possession of the property".

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The master made an order that the occupiers should be joined as defendants. On the summons being adjourned into court,

Held, that the practical course was to refer the summons back to the master with a direction that he should order the plaintiffs to give notice to the persons in possession that the plaintiffs were applying for an order for possession, and that that order would be made unless within fourteen days of the service of the notice any occupier applied to be added as a defendant to the summons.

Minet v. *Johnson* (1890) 6 T. L. R. 417; 63 L. T. 507 applied.

PROCEDURE SUMMONS.

The plaintiffs, the Leicester Permanent Building Society, were mortgagees of a dwelling-house under a legal charge, which excluded the statutory power of leasing, except with their express consent. Payments under the mortgage having fallen into arrear, the plaintiffs took out a summons under R. S. C., Ord. 55, r. 5A, claiming possession and citing the mortgagor as sole defendant. Inquiries subsequently made on behalf of the plaintiffs disclosed that the house was in the possession of one Goddard and his wife, who claimed that the house was let to them furnished at 5*l*. 5*s*. a week, the alleged letting having been effected after the date of the mortgage. No permission had been given by the plaintiffs to the defendant to effect a letting. The originating summons came before the master who ordered that Goddard and his wife should be made defendants, and the matter was adjourned into court that it might be decided whether or not it was necessary in such a case that the mortgagee should join any person found to be in occupation of the premises, possession of which is sought.

M. Berkeley for the plaintiffs. It is established by *Iron Trades Employers Insurance Association, Ld.* v. *Union Land and House Investors, Ld.* (1) and *Dudley and District Benefit Building Society* v. *Emerson* (2), that a person in possession under a lease granted by a mortgagor under his common law (not statutory) right to grant leases, is a trespasser as against the mortgagee, unless (possibly) such occupier is a statutory tenant. It is clear, therefore, that the Goddards, whatever their title may be, are trespassers as against the plaintiffs, who have a right to eject them: *Alliance Building Society* v. *Varma* (3). In *Martins Bank, Ltd.* v. *Kavanagh* (4), where proceedings were

(1) [1937] Ch. 313.
(2) [1949] Ch. 707.
(3) Ibid. 724.
(4) [1948] W. N. 321; 64 T. L. R. 485.

taken against the party in possession without joining the mortgagor, it was held that the latter must be made a defendant; that is the converse of the present case.

In *Minet* v. *Johnson* (5), it was not decided that the proceedings were wrongly constituted in the absence of the occupier, though he was allowed to apply to be joined.

It will be a great burden on building societies if they have to ascertain and join the actual occupiers in every case, *e.g.*, when possession is sought of a large block of flats.

The defendants did not enter an appearance.

WYNN-PARRY, J. There is a certain body of authority bearing on applications under this order, but no case really covers the present facts. It is established by the recent decision of the Court of Appeal in *Alliance Building Society* v. *Varma* (6), that Ord. 55, r. 5A, entitles the court " to make an order for delivery " up of possession to the mortgagee against a person in occupa- " tion, even though that person was neither the mortgagor nor a " person claiming to derive title under the mortgagor in the " sense of having a right of redemption ". But in that case the person involved was before the court.

It also appears from *Martins Bank, Ld.* v. *Kavanagh* (7), that on such a proceeding as this the mortgagor must be a defendant. But the question has still been left open whether the person in occupation should be joined as a defendant. The nearest case to this is *Minet* v. *Johnson* (8), there the plaintiff issued a writ against one Johnson to recover possession of a house, and signed judgment in default of appearance. The sheriff, in pursuance of a writ of possession, ejected from the premises one Hartley, who was in possession, and put in the plaintiff. Hartley had no knowledge of the action and did not claim to hold through Johnson. Hartley applied that the writ of summons and all subsequent proceedings in the action should be set aside for irregularity, and that the plaintiff should restore possession of the house to him. Williams, J., in chambers, made an order setting aside the judgment and subsequent proceedings, and directing the plaintiff " to go out of any possession obtained by " reason of or under the judgment, such order to take effect only " if the applicant "—that was Hartley—" within twelve days " should elect to be added as defendant; applicant to be at " liberty so to appear upon filing an affidavit that, at the time " of the issue of the writ, he was in possession by himself or his " tenants ".

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(5) (1890) 6 T. L. R. 417; 63 L. T. 507.

(6) [1949] Ch. 724.

(7) [1948] W. N. 321; 64 T. L. R. 485.

(8) 6 T. L. R. 417; 63 L. T. 507.

The Divisional Court affirmed that order, and the matter was taken to the Court of Appeal.

Lord Esher, M.R., said (9): "In this case the plaintiff bona "fide and without any abuse of the process of the court brought "an action against Johnson to recover possession of certain "premises. There is nothing to show but that he had a bona "fide belief that the defendant Johnson was the person in "possession. The writ was served on Johnson only, and he "allowed judgment to go by default, which was an admission "that, as between himself and the plaintiff, he was in possession "and the plaintiff was entitled to turn him out. Then, in "pursuance of a writ of possession the sheriff turns out of "possession the persons on the premises and delivers possession "to the plaintiff. If Hartley were a tenant of Johnson's of "course he must go out; therefore to support his complaint now "he must say that he had some independent right of his own. "What then is his remedy? There has been a miscarriage of "justice, and Hartley has a right to be heard, and he must be "let in to assert his case. If he had taken his point before "judgment had been signed, he would have been treated as "though he were a defendant in the action; if he has done so "after judgment has gone by default, without his knowing any-"thing of the former proceedings, he must then also be allowed "to defend. But the judgment must not be set aside as between "the plaintiff and Johnson; it can only be set aside so far as it "concerns him. That is what has been ordered here, but it is "said that that is not enough"; and his Lordship held that it was the correct order in the circumstances. He said later: "If "the judgment was set aside simply, Johnson would be able to "come in and defend if he liked; therefore the judgment must "be set aside, and also the writ of possession, only so far as it "affects Hartley. Williams, J., has imposed no terms on "Hartley; his order merely says in effect that Hartley must "come in in the same way as if he had come in before judgment "had been signed. The order is right, and this appeal must be "dismissed".

Lindley, L.J., said in the course of his short judgment (10): "On principle a person in actual possession ought to be made a "defendant; but where this has not been done Ord. XII, r. 25, "seems to me to point out what is the proper course of "procedure. The moment the person in possession has done as "he is there directed he is treated as a defendant in the action"; and Bowen, L.J., said (11): "The mistake at the root of this

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(9) 6 T. L. R. 417, 418; 63 L. T. 507.

(10) Ibid. 508.

(11) Ibid. 508.

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"application is, that the applicant has been deprived of some "right".

Although that case does not directly cover the present facts, it provides me with guidance as regards the correct course to follow in this matter. The evidence shows that the occupants are in possession, and claim to be in possession, under a furnished letting. It is difficult to imagine how they came to be in possession under that letting unless it was one purporting to have been made by the defendant; but that is not a matter on which, as it seems to me, the court can at this stage finally pronounce, and an opportunity ought to be given to the occupants to take any point that they may consider open to them with a view to resisting an order for possession against them.

On the other hand, if a hard and fast rule were to be laid down that in every case such as this the mortgagee ought to join as a defendant every person who in the course of the proceedings he learns is in possession, the result in many cases might well be very serious and an unnecessary embarrassment to the mortgagee—as, for instance, in the case of a large block of flats; and it appears to me that this summons, on the information which the plaintiffs had at the time of its issue, was properly taken out by joining only the mortgagor. But now that it has been learned that somebody else is in occupation, and claims to be in occupation under some form of letting, it would be a miscarriage of justice not to give that person an opportunity to be heard.

It further appears to me that it would be inconvenient in such a case to follow the course which was followed in *Minet* v. *Johnson* (12)—that is, to make the order, leaving the occupants to make an application to set it aside. That was the only course that could be taken in *Minet* v. *Johnson* (12) having regard to the circumstance that the order for possession was made when it was not known that Hartley was in possession. Here it is known before judgment who is in possession.

Therefore it appears to me that the practical course is to refer this summons back to the master, with a direction that he should order the plaintiffs to give notice to the persons in actual possession that the plaintiffs are applying for an order for possession, and that that order will be made unless within fourteen days of the service of the notice any occupier applies to be added as a defendant to the proceedings.

Order accordingly.

Solicitors: *Field, Roscoe & Co. for A. H. Pollard, Leicester.*

F. R. D.

(12) 6 T. L. R. 417; 63 L. T. 507.

In re A DEBTOR, *Ex parte* THE DEBTOR *v.* LIGUORI AND ANOTHER.

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1950
July 18, 24.

Evershed, M.R., Singleton and Jenkins, L.JJ.

[No. 277 of 1950.]

Exchange control—Bankruptcy—Judgment debt—Creditor resident outside "scheduled territories"—Debtor resident in United Kingdom—Rule of court prescribing payment of debt into court—Validity—Payment into court not made—Bankruptcy notice—Validity—Exchange Control Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *ss.* 5, 33, *Sched. IV, para.* 3—*Rules of the Supreme Court, Ord.* 42, *r.* 1 (2)—*Exchange Control (Bankruptcy Notices) Order,* 1949 (*S.I.* 1949, *No.* 585).

Section 5 of the Exchange Control Act, 1947, prohibits the payment by a debtor in the United Kingdom of a debt to a creditor resident outside the territories scheduled by the Act without permission from the Treasury. Section 33, sub-s. 3, makes Sch. IV to the Act applicable to, among other things, bankruptcy proceedings.

By para. 3 of that Schedule, ". . . rules of court—(*a*) enabling "any" judgment debtor "if he apprehends that the payment of" the judgment debt "is unlawful . . . except with the permission of "the Treasury, to pay that sum into court" and (*b*) declaring that a payment under para. 3 (*a*) shall be a good discharge "may be "made, as respects the High Court, under s. 99 of the Supreme Court "of Judicature (Consolidation) Act, 1925 . . . provided that (i) the "form of any bankruptcy notice shall be such as may be prescribed "by the Board of Trade". By para. 5 (1), ". . . a claim for a "sum not payable without the permission of the Treasury shall . . . "be admitted to proof. . .".

By R. S. C., Ord. 42, r. 1 (2), made under the power given by para. 3 of Sch. IV to the Act: "Where any person is directed by "any judgment . . . to pay any money to . . . any person who is "resident outside the scheduled territories . . . he shall, unless the "permission of the Treasury . . . has been given . . . pay the "amount thereof into court".

Rule 1 (2) is within the rule-making power given by para. 3 of Sch. IV to the Act of 1947 notwithstanding that it uses the word "shall", whereas para. 3 speaks of "enabling", in relation to payment into court, and it is accordingly valid, for the word "enabling" in para. 3 is equivalent to "providing machinery whereby any "person", etc., and the word "shall" is not used in r. 1 (2) as imposing a duty breach of which involves a penalty. Paras. 5 and 6 of the Sch. IV to the Act of 1947 indicate the intention of Parliament that, in the case of a debt which cannot be paid because of the Act of 1947, the debtor shall not be entitled on that account to escape payment. A debtor's failure to pay the amount of a judgment debt into court under r. 1 (2) after receiving a notice to pay it in the form prescribed by the Exchange Control (Bankruptcy Notices) Order, 1949, therefore constitutes an act of bankruptcy.

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A DEBTOR
In re.
Ex parte
THE DEBTOR
v.
LIGUORI.

APPEAL from Mr. Registrar Parton.

On April 15, 1950, Franco Liguori, the petitioning creditor, obtained final judgment against the appellant debtor for 6,087*l.* The petitioning creditor was at all material times resident in Switzerland, and therefore outside the "scheduled territories", as defined in Sch. I to the Exchange Control Act, 1947. On April 19, 1949, the petitioning creditor served on the debtor a bankruptcy notice in the following terms: "Take notice that "whereas the petitioning creditor, a person residing outside the "scheduled territories, has obtained judgment against you for the "sum of 6,087*l.* and whereas permission of the Treasury for "payment of the sum by you to him has not been obtained, you "must within seven days after service of this notice on you, "excluding the day of such service, pay into court in accordance "with the Rules of Court made pursuant to the Fourth "Schedule to the Act the said sum of 6,087*l.*. the amount of the "said judgment whereon execution is not now stayed, or you "must secure or compound for the same". That notice followed the form set out in the Schedule to the Exchange Control (Bankruptcy Notices) Order, 1949. The bankruptcy notice not having been complied with, a receiving order was made by Mr. Registrar Parton on June 7, 1949. The debtor appealed.

Muir Hunter for the debtor. Although the debtor has had a judgment against him for a debt of 6,087*l.* due to a Swiss resident in Italy, he is unable to pay him without the consent of the Treasury, because the creditor is outside the scheduled territories. This is provided by the Exchange Control Act, 1947, s. 5. In those circumstances, he cannot be made bankrupt, as the only alternative is given by para. 3 of Sch. IV to the Act of 1947 (1), which "enables" the debtor to satisfy the debt by

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(1) The Exchange Control Act, 1947, s. 33, sub-s. 1: "It shall be "an implied condition in any contract "that, where, by virtue of this Act, "the permission or consent of the "Treasury is at the time of the contract required for the performance "of any term thereof, that term shall "not be performed except in so far "as the permission or consent is "given or is not required . . .".

Sub-section 3: "The provisions "of the Fourth Schedule to this Act "shall have effect with respect to "legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding up of companies, "and proceedings under deeds of "arrangement or trust deeds for "behoof of creditors".

Fourth Schedule, para. 3: "Without prejudice to the provisions of "any enactments relating to the "making of rules of court, rules of "court—(*a*) enabling any person who "is required by any judgment, order "or award to pay any sum, if he "apprehends that the payment of "that sum is unlawful under this "Act except with the permission of "the Treasury, to pay that sum into "court; and (*b*) declaring that payment of a sum into court by virtue "of the preceding sub-paragraph, "together with the delivery to the

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payment into court. The difficulty is created by R. S. C., Ord. 42, r. 1 (2) (2), which provides that when any person is directed by any judgment or award to pay money outside the scheduled territories he shall pay this money into court. By r. 1 (3) that is a good discharge. There is, however, no ground for making a compulsory order for payment when under the Act of 1947 the debtor is only "enabled" to satisfy the debt by payment into court. There appears to be no reason why under

"other party concerned of such "evidence of the payment as may be "prescribed by the rules, shall, to "the extent of the payment, be a "good discharge to the person making the payment; and (*c*) so "regulating the process of execution "which may issue in respect of any "sum required to be paid by any "judgment, order or award as to "secure that, unless it is shown, in "such manner as may be prescribed "by the rules, that the permission "of the Treasury for the payment of "the sum is not required under this "Act or has been given without conditions, the proceeds of the execution will be paid into court, and, so "far as is necessary for that purpose, "varying the form of any writ of "execution or other similar document "or the duties of the sheriff or other "officer to whom any such writ or "other similar document is directed, "may be made, as respects the High "Court, under s. 99 of the Supreme "Court of Judicature (Consolidation) "Act, 1925 . . .: Provided that—(i) "the form of any bankruptcy notice "shall be such as may be prescribed "by the Board of Trade; . . .".

Paragraph 5: "(1) In any bankruptcy, in the winding up of any "company or in the administration "of the estate of any deceased person (being a bankruptcy, winding "up or administration carried on "under the law of any part of the "United Kingdom), a claim for a "sum not payable without the permission of the Treasury, shall, "notwithstanding that permission "has not been given or has been "revoked, be admitted to proof as "if it had been given and had not "been revoked: Provided that "nothing in this sub-paragraph "shall be construed as affecting the "application of the provisions of "Part II of this Act to payments by "any trustee, liquidator, personal "representative or other person in "any such bankruptcy, winding up or "administration".

Paragraph 6: "A debt for the "payment of which the permission of "the Treasury is required under this "Act shall, if in other respects it "complies with the requirements of "sub-s. 1 of s. 4 of the Bankruptcy "Act, 1914, be allowed to be a good "petitioning creditor's debt, notwithstanding the said requirement, if "and to the extent that the debt "can be satisfied either by a payment into court or by a payment "to a blocked account".

(2) R. S. C. Ord. 42, r. 1 (2): "Where any person is directed by "any judgment, order or award, to "pay any money to or for the credit "of any person who is resident outside the scheduled territories, as "defined by the Exchange Control "Act, 1947, he shall, unless the permission of the Treasury under the "said Act has been given unconditionally, or upon conditions which "have been complied with, pay the "amount thereof into court".

(3) "Payment into court under "the preceding paragraph of this "Rule shall, to the extent of the "payment, be a good discharge to the "person making the payment, and "thereupon no steps may be taken to "enforce the judgment, order, or "award to the extent of the amount "paid in notwithstanding the provisions of Rule 3 of this Order or "any other Order".

Ord. 42, r. 1 (2) payment of the debt into court is made compulsory. Under s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, the debtor can only be said to have committed an act of bankruptcy because of the compulsory provision of this rule for which there is no statutory justification. The creation of a new act of bankruptcy requires a new rule for which there is such justification.

Phillimore for the petitioning creditor [called on to assist the court with regard to the meaning of Ord. 42, r. 1 (2) in view of Sch. IV, para. 3, to the Act of 1947]. It is contended that the court would be stultified if any other word but "shall" were used in Ord. 42, r. 1 (2), in providing for the fulfilment of its own order under the Act of 1947. In so far as Ord. 42 seems contrary to the provisions of the Act, it would be contrary to all reason not to give effect to what must be the true intention. It would be monstrous to leave the court powerless.

[SINGLETON, L.J. May it not be that the order for payment into court within seven days in this case went further than there was authority to go?]

There is wide power to make rules under the Judicature Act of 1925, s. 99, which, it is contended, has not been exceeded. Order 42 is made as the only means of ensuring satisfaction of a foreign debt even though it must remain in court.

Aronson, K.C., and *Phillimore* for the Board of Trade [appearing as amici curiæ at the suggestion of the court]. The contention that r. 1 (2) of Ord. 42 is invalid is fallacious for three reasons: first, where a statute confers power to make rules of court which have to be laid before Parliament and rules are made under the power and laid before Parliament, if Parliament raises no objection to them they become part of the statute and are valid, even if they go beyond the powers originally conferred. These rules were laid before Parliament in accordance with s. 99 of the Judicature Act of 1925 and are now valid: see Maxwell on The Interpretation of Statutes (9th ed.), p. 54. Secondly, there is no inconsistency between the provisions of the Act of 1947 and r. 1 (2) of Ord. 42. Apart from the Exchange Control Act, 1947, it is the duty of a debtor to pay his creditor. The Act removes the power to satisfy the debt except by payment into court. If the debtor fails to pay into court, he becomes a defaulting debtor. There are many cases in which it has been held that the words "may" and "shall" are interchangeable: see s. 18 of the Bankruptcy Act, 1914; *In re Thurlow (Lord)* (3), *per* Lord Esher, M.R.; *Ex parte Forman* (4). "Shall" in r. 1 (2) only means that if the debtor does not pay into court he will be a defaulting debtor. Thirdly, the bankruptcy notice is valid, as it was made in accordance with a statutory provision.

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(3) [1895] 1 Q. B. 724.

(4) (1887) 18 Q. B. D. 393, 400.

Muir Hunter in reply. Unless it can be shown that the debtor is under a statutory duty to pay into court, no valid bankruptcy notice can be given. The rule purports to require a debtor to do what the statute imposes no duty on him to do. No greater burden should be put on the subject by the rules than that which is imposed by the Act.

EVERSHED, M.R. On April 15, 1950, the petitioning creditor obtained against the debtor final judgment for 6,087*l*. The creditor was then resident in Switzerland, which is not a scheduled territory within the meaning of the Exchange Control Act, 1947. By virtue of s. 5 of that Act, it is unlawful for a person resident in this country, as is and was the debtor, to make any payment to or for the credit of a person in the position of the petitioning creditor save with the permission of the Treasury, and it is conceded that no such permission has at any time been given. But the petitioning creditor has sought to take advantage of further provisions of the Act of 1947, of certain rules, and of a statutory instrument which emanated from that Act, in order to make the debtor a bankrupt. There was served on the debtor on April 19, 1950, a bankruptcy notice in a form which has its authority in the statutory instrument to which I have alluded.

[His Lordship read the notice, and continued:—] The question raised in this appeal is whether that bankruptcy notice had any effect or validity. The registrar held that it had, and made a receiving order accordingly. But Mr. Muir Hunter, for the debtor, has argued, very properly, that, after all, bankruptcy is a matter affecting the liberty and status of the citizen, and that it is the duty of the court to take care that the bankruptcy law should not be applied as regards any individual unless there is clear jurisdiction and authority for its application.

The question—and it is one on which I have felt some little difficulty—really turns, on analysis, on this: in the bankruptcy notice which I have read there is reference to rules of court made under Sch. IV to the Act of 1947. The rules invoked are in paras. (2) and (3) of R. S. C., Ord. 42, r. 1, which sub-rules were made ostensibly in pursuance of the power conferred by the Act of 1947. The whole matter turns, I think, upon whether r. 1 (2) is or is not ultra vires.

I should, by way of preface to further consideration of the matter, refer to the fact that bankruptcy notices under the Bankruptcy Act, 1914, are the subject of s. 2 of that Act, which provides: "A bankruptcy notice under this Act shall be in the "prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the "terms of the judgment or order, or to secure or compound for "it to the satisfaction of the creditor or the court . . .". The prescribed form referred to in s. 2 came into existence as a result of a procedure which admittedly has not been applied in this particular case: the particular bankruptcy notice with which we are concerned was not in the prescribed form under the Act.

If the notice was validly issued, it was issued under a special power conferred on the President of the Board of Trade by the statutory instrument referred to. There is therefore no doubt that, as regards the subject-matter of this appeal, the more normal procedure in reference to bankruptcy matters has been departed from. But if Parliament has, on the proper construction of the Act of 1947, given the necessary authority and created liability to bankruptcy proceedings by means which differ from the more stereotyped method enshrined in the Bankruptcy Act, 1914, then plainly it is not for this court to question their propriety.

As already stated, s. 5 of the Act of 1947 prevents a debtor from paying to, or for the credit of, a creditor outside the scheduled territories a judgment debt without Treasury permission. By s. 33, sub-s. 1, it is provided that it shall be an implied condition in any contract that, where Treasury permission is necessary, then payment in accordance with the contract is not to take place save after that permission has been obtained. By s. 33, sub-s. 3: "The provisions of the Fourth Schedule to this "Act shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates "of deceased persons, the winding up of companies, . . .".

[His Lordship read paras. 3, 5 and 6 of Sch. IV, and continued:—] Paragraphs 5 and 6 seem inevitably to show that Parliament is expressing the intention that, in the case of a judgment such as that in question here, which cannot be paid because of the Exchange Control Act, failure to pay the amount into court after receiving the necessary notice is to constitute an act of bankruptcy. I think that there can be no doubt that that was the intention—that the debtor should not be entitled to say: "I "cannot pay because of the Exchange Control Act. I am not "going to bother about asking the Treasury for permission. If "I do I shall not get it, and there is nothing that the creditor "can do". I think that it was intended to provide, first, that there should be an alternative means of discharge to the debtor, namely, by payment into court, and further that there should be the right to invoke bankruptcy procedure in the event that, putting it briefly, advantage was not taken of the alternative means. I emphasize that, because it is the burden of Mr. Hunter's argument that Parliament, whatever it may have intended, has expressed itself in terms which leave, as a matter of construction, no doubt that all that the rules were intended to do, and, therefore, all that the rule-making authority had power to achieve, was to give to a person in the position of the present debtor a right, if he chose to make use of it—and particularly if he genuinely apprehended that he could not pay because of the Exchange Control Act—to give him a privilege, without his being under any positive obligation to do any such thing; that since the rule, as will appear, went beyond that, it is ultra vires; and that since, finally, the bankruptcy notice which was prescribed in the statutory instrument proceeded on the footing that the existing rule was valid, or at least that a valid rule had been made, it in turn falls to the ground.

That is the argument; and it is a commentary on it, as I think, and as Mr. Muir Hunter admitted, that, according to his suggestion, any bankruptcy notice which proceeded merely on the failure of the debtor to take advantage of a privilege, as distinct from a failure to do what he had been told that he was bound to do, would not, according to bankruptcy procedure, be a good bankruptcy notice, with the rather startling result that, notwithstanding the strong indications to the contrary, having regard to the language which Parliament chose to adopt in Sch. IV to the Act of 1947, no effective bankruptcy notice could possibly have either been prescribed or made use of in any such case as the present. I think that he accepts that fully, and must.

But I have found myself unable to accept this argument. This statutory instrument bears date March 28, 1949, and is entitled: "The Exchange Control (Bankruptcy Notices) Order, "1949". It was made by the President of the Board of Trade, and I hold that he was entitled to make it if the premiss on which it rested—namely, the validity of the new rule, Ord. 42, r. 1 (2), is assumed.

The real point in this case is whether the rule is valid. Rule 1 (2) provides: "Where any person is directed by any "judgment, order, or award, to pay any money to or for the "credit of any person who is resident outside the scheduled "territories . . . he shall, unless the permission of the Treasury ". . . has been given . . . pay the amount thereof into court". Rule 1 (3) follows para. 3 (*b*) of Sch. IV to the Act in that it provides: "Payment into court under the preceding paragraph "of this rule shall, to the extent of the payment, be a good "discharge", etc.

There is, of course, at first blush an obvious disparity between the wording of para. 3 (*a*) of Sch. IV to the Act and that of Ord. 42, r. 1 (2); for the former refers to something enabling a person, if he apprehends a certain state of affairs, to pay money into court, whereas the latter in terms appears imperative and says that, whatever his apprehension may be, if the Act in fact applies he shall pay it into court. It was because of that difference in language that I felt for some time doubtful whether it could be said that this rule really was within the rule-making authority conferred by Sch. IV.

I observe that the opening words of para. 3 of that Schedule are: "Without prejudice to the provisions of any enactments "relating to the making of rules of court", and there follows a specific reference to s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. We are, as Mr. Phillimore pointed out with some force, after all concerned here with an order of the court, an order that the court has made; and Ord. 42, which is headed "Execution", concerns the consequences of an order made by the court to pay money. I think that there is some force in the argument that, apart from the particular authority conferred on the rule-making body by para. 3 of Sch. IV to the Act of 1947, there may be added power in the general language of s. 99 of the Act of 1925 itself. But I need not pursue that further, because I have come to the conclusion that r. 1 (2) was within the competence of the rule-making power by virtue of the Act of 1947. I think that the difficulty created by the distinction between "shall" in the rule and "enabling" in para. 3 of Sch. IV is really resolved when one considers the context and the object in view. I have already said that Ord. 42 is concerned with execution. It provides what is to happen after an order has been made by the court to pay money, and what steps have to be taken, and what is liable to happen to the person ordered to make the payment if he does not pay. As Mr. Aronson pointed out, that is quite a different context from that in which the word "shall" may be found, for example, in an Act of Parliament which imposes a duty to do something or not to do something—a common formula today, failure to comply with which involves the person in question in penalties. In this order the word "shall" cannot, of course, be used as imposing an obligation subject to a penalty of that kind. It is, as I have said, merely making provision for what is to be done in the case of an order of the court directing a payment which cannot be performed according to its terms because of the Exchange Control Act, 1947.

As has been pointed out, there is no general power for those who have been ordered by a judgment of the court to pay A.B. a sum of money to go and pay it into court. The only way in which a debtor who has been ordered to pay A.B. 100*l*. can comply with that obligation is to go and find A.B. and pay him. He cannot do it in any other way without A.B.'s consent. That being so, I think that the proper construction, going back now for the moment to Sch. IV to the Act, to be given to the word

" enabling " is to treat it as equivalent to " providing machinery whereby any person ", etc. As I have said, in the absence of some rule, there will be no such machinery; and it is to be observed that under para. 3 (*a*) no consequences of non-compliance are prescribed: it is simply a paragraph authorizing or directing the rule-making authority to provide the machinery. What happens afterwards, if advantage is taken of the machinery, is discovered by looking at para. 3 (*b*)—namely, that the person paying the money into court gets pro tanto a discharge. If that be the right view of para. 3 of Sch. IV to the Act of 1947, it seems to me that Ord. 42, r. 1 (2), does not, on its true construction, go beyond the authority conferred upon the rule-making authority, for it is merely providing that in the cases mentioned a person ordered to pay a particular individual is to pay into court instead. That is the way in which, according to the rules, he will satisfy the judgment. If he does not do it, he will not suffer any penalty: he does not commit a criminal offence; but the result of his not doing it is simply that he is a debtor who has not paid the debt ordered to be paid, and such other consequences as the rules or the Act of Parliament provide, if he does not pay, will consequently ensue. Order 42, r. 1 (2), therefore, is simply doing, in other words, what para. 3 of Sch. IV says: providing machinery whereby in such a case discharge of the debt is to be achieved by payment into court.

There is still, of course, the point that Ord. 42, r. 1 (2), speaks of payment " to any person who is resident outside the scheduled " territories as defined by the Act ", whereas para. 3 (*a*) of Sch. IV speaks of " the debtor apprehending that the payment " of the sum is unlawful ", and the word " apprehends " is, of course, very commonly used as meaning " is afraid ", though it does not necessarily have that meaning. But in all the circumstances I think that there is no real substance in that point. As has been pointed out, where proceedings are started by a person resident outside the scheduled territories, it must appear on the face of the writ that they are so started. A debtor sued in such circumstances is, I think, bound to apprehend, that is, to learn or understand, that the prohibition is applicable. I therefore do not think that that change of language is sufficient to invalidate the construction which I think ought to be given to the rest of para. 3 of Sch. IV, or to qualify my conclusion that Ord. 42, r. 1 (2), is within the scope of the power conferred by the paragraph.

I agree with Mr. Hunter that this is really a matter of principle, in the sense that it turns mainly on the proper construction of para. 3 (1) and r. 1 (2) and is one on which we are not likely to obtain guidance from authority. Therefore I will not take up time by making any reference to the few cases cited.

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I conclude that the argument against the validity of Ord. 42, r. 1 (2), fails, from which it follows that the premiss on which the statutory instrument challenged rests is established. On that assumption I see no ground for suggesting that the form of notice which the statutory instrument prescribed was not well within the scope of the proviso at the end of para. 3. Everything else, from that stage onwards, follows: the form actually used in this case followed the statutory instrument, and nothing more remains to be said.

I agree with the view of the registrar, and the appeal should be dismissed.

Singleton, L.J. I agree.

Jenkins, L.J. I also agree.

Appeal dismissed.

Solicitors: *Michael Abrahams, Sons & Co.; L. A. Hart; Solicitor to the Board of Trade.*

B. A. B.

Affirmed. [1951] 1 Ch. 699

Affirmed. C.A. [1951] 1 All E.R. 1001.

PEARLBERG *v.* MAY.

Harman, J.

1950

Nov. 1.

Vendor and purchaser—Specific performance—Purchaser remaining in possession—Delay in completion—Purchase money—Payment into court—Interest payable after lodgment.

Where under a contract for the purchase of real estate which provides for the payment of interest on the purchase money not paid on the day fixed for completion, the purchaser, being in possession before completion is ordered, in accordance with the practice settled by *Greenwood* v. *Turner* [1891] 2 Ch. 144, to lodge the purchase money in court as an alternative to giving up possession, that lodgment does not absolve him from the obligation to pay interest at the contract rate.

Action.

At an auction sale held on November 24, 1948, the plaintiff became the purchaser from the defendant of certain freehold property which was described, and the special conditions of sale of which were contained, in printed auction particulars which contained a memorandum recording the purchase. The purchase money amounted to 33,925*l.*, and the purchaser paid to the vendor's agents deposits amounting to 3,392*l.* 10*s.*

The special conditions provided among other things that the

[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

property was sold subject to the National Conditions of Sale (14th ed.) so far as not varied by or inconsistent with the special conditions, and by condition 3 (*a*) fixed completion for January 12, 1949, when the balance of the purchase money was to be paid and if not so paid was to carry interest at 5 per cent. until payment, with an option to the vendor to take the rents and profits in lieu.

Completion was postponed by agreement until May 10, 1949, the purchaser paying a further 10,000*l*. of the purchase money. Thereafter, as a result of notice given by the vendor of his intention to re-sell as provided by condition 23 of the National Conditions of Sale (14th ed.) a writ was issued on May 16, 1949, by which the purchaser sought specific performance and an injunction to restrain a re-sale.

The purchaser, in her statement of claim, alleged that since May 10, 1949, she had always been ready to complete but that the vendor was in default by reason of his failure to give vacant possession. She alleged that she had not been given possession of a certain part of the property. By way of defence and counterclaim the vendor also asked for specific performance, alleging default on the part of the purchaser.

On June 9, 1949, immediately after the delivery of the statement of claim, the vendor moved the court for an order upon the purchaser to pay into court the balance of the purchase money and interest, amounting to 20,832*l*. 7*s*., or, alternatively, that the action be dismissed. This motion was not in the ordinary form in such a case in that it did not ask that the purchaser should lodge the purchase money in court or go out of possession. The motion was, however, treated as though that had been its object. It was supported by an affidavit alleging that the purchaser had been let into possession of the property on January 12, 1949, and had so remained ever since.

The purchaser did not file any evidence on the motion, and on June 21, 1949, an order was made in these terms: "Let the "[purchaser] on or before July 5, 1949, lodge in court "20,832*l*. 7*s*., being the unpaid balance of the purchase money "and interest to June 9, 1949, (together with interest on the "principal sum of 20,532*l*. 10*s*. at 4 per cent. per annum from "June 10, 1949, to the day of lodgment) for the freehold property "known as Cams Hill, Fareham, in the county of Southampton, "and land adjoining thereto in the said writ mentioned. And "in default of the [purchaser's] so lodging the said sum within "the time aforesaid let the [purchaser] on or before July 5, 1949, "deliver up to the [vendor] possession of the said property." It was agreed that the rate of 4 per cent. mentioned in this order in respect of the period from June 10 to July 5 was a slip for 5 per cent.

HARMAN, J.

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PEARLBERG v. MAY.

The National Conditions of Sale (14th ed.) provide, so far as relevant: " 5 (1) If from any cause whatever (save as hereinafter " provided) the purchase shall not be completed on the day " fixed for completion the purchaser shall pay interest on the " remainder of his purchase money at the rate provided by the " Special Conditions . . . until the purchase shall actually be " completed. . . . 5 (3) . . . if the delay arises . . . from " any cause other than the neglect or default of the purchaser, and if the purchaser (not having been let into possession of the property) places the remainder of his purchase " money at his own risk at interest on a deposit account . . . " or on any security which the purchaser may select, and gives " written notice thereof to the vendor or his solicitor . . . the " vendor shall from the time of such notice be entitled to such " interest only as shall be actually produced by such deposit or " security. . . . 6 (1) If the purchaser is let into possession of " the property before the actual completion of the purchase, " then, as from the date of his taking possession and until actual " completion of the contract or until he gives up possession to " the vendor, the purchaser shall (i) pay interest on the remainder " of the purchase money at the rate of 4 per cent. per annum ". The purchaser having abandoned her contention that she had not been given possession of the whole of the property, the parties were agreed that no matters now remained in dispute in the action except the question whether interest was payable on the balance of the purchase price from the date of payment in to the date of completion. This point now came before Harman, J., for decision.

J. Pennycuick, K.C., and *I. S. Warren* for the purchaser. The purchaser contends that, while the vendor is entitled to the entirety of the sums in court, as from the date of payment in, no interest is payable under the terms of the contract.

This follows from the practice of the courts in relation to payment in. The practice dates from the time of Lord Eldon and is based on the principle that a purchaser in possession cannot keep both purchase money and property: see *Gibson* v. *Clarke* (1); *Bradshaw* v. *Bradshaw* (2); *Cutler* v. *Simons* (3).

The right to interest follows from the nature of the principle that where a purchaser is in possession he must pay the actual balance of the purchase money into court or go out of possession. Since it is the balance of the purchase money which is paid into court, the vendor's rights under condition 5 of the National

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(1) (1813) 1 V. & B. 500.
(2) (1817) 2 Mer. 492.
(3) (1816) 2 Mer. 103.

Conditions of Sale (14th ed.) are extinguished, for there is no longer any purchase money under the contract on which interest can be paid.

The principle that equity looks on that as done which ought to be done applies: upon lodgment in court any adjustment of income rights must be made on the footing that the purchaser paid the balance of the purchase money on the date fixed for completion by the contract.

The authorities lend no support to the proposition that the court must consider the conduct of the parties and decide which of them has been responsible for the delay. If it be said that this bears hard upon an innocent vendor it must be remembered that application for payment in lies entirely at the discretion of the vendor; and it is therefore contended that he should carry any consequent loss.

[They referred also to *Burroughs* v. *Oakley* (4); *Dixon* v. *Astley* (5); *Pope* v. *G. E. Ry.* (6); *Lewis* v. *James* (7); *Greenwood* v. *Turner* (8); *In re Cassano and Mackay's Contract* (9); Seton's Judgments and Orders (7th ed.), p. 2222.]

Geoffrey Cross, *K.C.*, and *Dudley Collard* for the vendor. The purchaser cannot benefit by her own default. It is wrong in principle to suppose that "the loss must lie where it falls". Suppose the following facts: a purchaser takes possession on the date fixed for completion, but the vendor cannot complete because he cannot give a good title. The vendor moves to have the remainder of the purchase money paid into court. Eventually the vendor succeeds in making title. Then if under the terms of the contract the rate of interest on the outstanding purchase money is less than that allowed by the court, in such a case, on the purchaser's contention, the vendor will be entitled to a higher rate of interest than that provided for by the contract, although the vendor is the party in default.

The true principle is that payment into court is the price which the purchaser must pay for being allowed to remain in possession: see *Humphries* v. *Horne* (10). It is a security for the vendor. A vendor who has an obstructive purchaser should not be placed in the dilemma that either he moves for payment in, whereupon he loses interest under the contract from the date of lodgment, or he has no security with the purchaser in possession.

Further, it should be noted that condition 5 (1) of the National Conditions of Sale (14th ed.) provides that if from any cause whatsoever subject to condition 5 (3) the purchase is not completed on the date fixed for completion the purchaser is to pay interest on the remainder of the purchase money from that date *until actual completion*, while condition 5 (3) only relieves a purchaser from so paying interest when he is neither in default nor in possession.

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(4) (1815) 1 Mer. 52.

(5) (1816) 1 Mer. 133.

(6) (1866) L. R. 3 Eq. 171.

(7) (1886) 32 Ch. D. 326.

(8) [1891] 2 Ch. 144.

(9) [1920] W. N. 7.

(10) (1844) 3 Hare 276.

Pennycuick, K.C., in reply.

Cur. adv. vult.

November 1. Harman, J., read the following judgment, in which he stated the facts and continued:—The purchaser, by submitting to the order of June 21, 1949, must be taken to have admitted that she had been let into possession on January 12, 1949, and she did in fact elect on that footing to retain possession and to lodge in court the sums directed by the order. The denials in her reply delivered on June 22, 1949, can make no difference.

It would appear that no further step has been taken in the action, and I need only record that on May 8, 1950, the purchaser, by her solicitors, agreed to pay the costs of both action and counterclaim, thus admitting the justice of the vendor's case and the failure of her own. It has since then been recognized that there is now no obstacle to an actual completion except the dispute upon which I have to adjudicate, and which is this: having regard to the lodgment in court of the purchase money, has there been any liability on the purchaser since that date to pay interest on the balance of the purchase money at the contractual rate of 5 per cent.; or are the vendor's rights in that respect limited to receiving the fund in court together with whatever interest it may have earned on deposit in the pay office?

It is the purchaser's contention that, the vendor having for his own security chosen to have the balance due lodged in court, the order in that behalf is equivalent to payment of the purchase money by her, and that she, having been deprived of the money in this way, is not bound to pay interest upon a sum that has not been in her hands.

The vendor, on the other hand, relies on the terms of the contract which provide for payment of interest until the date of actual completion, a day which admittedly has not yet arrived; and he argues that the lodgment in court which the purchaser was compelled to make was merely a term upon which she was allowed by the court to retain possession of the property before completion, and is no more than a security to the vendor for the ultimate payment of the purchase money if he be right, or for something in the nature of an occupation rent if he be wrong.

The order of June 21, 1949, is, except in one respect, in a form well known in this Division to every practitioner under the name of a "*Greenwood* v. *Turner* (11) order"; but, though such orders have been made by Chancery judges for close on 150 years, it would appear that the present point has not hitherto been decided, or at least that no decision on the point has been reported. I must therefore look into the history of the matter to see if any light be thrown upon it by the decisions.

These seem to begin early in the nineteenth century, the earliest which I have found being a decision in 1808 of Lord Eldon, L.C., in *Clarke* v. *Wilson* (12). There the defendant was in possession and was objecting to the plaintiff's title; and the Lord Chancellor, on the plaintiff's motion, opined that the plaintiff might require the defendant to pay the purchase money or give up possession of the estate. This practice appears to have become fixed within the next ten years, and there are a number of reports on the subject, for instance, *Gibson* v. *Clarke* (13), where the side-note states that a purchaser cannot without express contract retain the possession withholding the money. Lord Eldon, L.C., described the motion as of very great importance as a general precedent.

Other cases decided at about the same time are *Burroughs* v. *Oakley* (14), *Dixon* v. *Astley* (15), and *Cutler* v. *Simons* (16), where the side-note states that the orders made "appear to have "settled the practice partially adopted in some former cases, "such as *Burroughs* v. *Oakley* (14) and *Dixon* v. *Astley* (15), as "to payment into court of their purchase money by purchasers "in possession by virtue of the agreement and otherwise".

Other similar cases are *Bradshaw* v. *Bradshaw* (17)—where the Lord Chancellor stated the principle to be (18): "You can-"not keep the estate and money too"—and *Crutchley* v. *Jerningham* (19). To the same effect I find Sir John Leach, V.-C., in *Wickham* v. *Evered* (20), in 1819, saying this: "The defen-"dant cannot keep possession of the estate and of his purchase "money too. If he elect to retain the possession, let the pur-"chase money be paid in within a month, without prejudice to "any question in the cause".

Cotton, L.J., in *Lewis* v. *James* (21), refers to this type of order in these words: "This is in some respects like a case "where a purchaser being in possession is required to pay into "court, if he remain in possession, the purchase money agreed "upon, but it is well known that in such a case under ordinary "circumstances an option is given to the purchaser to go out,

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(11) [1891] 2 Ch. 144.
(12) (1808) 15 Ves. 317.
(13) 1 V. & B. 500.
(14) 1 Mer. 52.
(15) 1 Mer. 133.
(16) 2 Mer. 103.
(17) 2 Mer. 492.
(18) Ibid. 493.
(19) 2 Mer. 502.
(20) (1819) 4 Madd. 53.
(21) 32 Ch. D. 326.

"and the order only is that if he continue in possession he must "pay the price into court" (22).

The modern form of order appears to have been settled in *Greenwood* v. *Turner* (23), already alluded to, where Kekewich, J., cited some of the cases. In that case an application was made by the vendor for interest on the purchase money from the date fixed for completion until the date of lodgment: and the judge is reported as directing the purchase money to be lodged in court with interest, or, alternatively, that the purchaser do give up possession and that in that event he pay to the vendor interest on the purchase money till the day he goes out of possession.

When, however, one looks at the order made as set out in Seton (7th ed.), p. 2222, it is that in the event of the defendant's electing to vacate interest should be paid not to the vendor but into court, and that form of order has been followed ever since, generally speaking, though Astbury, J., voiced his dislike of the last part of it in *In re Cassano and Mackay's Contract* (24). It is to be observed that the order in the present case makes no provision for interest if the purchaser deliver up possession, as she was bound to do on July 5, 1949, in default of lodgment of the purchase money and interest in court on that day.

The cases, as it seems to me, throw no direct light on the subject. It is true that the principle on which these orders are made is that it is unjust for the purchaser to have both the property and the purchase money; and it is argued from this that what is paid is in fact the unpaid balance of the purchase money, and that lodgment of this sum discharges the payer from all liability in that respect so that there is no balance of the purchase money on which interest is leviable. It is said that there is no hardship on the vendor who chose to take this course knowing that the money would earn only the court rate of interest henceforward, and further, that it would be an injustice if the purchaser, being out of her purchase money, must still pay interest upon it.

I find these arguments persuasive but not decisive. It seems to me that there is nothing in that which has happened to vary the contract which provides for interest at 5 per cent. on the purchase money until actual completion, an event which has not yet occurred. It is true that the money lodged in court was calculated by reference to and is in the order described as the balance of the purchase money, and it has been so described ever since these orders were made; but it appears to me that in fact the contractual amount of the purchase money and interest up to the date of lodgment is merely the measure by which the court judges the just obligation of a purchaser who wishes to retain possession pending settlement of his dispute. It is in fact, I think, no more than a security to the vendor who is deprived of his contractual option to take the rents and profits of the property in lieu of interest. Mr. Cross drew my attention to a case of *Humphries* v. *Horne* (25), which seems to me pertinent in this respect.

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(22) 32 Ch. D. 330.

(23) [1891] 2 Ch. 144.

(24) [1920] W. N. 7.

In that case the side-note reads in these terms: " A pur-" chaser, complaining that his conveyance did not comprise the " whole of the property which he had contracted for, filed his " bill for a conveyance of the remainder, and obtained an injunc-" tion restraining the vendor from suing him for the purchase " money, part of which was afterwards ordered to be paid into " court to abide the event of the suit. The bill was dismissed. " *Held*, that the vendor was entitled to the residue of the pur-" chase money, and the interest upon it, to the time of payment, " although the purchase money in court had not been laid out, " and no interest, therefore, had accrued thereon ".

The defendant there had obtained judgment at common law for the purchase money. The plaintiff on filing his bill obtained an injunction, as was then usual in Chancery, restraining proceedings on that judgment; but, this bill having been filed, the defendant moved for a release from the injunction, which was continued only on terms, namely, that the plaintiff, remaining in possession, as he did, should pay 1,000*l.* of this purchase money to the vendor and the balance into court, pending the dispute. The plaintiff failed in his bill.

The Vice-Chancellor, having decided that matter, went on in these terms (26): " The question is, what ought I to require the " plaintiff to do. If the money were not in court, the right of " the vendor to interest would be determined by the contract " for sale and purchase. Then what has taken place? The court, " at the instance of the plaintiff, admitting that he had no defence " at law, in order that he might assert a right in this court which " has turned out to be unfounded, has restrained the defendant " from recovering his purchase money. Common justice, and " the principles of this court in accordance with it, require that " the court should indemnify the defendant against the con-" sequences of the act of the court done at the plaintiff's instance. " . . . In such a case, unless the defendant by some act or " omission has prejudiced his right he must be placed in the " same situation as if the injunction had never been granted ".

In that case prima facie the purchaser had no right to possession, not having completed, and prima facie he should have been

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(25) 3 Hare 276.

(26) Ibid. 279.

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ordered to go out of possession. But, as he wished to retain the privilege of remaining in possession, the court said: "If you "want to have possession and yet maintain your dispute, you "shall lodge the balance of the purchase money in court as a "security": and this was held not to deprive the defendant of his contractual right to interest. It seems to me that the position is much the same here.

There is one further point, and it is this: it would be strange that a purchaser admittedly in possession and in default could stop interest from running in this way, having regard to the proviso already alluded to in the National Conditions [condition 5 (3)] which only allows the avoidance of payment of interest to a purchaser who is neither in possession nor in default.

Accordingly, in my judgment, the lodgment in court of the purchase money has not deprived the vendor of his right to interest at the contractual rate on the sum of 20,532*l*. 10*s*. of 5 per cent. a year from June 19, 1949, the date up to which interest at that rate has been added in the calculation of the money lodged in court. The vendor will give credit for interest included in the sum lodged at 4 per cent. from June 10, 1949, to July 5, 1949, and thereafter, if the whole sum in court be paid out to him, he will also give credit for any interest received from the Paymaster-General on the lodged sum, and there will be a set off.

Judgment for the defendant.

Solicitors: *Warren & Warren; Curwen, Carter & Evans, for Biscoe-Smith & Blagg, Portsmouth.*

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June 26, 27; *July* 14.

Evershed M.R., Singleton and Jenkins L.JJ.

BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY) *v.* KINDERSLEY AND ANOTHER.

[1949 B. 4609.]

Company — Winding up — Foreign banking company dissolved — Subsequent winding-up order in England—Winding up impeached—Same parties seeking to prove in liquidation—Approbation and Reprobation—Banking company's business not carried on within the jurisdiction—Existence of assets in England justifying winding-up order—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 1 (*d*).

The plaintiff company were a Russian bank established in 1866 but dissolved by the Soviet Government in 1918. There were substantial assets in this country belonging to the bank. In 1932 Eve J.

made a winding-up order of the bank under s. 338, sub-s. 1, of the Companies Act, 1929. An action was brought by the liquidator against the defendants as surviving partners of a firm which had existed in England to recover a sum of 28,990*l.* alleged to have become due to the bank on accounts with the firm. The defendants took out a summons asking for an order dismissing the action on the ground that the bank were non-existent. Notwithstanding this, the defendants had sought to prove in the liquidation for 26,000*l.* as being in fact due to their firm on those accounts. This proof was rejected by the liquidator and, the registrar having refused leave to appeal out of time, an appeal from him was standing over pending the decision of this case. Harman J. dismissed the summons on the ground that the defendants were seeking to approbate and reprobate. He also held that the fact that the bank had assets in this country was a valid ground for making the winding-up order. On appeal—

Held, (1.) that there was here no case of approbation and reprobation for the defendants had made no election from which they could not resile, and they would not be regarded as having elected unless they had taken a benefit under or arising out of their course of conduct: *Smith* v. *Baker* (1873) L. R. 8 C. P. 350, *Ex parte Robertson* (1875) L. R. 20 Eq. 733, and *Evans* v. *Bartlam* [1937] A. C. 473, applied; (2.) that if proof of the conduct of business in England by the bank were a condition necessary to the existence of jurisdiction in the English courts to wind up the bank under the Companies Act, 1929, s. 338, sub-s. 1 (*d*) (i), that condition was on the evidence satisfied; but (3.) that in the case of a foreign corporation (such as the bank) which had been dissolved and extinguished in the country in which it was established, it was not necessary as a statutory condition of jurisdiction in the English courts to wind them up to prove that they had, before their dissolution, established at some place in England a branch or other business place, and that that business had ceased: it was sufficient that there were assets of the bank in this country, and persons here claiming as creditors of the bank or said to be indebted to it, as being indicia of a business in some sense formerly conducted here.

In re Lloyd Generale Italiano (1885) 29 Ch. D. 219, explained. *In re Russian and English Bank* [1932] 1 Ch. 663, and *Russian and English Bank* v. *Baring Bros. & Co.* [1936] A. C. 405, applied.

APPEAL from Harman J.

The plaintiff company, Banque des Marchands de Moscou (Koupetschesky), were formed in 1866 under the laws of the Russian Empire to carry on the business of bankers in Moscow and elsewhere in Russia. The plaintiff bank bore a Russian name of which the name above given is the French transliteration. In 1918 the banks were dissolved by decrees of the Soviet Government and ceased to exist. On May 30, 1932, Eve J., purporting to act under the Companies Act, 1929, s. 338, made an order winding up the bank. At that time the effect and dates of the Russian decrees had not been established in the English courts.

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On September 9, 1949, this action was brought by the liquidator of the bank by leave of the Registrar of Companies under s. 191 of the Act of 1929 against the defendants as being the only surviving partners of the firm of Lazard Bros. & Co. (hereinafter called Lazards) for the sum of 28,990*l*. 11*s*. 1*d*. claimed as the consolidated balance due on the accounts between the bank and the firm. As part of their business the bank had financed for customers in Russia the purchase in England of raw cotton, and the account with Lazards was said to have arisen in the course of that business. On March 8, 1950, the defendants took out a summons asking for an order dismissing the action on the ground that the banks were non-existent and that the action had been begun without proper authority, and for an order for costs against the liquidator or the solicitors by whom the writ was issued. Notwithstanding this, the defendants had sought to prove in the liquidation for the sum of 26,000*l*. alleged to be the true balance owing to the firm on the account. This proof had been rejected and proceedings were pending by way of appeal from the registrar who had refused to allow an appeal from the liquidator out of time. There was evidence that the bank never had an office or place of business in England and that they did not at any time carry on business in England through a branch or by agents.

Harman J. dismissed the procedure summons on the ground that the defendants were seeking to approbate and reprobate as they were trying to prove in the liquidation and at the same time claiming that it was a nullity. He held, further, that the fact that the company had assets in this country was a valid ground for making the winding-up order having regard to s. 338, sub-s. 1, of the Companies Act, 1929 (1). The defendants appealed.

Charles Russell K.C. and *Gwyn Rees* for the defendants. The proceedings in this action should be stayed on the ground that

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(1) Companies Act, 1929, s. 338, sub-s. 1: "Subject to the provisions "of this part of this Act, any un- "registered company may be wound "up under this Act, and all the pro- "visions of this Act with respect to "winding up shall apply to an un- "registered company, with the follow- "ing exceptions and additions . . . "(*d*) The circumstances in which an "unregistered company may be "wound up are as follows: (*i*) If the "company is dissolved, or has ceased "to carry on business, or is carrying "on business only for the purpose of "winding up its affairs . . . ."

Sub-section 2: "Where a com- "pany incorporated outside Great "Britain which has been carrying on "business in Great Britain ceases to "carry on business in Great Britain, "it may be wound up as an unreg- "istered company under this part of "this Act, notwithstanding that it "has been dissolved or otherwise "ceased to exist as a company under "or by virtue of the laws of the "country under which it was incor- "porated".

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the plaintiff bank are a non-existent company. The parties are agreed that the company ceased to exist in 1918, the question is whether the liquidation proceedings of 1932 were valid and the liquidator is now entitled to issue the writ in this action. There is the further question whether the defendants, having regard to the fact that they have sought to prove in the liquidation, are precluded from now applying to stay the action.

First, the judge was wrong in holding that the doctrine of approbation and reprobation applied here. For there to have been approbation by the defendants a benefit must have been taken by them. The defendants obtained no effective benefit by putting in a proof, since that proof has not been admitted. The fact that a proof was lodged does not prevent the defendants from contending that the liquidation proceedings are bad. It is only if the defendants' proof had been admitted that the defendants would have received a benefit. Merely to seek a benefit is not enough to bring the doctrine of approbation and reprobation into operation. The defendants want the position with regard to their proof kept open so that, should the bank succeed in this action, the defendants can proceed with their proof. The case should be looked at as a whole. What the defendants are saying is that the bank have no cause of action. Alternatively, they seek to keep open their right to a counter-claim. [They referred to *Smith* v. *Baker* (2), *Ex parte Robertson* (3) and *Evans* v. *Bartlam* (4).] It is clear from the decision of the House of Lords in *Lissenden* v. *C. A. V. Bosch, Ld.* (5) that the actual receipt of a benefit is essential to the application of the doctrine of approbation and reprobation. To claim a benefit is not enough.

Secondly it is contended that the winding-up order made by Eve J. in 1932 was made without jurisdiction. The jurisdiction to wind up a foreign company was in this case conferred if at all by s. 338, sub-s. 2, of the Companies Act, 1929. That subsection does not cover the case where a company has never carried on business in this country. In *In re Tovarishestvo Manufactur Liudvig-Rabenek* (6) Cohen J. accepted it as essential for the exercise of the jurisdiction to wind up that the company should have a place of business in this country. The question at issue there was whether the place of business in question must be an "established" place of business. [They referred to *In re Lloyd Generale Italiano* (7); *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (8); *Lazard Bros. & Co.* v. *Banque Industrielle de*

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(2) (1873) L. R. 8 C. P. 350.
(3) (1875) L. R. 20 Eq. 733.
(4) [1937] A. C. 473.
(5) [1940] A. C. 412.
(6) [1944] Ch. 404.
(7) (1885) 29 Ch. D. 219.
(8) [1925] A. C. 112.

Moscou (9).] The purpose of the sub-section is to prevent the fact that a foreign company has been dissolved from being a bar to winding-up proceedings in this country. The sub-section does not confer jurisdiction where the company never has carried on business in this country. Here, if all the transactions of this bank in this country are considered as a whole, it is clear that they were not carrying on business here. [They referred to *The Lalandia* (10).]

There is no record of the bank's having carried on business in this country apart from an abortive attempt between 1920 and 1921 when they had already been dissolved. It is admitted that the onus in this case was in the first instance on the defendants; but, on its being established that there is no evidence that the bank carried on business in a place in this country, the onus shifts. The defendants cannot be liable to show that no business in this country was ever carried on by the bank as from their creation in 1866. Further, a debtor cannot be bound by an order made without jurisdiction. The suggestion that it is enough that the bank had large assets in this country to justify the winding-up order cannot prevail. It is not sought to have the winding up set aside generally: the contention is that, as against the defendants as alleged debtors, it is a nullity. The defendants are not here as creditors but as alleged debtors, and the winding up as against them is invalid.

Upjohn K.C. and *R. H. Walton* for the liquidator. Under s. 338 of the Companies Act, 1929, an ample and unfettered jurisdiction to wind up an unregistered company which had been dissolved was conferred on the court. It is a discretionary power to be exercised only when it is just and equitable. This section has not often come before the court for consideration.

[EVERSHED M.R. In earlier legislation it looks as if the word "dissolved" as used in s. 338, sub-s. 1 (*d*), had its origin in reference to partnerships so that it left it open whether there was jurisdiction to wind up a company which had ceased to exist.]

The status of companies was not so well defined in the early part of the nineteenth century as it is now but in the later Companies Acts "dissolved" must have had the ordinary meaning of ceasing to exist.

[SINGLETON L.J. How can "dissolved" be read with "otherwise ceased to exist" in sub-s. 2?]

The latter words were probably directed to such a case as a Russian company, but it cannot have been the intention in passing sub-s. 2 to throw doubt on the meaning of sub-s. 1 (*d*).

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(9) [1932] 1 K. B. 617.

(10) [1936] P. 56.

[EVERSHED M.R. For 100 years it seems to have been assumed that the carrying on of a business in this country was a condition of the exercise of the discretion to wind up.]

In fact that rests on two cases only: *In re Lloyd Generale Italiano* (11) and *In re Tovarishestvo Manufactur Liudvig-Rabenek* (12). In *In re Dendre Valley Railway & Canal Co.; Ex parte Moss* (13) the whole question was whether the substratum of the company was gone. There was no suggestion of any business in England.

[EVERSHED M.R. The judge then considered whether the company had been dissolved or had otherwise ceased to exist.]

The only question on which further information was needed was whether the company were under no obligation to the Belgian Government or had to carry on with their operations, for in the latter case the substratum would not be gone. There was no suggestion of business being carried on in this country. It is submitted that there is ample jurisdiction for the court to make a winding-up order in this country against a body which cannot otherwise recover payment of the debts due to them in this country. It is the existence of assets here of which the company will not otherwise receive payment that is sufficient.

There are three classes of foreign company: (1.) companies opening offices in England and carrying on business through their agents; (2.) companies which do not open offices here but carry on business here by employees; (3) companies not dealing directly but through agents on the footing of their direct liability to the agents. Why should it be right to wind up companies of the first kind and not others? The object of s. 338, sub-s. 1 (*d*), was to meet that difficulty. *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (14) has no bearing on the present case.

It has been recognized in the past that a foreign company having assets in this country could be wound up: *In re Lloyd Generale Italiano* (15). It is submitted that if in the past it has ever been laid down as an inflexible rule that the foreign company must have been carrying on business here, that should be overruled. [They referred to *Russian and English Bank and Guedalla* v. *Baring Brothers & Co.* (16).] It would be absurd that in a case where a company are defunct in their own country, they should be deprived of the means of collecting assets and distributing them among creditors in this country except on proof that they had offices here. When the winding-up order was made on May 30, 1932, there was evidence that business had been begun in this country in 1920.

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(11) 29 Ch. D. 219.
(12) [1944] Ch. 404.
(13) (1850) 19 L. J. (Ch.) 474.
(14) [1925] A. C. 112.
(15) 29 Ch. D. 219.
(16) [1936] A. C. 405.

In any case the defendants are blowing hot and cold in claiming that the winding-up was invalid and at the same time making a claim in the winding-up as a creditor. They are approbating and reprobating and that is not possible. [They referred to *Evans* v. *Bartlam* (17) and *Public Trustee* v. *Pearlberg* (18).]

Charles Russell K.C. replied.

Cur. adv. vult.

July 14. EVERSHED M.R. in his judgment, which was read by Singleton L.J., stated the facts, and continued: It is not disputed that the appropriate leave was given by the court having jurisdiction in the winding up to the liquidator to institute the present proceedings. But the defendants by their summons challenge the validity of the winding-up order itself which, though made eighteen years ago, and since substantially acted on, is (they say) not binding on them, the defendants. The ground of their challenge is this: they say that in order to give to the English court jurisdiction to wind up a foreign corporation which has (like the plaintiff bank) been dissolved and extinguished by the law of its place of origin, it must be shown that such corporation had a branch in England or carried on in England directly by its agents and at or from some established, specified or identifiable place or places in England an English business; that Eve J. (accepting this requirement) based his jurisdiction (as in fact he did) on evidence given before him on the part of one Czamanski to the effect that, purporting to act as servant or agent of the bank and with their authority in the early part of the year 1920, he had, under s. 274 of the Companies (Consolidation) Act, 1908, filed particulars of the English business of the bank, giving as their registered address No. 38, Lime Street, in the City of London, which particulars remained on the register until their removal by Czamanski in March, 1921; and that, as now appears and is conceded, the bank having ceased to exist some time before the date of registration, Czamanski could then have had no authority from the bank; with the result that that registration, on which Eve J. exclusively relied, is now shown to have had no force and effect whatever, and that there was and is no evidence of such a carrying on of an English business by the bank at any time as is required to support the validity of the winding-up order. The defendants also relied below upon the circumstance that there had been no proper service of the winding-up petition. That objection is not, however, now pursued, and may be disregarded.

The answer of the bank by their liquidator to this challenge is of a twofold character. First, it said that the defendants, having sought to prove in the winding-up and persisting in that claim by their application for leave to appeal out of time against the rejection of their proof, cannot in these proceedings now be heard to impugn the validity of the winding-up proceedings. Second, it is said that, although the particular matter on which Eve J relied in 1932 is now shown to be a broken reed, nevertheless, if there be such a condition as above mentioned to the jurisdiction to wind up the bank, there was and is sufficient evidence, apart from the purported registration in 1920, to satisfy the requirement; but that in any case where, as in the present case, there are (and were in 1932) substantial assets in England to administer, both in the form of cash and in the form of English debtors to the bank and also English creditors of the bank, there is in law no other condition required to found the jurisdiction to wind up the dissolved bank. More particularly, in such a case as the present it is not necessary to prove that the bank had ceased to have an English business, as commonly understood; still less that there was some established, specified or identifiable place or places in England from which that business was conducted.

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(17) [1937] A. C. 473, 482.

(18) [1940] 2 K. B. 1.

The main ground on which Harman J. rested his decision was that first above mentioned, namely, that the defendants are pursuing at one and the same time two inconsistent or incompatible courses of action: in these proceedings they are challenging the validity of the winding-up order and all the steps taken in the winding-up consequent on it; at the same time they are seeking to assert a right to prove in the winding-up and thereby to take the benefit of the winding-up order. " This is an attitude ", said the judge, " of which I cannot approve. Nor do I think " that in law the defendants are entitled to take it. They are, as " the Scottish lawyers have it, approbating and reprobating, or, in " the more homely English phrase, blowing hot and cold ".

The phrases " approbating and reprobating " or " blowing hot " and blowing cold " are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious. From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent. These requirements appear to me to be inherent, for example, in *Smith* v. *Baker* (19) and *Ex parte Robertson* (20). See also the speech of Lord Atkin in *Evans* v. *Bartlam* (21): "I find nothing in the facts analogous to cases where a party, "having obtained and enjoyed material benefit from a judgment, "has been held precluded from attacking it while he still is in "enjoyment of the benefit. I cannot bring myself to think that "a judgment debtor, who asks for and receives a stay of execu"tion, approbates the judgment so as to preclude him thereafter "from seeking to set it aside, whether by appeal or otherwise. "Nor do I find it possible to apply the doctrine of election": and the speech of Lord Russell of Killowen (22): "The doctrine of "approbation and reprobation requires for its foundation incon"sistency of conduct; as where a man, having accepted a benefit "given him by a judgment, cannot allege the invalidity of the "judgment which conferred the benefit".

Mr. Upjohn referred to the decision of this court in *Public Trustee* v. *Pearlberg* (23). In that case a vendor had issued a writ claiming, and claiming exclusively, specific performance of his contract and damages in addition or substitution. While his action was still pending the vendor proceeded, pursuant to the terms of the contract, to give to the purchaser a notice making time of the essence of the contract and intimating that unless the purchase were then completed, he would rescind the contract. It was held that so long as his claim for specific performance remained outstanding the vendor could not assert an inconsistent claim to rescind. In my judgment that case provides no analogy to, or guide in, the circumstances of the present appeal. The vendor in *Public Trustee* v. *Pearlberg* (23), so long as he claimed, and claimed only in his action specific performance of the contract or damages, was necessarily asserting his willingness to perform it according to its terms and was, moreover, inviting the court by its order to determine the date for actual completion. It followed that by maintaining his action and, at the same time, by asserting a right to state his own and a shorter time for completion, and also to rescind, the vendor was seeking to affirm and disaffirm the same contract, or to assert under the same contract two inconsistent remedies.

Mr. Upjohn sought to say that in like manner in the present case the defendants were seeking at the same time to affirm and disaffirm the same instrument, namely, the winding-up order. But in my judgment this is not so. What are the defendants doing here? In one respect it is to be noted that they have, by their counsel, made clear in this court a qualification of the course

(19) L. R. 8 C. P. 350.
(20) L. R. 20 Eq. 733.
(21) [1937] A. C. 473, 479.
(22) Ibid. 483.
(23) [1940] 2 K. B. 1.

of conduct which offended the judge. According to his judgment it appears that in the court below the defendants claimed that, even if they succeeded upon their present application and could thereby successfully resist any claim by the liquidator to recover sums owing upon the alleged account by the defendants, they would nevertheless still be entitled in the winding-up to prove for sums standing to their credit in the same account. It is not surprising that such an assertion was obnoxious to the judge or that he indicated the impossibility of such a position. It is, to my mind, quite clear—and Mr. Russell has plainly so conceded—that if the defendants should succeed on their present summons and take the benefit as a consequence of having disabled the bank from suing to recover their claims, the defendants would indubitably have elected against the winding up and could not be allowed to prove in the liquidation.

But it does not, in my judgment, follow, because the defendants have sought unsuccessfully to prove and are now seeking to keep alive pending the present appeal, their right to appeal against the rejection of their proof, that they cannot in the present proceeding seek to defeat the liquidator's claim in limine by challenging his right to sue. As I have just stated, if the defendants succeed in this application, that will be an end of any claim on their part in any circumstances to enjoy the benefit of the winding up. But if they should fail in their present application but succeed upon the merits of their defence, I can see no ground in principle or in law why they should not then persist in their assertion of a right to be creditors in the liquidation, and to prove accordingly.

The substantial case between the parties is one which depends on the proper result, as I understand it, of a complex account between them, each alleging that upon a true view of it the balance is in its favour. If the bank were not in liquidation the defendants would no doubt add a counterclaim to their defence. But since the bank are in liquidation, the only way whereby one who seeks to rank as a creditor can recover is by way of proof. It is admitted that if the defendants had been willing to accept as final the liquidator's rejection of their proof, there could be no objection on the ground under discussion as to their present summons. The fact of proving, therefore, cannot constitute the alleged election. If election there has been, it must consist in their seeking to appeal out of time against the rejection, and being parties to the adjournment of that application until after the present hearing. But I cannot see that such a proceeding, merely keeping alive whatever right they may have when the matter is heard to appeal against rejection of their proof, can amount to an election sufficient for present purposes, or can constitute or be taken to confer a benefit, the retention of which is

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inconsistent with their present application. If benefit there be, it is one derived from the rules of the court and not, as it seems to me, from the winding-up order, and this brings the case by way of analogy more closely in line with the circumstances of *Evans* v. *Bartlam* (24).

In the ordinary case, where one party is seeking to pursue at the same time inconsistent courses of conduct, the other may be seriously embarrassed thereby; for by resisting one he may find himself inferentially conceding the other. There is in the present case plainly no such embarrassment, and I derive some support for my conclusion from the second of the grounds for rejection of proof put forward by the liquidator, namely, that the effect of the Russian Revolutionary Decrees in and after 1918 was to vest in Russian authority any claim against the bank which the defendants might have. In my judgment both parties to the present proceedings have made it plain that they are relying, as I think they are entitled to rely, on all defences they may have against claims on the part of the other. I, therefore, have reached a different conclusion on this matter from that of the judge below.

But Harman J. also expressed the opinion that the winding-up order of Eve J. could be supported notwithstanding that, as now appears, the steps taken to effect registration of a business in this country by Czamanski, purporting to act on behalf of the bank, were taken too late, that is, at a time when his principal had ceased to exist.

Mr. Russell accepted—as plainly he had to—the onus of showing, in the first instance, that the ground on which Eve J. had relied for jurisdiction was unsound. But the onus, according to Mr. Russell, then shifted; for, he said, it would be an absurd and impossible task for him to show that at no time since 1866 had the bank ever had an English business. However that may be, I think that in a case such as the present, where the order impugned has stood for eighteen years and the rights of many people have been affected in proceedings taken on the assumption of its validity, and where, moreover, there are very substantial assets (there being a large sum of cash now held for the liquidator), numerous persons claiming as creditors and no other means of administering the affairs of the bank in England, the court should not be slow to draw the necessary inferences from such facts as are available.

The evidence is no doubt somewhat slender. That is natural enough, for it is now 1950 and Czamanski, who could undoubtedly have given much information, died some time ago. Harman J. said that the evidence before him was not sufficient to satisfy him that the bank had ever in fact carried on business in England,

(24) [1937] A. C. 473.

but added that he was far from saying that that fact could not have been proved in 1932. In my judgment, and having regard to the circumstances to which I have just alluded, the necessary inference—and I am assuming that it is necessary—can and should be drawn. The evidence, in addition to the facts of the existence of assets and creditors, consists of an affidavit of this same Czamanski sworn in February, 1932. The affidavit was not sworn in the winding-up proceedings, and it was directed to a purpose wholly unconnected with the present question. The deponent's signature has, however, been identified in these proceedings and the affidavit has, pursuant to the Evidence Act, 1938, or otherwise, been accepted as admissible.

Paragraphs 2 and 3 of the affidavit are as follows: " (2.) Prior " to the revolution in Russia in 1917 I was for many years associ- " ated with the banking industry in that country, and in the year " 1912 I was offered and accepted a post with the above named " defendant company. The post involved my having charge of " what was known as the goods section of the bank. This was " the department that dealt with the financing of the bank's " customers' purchases of goods from foreign countries, and some " very large transactions were entered into in this connexion " particularly with regard to the purchases of cotton through " English merchants. This necessitated my visiting England on " behalf of the bank on various occasions to conduct negotiations " with firms dealing in cotton in London, Liverpool and else- " where. In the year 1916 I was elected by a general meeting " of shareholders one of the five members of the board of the " Moscow Merchants Bank. The bank was incorporated under " the laws of the old Russian Empire, and it had a very large " business. Its head office was at Ilkina, Moscow. It had " branches in Petrograd, Kieff, Kharkoff, Rostov-on-Don and " Kokand. Prior to the revolution it had no branches outside " Russia, and conducted its business with various foreign coun- " tries through various agents. (3.) After the revolution took " place in Russia the whole of the bank's assets in Russia were " seized by the Soviet authorities, and it was impossible to con- " tinue to carry on business there. I and my fellow directors " had to escape from Russia as best we could. I succeeded in " reaching England in November, 1918, and on doing so con- " sidered what steps I could take to preserve the assets of the " defendant bank in the interests of its creditors and share- " holders. In consequence of my being acquainted with a " number of influential English firms as a result of the business " conducted by me, as set out in paragraph 2 of this my Affidavit, " I thought the best method to adopt would be to start a branch " of the bank in England. At that time, I, in common with " many other people, thought that the disturbances in Russia "were only of a temporary character, and that ultimately the old "state of affairs would be restored. It was, of course, within "my knowledge that the Midland Bank had in London a very "substantial amount standing to the credit of the defendant "bank. I was advised by English solicitors, who were then "acting for me, Messrs. Roney & Co. of New Broad Street, "London, to effect the registration of the defendant company "as a company carrying on business in England. I understand "that the necessary steps were taken by them and that the "registration was, in fact, effected. The address registered was "38, Lime Street in the City of London where it was my inten"tion to carry on the business of the bank".

In my judgment the proper inference from para. 2 is that from 1912 onwards Czamanski was doing business, in the ordinary acceptation of that phrase, on behalf of his principal, the bank, in England with persons resident here, and although there is no evidence on the point one way or the other it seems to me impossible to resist the conclusion that in some degree the assets now available and the creditors now claiming to participate in the winding up should be attributed to this business conducted in England. I cannot attach to the fact that Czamanski's "busi"ness" is described by him as "conducting negotiations with "English firms" or to the statement that, before the Revolution, the bank "conducted its business with foreign countries through" as distinct from "by" various agents, the significance, as Mr. Russell would have me do, that the bank had not themselves and directly any "business" in England at all. It seems to me that the references in para. 3 to the steps taken by Czamanski "to preserve the assets" of the bank and to his acquaintance with influential English firms "as a result of the business con"ducted by me" point strongly in the other direction and go far to show that the use Czamanski sought to make (futilely as it now turns out) of s. 264 of the Companies (Consolidation) Act, 1908, was aimed at maintaining and "preserving", until (as he thought) better days should come, a goodwill and business connexion belonging to the bank.

It is true that there is no evidence of the establishment before 1918 of anything in the nature of a "branch" or any specific or regular "place" of business in this country. But, if I am right in concluding that Czamanski, on the occasion of his visits to this country, did in fact transact the business of the bank, then he must have done so at or from some "place". In circumstances not dissimilar, Cohen J. held in the *Rabenek* case (*In re Tovarishestvo Manufactur Luidvig-Rabenek*) (25), that, assuming a specific or identifiable "place" of business to be requisite, the Midland Hotel, Manchester (where the Rabenek Company's agents stayed when visiting England on their principals' business) sufficiently answered the description; and Mr. Russell did not challenge the correctness of Cohen J.'s decision. Czamanski may have varied his patronage; but whether or not he did, there must, in my opinion, have been a "place" or "places" of business in this country as a matter of principle no less satisfactory than was the Midland Hotel, Manchester, in the *Rabenek* case (25). I am therefore of opinion that, if proof of the conduct of business in England by the bank is a condition necessary to the existence of jurisdiction in the English courts to wind up the bank, that condition is, on the evidence, satisfied.

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(25) [1944] Ch. 404.

But I agree with Harman J. that in the case of a foreign corporation, such as the bank, which has, ex hypothesi, been dissolved and extinguished in the country where it was established, it is not necessary, as a statutory condition of jurisdiction in the English courts to wind it up, to prove that it had, before its dissolution, established at some place in England a branch or other business and that that business had ceased.

The winding-up order made in the present case was made, as already stated, in pursuance—or purported pursuance—of sub-s. 1 (*d*) (i) and not under sub-s. 2 of s. 338 of the Act of 1929 (now respectively s. 399, sub-s. 5 (*a*) and s. 400 of the Act of 1948); and, so far as I am aware, all winding-up orders in like cases have been similarly made. It will be convenient to deal first with the scope of, and jurisdiction conferred by, sub-s. 1 (*d*) (i) without regard to the effect on the construction of the section of sub-s. 2 which, having been first enacted as s. 91 of the Companies Act, 1928, was introduced by the Consolidating Act of 1929 into our winding-up legislation.

Sub-s. 1 (*d*) (i) of s. 338 of the Act of 1929 provided as follows: "The circumstances in which an unregistered company may be "wound up are as follows:—(i) if the company is dissolved, or "has ceased to carry on business, or is carrying on business only "for the purpose of winding up its affairs". This form of words is substantially identical with that which has consistently appeared in all the relevant legislation since the Act of 1848 (11 & 12 Vict. c. 45). As a matter of language, it is plain that the three conditions named are independent and not cumulative. Assuming, therefore, in the case of a foreign corporation which has by its local law been extinguished, that it is covered by the words "is dissolved"—which words must, as it is conceded, be taken to mean "has been dissolved"—it would appear from the language used that no other condition has to be fulfilled in order to confer upon the English court jurisdiction to wind it up.

As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary. Prima facie if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts. In the present case there are substantial assets standing in the name of the bank or its liquidator, and there are persons within the jurisdiction having claims to participate in the distribution of those assets. At the same time, by reason of the total extinction in Russia of the bank and the absence of any machinery under Russian law for the due distribution of the assets among the persons regarded as properly having claims upon them, there would be, unless the machinery of winding up under the Companies Act is available, no means of any kind existing for the administration of the English assets.

The existence of assets here, the presence here of persons claiming as creditors of the bank or said to be indebted to them, seem to constitute at least the indicia of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, upon the general principle above referred to would make the case appropriate for the exercise by our court of its winding up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic, unless it is also necessary to show that that business was carried on directly and from some established or specified place or places in this country.

The question was considered by Cohen J. in the *Rabenek* case (26). In that case it was not disputed that the dissolved Russian company had formerly carried on business in England; but it was argued for the Crown (who appeared on the petition) that it would be necessary to show, in order to found jurisdiction to wind up the company, that the company had had an office or other established place of business in this country. The judge, in my opinion rightly, rejected that argument. But he was also of opinion that the dissolved foreign or unregistered corporation must have had a " place " of business in this country of some kind. " The provisions," he said, " of s. 338, sub-s. 1, in my " opinion make it clear that an unregistered company cannot be

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(26) [1944] Ch. 404, 409.

" wound up under Part X of the Act, unless it has a place, not " an established place, of business in Great Britain, for, unless it " has such a place of business, no question can arise whether the " place of business in England or the place of business in Scotland " is the principal place of business ". In the case before him the judge was able to surmount the difficulties in the petitioner's way by arriving at the somewhat artificial conclusion that the Midland Hotel, Manchester (where the company's agents were proved to have stayed when visiting England and transacting business), must be treated as having been the company's " place " of business in England: and I have already given my reasons for thinking that, if this requirement must be satisfied in the present case, then, since Czamanski has stated that he visited England from time to time on the business of the bank and must, on such occasions, have stayed somewhere in England, it is sufficient that the place or places (though unspecified) where he stayed constituted the bank's place or places of business in England. But, in my judgment, it is not necessary, in order to found jurisdiction, to prove that the dissolved foreign corporation had any specified or identifiable " place " or " places " of business in England. It is true that in paras. (*a*) and (*b*) of the sub-section reference is made to the consequences which follow " if it has a principal place of business " in England or Scotland or both. But it does not, in my judgment, follow that the courts in England (or Scotland) have no jurisdiction to wind up a dissolved foreign corporation if it is not shown to have had a principal or any place of business in either.

In the *Rabenek* case (27) Cohen J. referred to *In re Lloyd Generale Italiano* (28), and quoted at length the judgment in that case of Pearson J. That judgment, and more particularly the sentence in it, " I am decidedly of opinion that the Act is " confined to English companies and foreign companies carrying " on business in England with, so to speak, a residence of their " own—a branch office—in this country ", has constituted the authority for the view expressed by the textbook writers that the existence of such a " residence " was necessary to found the jurisdiction of our courts to wind up a dissolved foreign corporation. Thus it is, for example, stated in Buckley on the Companies Acts (7th ed.), p. 466, that " there is no jurisdiction to " wind up a company established in a foreign jurisdiction which " has no office or branch in this country but which carries on " business here by means of agents ". And (to take a modern example), in Palmer's Company Law (15th ed.) (1933), p. 473, edited by Judge Topham, occurs the sentence, " Before 1929 a " company which had been carrying on business in England

(27) [1944] Ch. 404. (28) 29 Ch. D. 219.

"through an agent but without any branch in this country, could "not be wound up in England, though it was being wound up "abroad". In both cases the sole authority for the view expressed is *In re Lloyd Generale Italiano* (28). As observed by Cohen J., not only in the case cited had there been no place of business of any kind in England, but there were no assets in England—nothing which the English court could in any case administer. In my judgment *In re Lloyd Generale Italiano* (28) ought not to be regarded as an authority for the view that proof of the existence of a "place" of business in England, whether established or otherwise, is a condition to the existence of jurisdiction in the English court to wind up a dissolved foreign corporation.

I have so far discussed the matter by reference only to sub-s. 1 of s. 338 and without regard to sub-s. 2. The latter sub-section is as follows: "Where a company incorporated outside Great "Britain which has been carrying on business in Great Britain "ceases to carry on business in Great Britain, it may be wound "up as an unregistered company under this part of this Act "notwithstanding that it has been dissolved or otherwise ceased "to exist as a company under or by virtue of the laws of the "country under which it was incorporated".

There can be no doubt, having regard to the history of the sub-section, that it was enacted with particular reference to the problems which arose as a result of the Russian revolutionary legislation affecting Russian corporations. And if the matter were free from authority there would, as it seems to me, be much to be said for the argument that, sub-s. 2 having been introduced into the section, that sub-section and sub-s. 1 must be read and construed together; with the result that, notwithstanding the wide and general terms of para. (*d*) (i) of sub-s. 1, all cases (and particularly the Russian cases) falling within the terms of sub-s. 2 must be treated as governed exclusively by that sub-section and subject, therefore, to the limitation (whatever might be its effect) of the phrase "which has been carrying on business "in Great Britain, etc.". When *In re Russian and English Bank* (29) came before Bennett J. he was of opinion that the words "ceases to carry on business in Great Britain" must be strictly construed to refer only to the future. He held, therefore, that the sub-section could have no application to a case where the Russian company concerned had long since ceased to carry on such business; and, treating the sub-section as not intended to alter the existing law, made a winding-up order under sub-s. 1 (*d*) (i), a precedent which appears, as I have said, to have since been consistently followed. The latter part of Bennett J.'s conclusion (though not the former) was accepted by

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(28) 29 Ch. D. 219.

(29) [1932] 1 Ch. 663.

Cohen J. in the *Rabenek* case (30), and has also received support in the House of Lords in *Russian and English Bank* v. *Baring Bros. & Co.* (31), in which it was decided that where a winding-up order has been made in regard to a dissolved Russian corporation, and the necessary leave has been obtained (as in the present case) from the Registrar in Companies Winding-up, the liquidator can bring an action in the name of the foreign corporation notwithstanding that it is a mere nominis umbra, that it has altogether ceased as an entity to exist.

But before referring to the speeches in the *Baring Bros.* case (32) I would observe that the construction placed on the sub-section by Bennett J. seems to involve the notion that a foreign corporation which has been " dissolved or otherwise ceased " to exist as a company " may still be regarded as carrying on business in this country. And, as Jenkins L.J. stated during the argument, it may not be irrational, having regard to the uncertainty which existed in the years 1928 and 1929 as regards the effect of the Russian revolutionary decrees, to suppose that Parliament was intending to provide that, for the purposes of winding-up jurisdiction, steps taken to establish and register businesses in this country in the names of Russian corporations should not be treated as ineffective on the ground merely that that corporation and the authority purported to be exercised on their behalf had already ceased to exist. On that view of the sub-section, the winding-up order of Eve J. in 1932 could not be impeached on the ground that Czamanski in 1920 had, as now appears, no authority to do what he then did.

But it is, in my judgment, unnecessary to pursue these matters further. I turn first to the speech in the *Baring Bros.* case (32) of Lord Blanesburgh. After referring to Bennett J.'s view of the meaning to be attributed to the phrase in sub-s. 2 of s. 338 of the Companies Act, 1929, " ceases to carry on business " in Great Britain ", Lord Blanesburgh said (33): " I am not " prepared, as at present advised, to take so strict a view of the " sub-section. I can see no reason, in principle, for a line of " demarcation so arbitrary; nor am I forgetful, although its " effectiveness was thereby held in reserve, that the sub-section " had appeared in the Act of 1928. It must also be remembered " in relation to a measure of pure consolidation like the Act of " 1929, that normally the date of its commencement is, subject, " of course, to any unambiguous direction in any particular " instance, the most irrelevant of dates for any effective " purpose ".

From Lord Atkin's speech I venture to quote at greater length.

(30) [1944] Ch. 404.
(31) [1936] A. C. 405.
(32) [1936] A. C. 405.
(33) Ibid. 416.

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Referring to the Russian revolutionary legislation, he said (34): "The material date is said to be some time in the year 1918. "The resulting position was embarrassing. There were what "appeared to be assets in this country, some doubtless acquired "during the period of trading by the nonentity; there were "creditors of the pre-dissolution and post-dissolution period. "The obvious course was to wind up the companies, if that "could be done. By the Companies Act of 1862, s. 199, there "was power to wind up unregistered companies 'whenever the "'company is dissolved or has ceased to carry on business or is "'carrying on business only for the purpose of winding up its "'affairs'. Under this provision it was accepted law that the "courts could order a winding-up of a company incorporated "abroad which had carried on business in this country. But "there had been no decision as to the power to wind up an incorporated company which had in fact been dissolved although "there may have been a very occasional order made in such cases "without any direct notice of the point. It was in these circumstances, and I have no doubt with direct reference to the "difficulties as to the Russian banks disclosed by the litigation "to which I have referred, that the legislature in the Companies "Act of 1928, an amending Act, s. 91, provided 'Where a "'company incorporated outside Great Britain which has been "'carrying on business in Great Britain ceases to carry on business in Great Britain it may be wound up as an unregistered "'company . . . notwithstanding that it has been dissolved or "'otherwise ceased to exist as a company under or by virtue of "'the laws of the country under which it was incorporated'. "The section is now found in the Companies Act of 1929, the "consolidation Act, in Part X entitled 'Winding up of unregistered companies' as sub-s. 2 of s. 338, which by sub-s. 1 "enacts 'Subject to the provisions of this Part of this Act, any "'unregistered company may be wound up under this Act, and "'all the provisions of this Act with respect to winding up shall "'apply to an unregistered company.' . . . Sub-s. 1 (*d*), repeating the provisions of the Act of 1862, s. 199, and the similar "s. 268 of the Act of 1908, provides 'The circumstances in which "'an unregistered company may be wound up are as follows'; "if the company is dissolved, or has ceased to carry on business, "or is carrying on business only for the purpose of winding up "its affairs. I for myself come to the conclusion that s. 91 of "the Act of 1928 was introduced as s. 338, sub-s. 2, into the "Act of 1929 for the removing of doubts and to make it clear "that the words 'if the company is dissolved' were meant to "apply to an incorporated company dissolved according to the

(34) [1936] A. C. 423.

"law of its constitution, and not intended to give a new enabling "power only applicable to a company which should cease to "carry on business after the passing of the Act. Such a construction would in fact in reference to the Russian Banks have "defeated the immediate object of the Legislature".

As regards the "doubts" which Lord Atkin thought were intended to be removed by what became sub-s. 2 of s. 338 of the Act of 1929, it is to be remembered that the word "dissolved," which, as I have already observed, has consistently appeared in all our legislation for the winding up of companies since 1908, took its rise from the old partnership conception and might therefore reasonably be taken to refer to the step or process of dissolution as understood in partnership affairs as distinct from the final extinction of the corporate entity.

I refer finally to the speech of Lord Macmillan in the *Baring Bros.* case (35): "The purpose of pronouncing a winding-up order "is to secure the collection and distribution of the assets of the "company to which it relates. The logical inquirer may ask "how a company which has ceased to exist can have any assets. "But when the legislature authorized the making of a winding-up "order in the case of a dissolved company it must be presumed "to have intended such order to be effective and to result in the "collection and distribution of assets. To hold that the legis-"lature has authorized the collection of the assets of a dissolved "company, but has withheld the power of recovering these assets, "would be to attribute a singular ineptitude to Parliament".

In the light of the judicial pronouncements to which I have referred in the House of Lords, and also those of Cohen and Bennett JJ., Parliament re-enacted in ss. 399 and 400 of the Companies Act, 1948, the exact language of sub-ss. 1 and 2 of s. 338 of the Act of 1929. It follows in my judgment that sub-s. 2 of s. 338 must be regarded as expository only and as not having been intended to give jurisdiction to wind up dissolved foreign corporations (such as the plaintiff bank) subject to special limiting conditions not applicable to the more general jurisdiction conferred by sub-s. 1; and that by the opening words in sub-s. 2, "where a company incorporated outside Great Britain which has "been carrying on a business in Great Britain . . .", is intended (subject to the suggestion of Jenkins L.J.) no more than a reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction.

In my judgment, therefore, the language of sub-s. 2 does not qualify the conclusion which I have reached on sub-s. 1. I think that, in circumstances such as exist in the present case, it is unnecessary as a foundation for a winding-up order to prove that the bank had any branch or office in England or carried on their business operations in England from some established or specific or identifiable place of business; and that Eve J. had jurisdiction to make the order which he made in May, 1932, apart from the matter on which he expressly relied. It follows from the *Baring Bros.* case (36)—and it is not disputed—that the present liquidator was entitled to institute the action in the name of the bank, and that the defendants' application fails.

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(35) [1936] A. C. 437.

I refer in conclusion to one other matter: on the hearing in 1932 of the winding-up petition by Eve J. the Crown was represented as interested in bona vacantia. I asked during the hearing of the appeal whether the Crown desired again to be represented. Mr. Upjohn read to us a letter from the Treasury Solicitor stating that the Crown did not desire to appear separately but was content that the matter should be argued by counsel for the liquidator. For the reasons I have given I think that the appeal should be dismissed.

SINGLETON L.J. I agree.

JENKINS L.J. I also agree.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Linklaters & Paines; Slaughter & May.*

H. C. G.

(36) [1936] A. C. 405.

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[1949 C. No. 4803.]

Town and country planning — Charges — Exemption — Charity — Land held by trustees for "promotion of industry, commerce and "art"—Charitable purposes—Crystal Palace Act, 1914 (4 *Geo.* 5, *c. v*), *s.* 14—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 85.

By the Crystal Palace Act, 1914, a body of trustees were incorporated and by s. 14 entrusted with "the entire control and "management of the [Crystal Palace] and the park [of some 200 "acres] as a place for education and recreation and for the promotion "of industry commerce and art". The wide variety of powers conferred on the trustees by the section included, under sub-s. 8, the power to "do any act or thing which may in the judgment of the "trustees appear calculated to promote the objects and purposes of this Act . . .". In fact the property was administered in such a way as to confer a great benefit on the public by the provision of recreation and amusements at a low cost. Various local authorities were authorized by the Act to make specified contributions towards the purposes of the Act. The Minister of Town and Country Planning decided, because in his opinion the objects of the trust included the promotion of art, industry and commerce, that the land was not held on charitable trusts so as to be exempted by s. 85 of the Town and Country Planning Act, 1947, from charges under that Act which it would otherwise have to bear. On appeal by the trustees under s. 92 of the Act of 1947,

Held, that the promotion of art was a purpose existing for the benefit of the public at large and of a charitable nature, the expression "promotion of art" not being properly construed as meaning the promotion of the activities and interests of artists: *In re Ogden* (1909) 25 T. L. R. 382, doubted: *Royal Choral Society* v. *Inland Revenue Commissioners* (1943) 112 L. J. (K. B.) 648, followed; that the words "promotion of industry and commerce" could, in view of the whole purpose of the Act of 1914 and the constitution of the trustees, not be construed to mean merely the promotion of the interests of those concerned in the manufacture and sale of their particular products; that the very wide ambit of the powers conferred on the trustees by s. 14 of the Act of 1914 did not prevent the trust from being a charitable trust, because those powers were not objects in themselves but simply ancillary to the purposes laid down in the opening words of the section: *Oxford Group* v. *Inland Revenue Commissioners* [1949] W. N. 343, distinguished; that the intention of the Act of 1914 in including among the objects of the trust the promotion of industry, commerce and art, was the benefit of the public or community and not the furtherance of the interests of individuals; and that the trust was accordingly of a charitable nature and entitled to the exemption conferred by s. 85 of the Act of 1947.

ADJOURNED SUMMONS.

By s. 14 of the Crystal Palace Act, 1914 (1), it is provided that the trustees of the Crystal Palace and Park "shall have the "entire control and management of the palace and the park as

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(1) Crystal Palace Act, 1914, s. 14: "The trustees shall have the "entire control and management of "the palace and the park as a place "for education and recreation and for "the promotion of industry commerce and art and subject to existing leases tenancies licences and "agreements and to the proviso to "this section they may exercise the "following powers (that is to say): "(1) They may maintain alter "extend and repair the palace and "other buildings and may improve "and extend the park and appropriate "lay out form fence and maintain

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" a place for education and recreation and for the promotion of " industry commerce and art ".

On May 25, 1949, the trustees applied to have determined by the Minister of Town and Country Planning, under s. 92, of the Town and Country Planning Act, 1947, the question whether the land was held on charitable trusts within s. 85 of that statute, which provides for certain exemptions in favour of land held on charitable trusts.

" grounds for cricket and other " games sports amusements meet" ings assemblies and other purposes " and also gardens roads walks " fences plantations ornamental lakes " and spaces for military drill and " exercise and they may also pull " down and remove the whole or any " portion of the palace or other build" ings and may construct new " buildings and erections in lieu " thereof or in addition thereto: (2) " They may close the whole or any " portion of the palace and the park " and may make such reasonable " charge as they think fit for admis" sion to the palace or any part " thereof and to any portion of the " park which may be set aside or let " in accordance with the provisions " of this Act: (3) They may set " aside or let for such period and sub" ject to such conditions as they " think fit the whole or any portions " of the palace or the park for the " exclusive use of any educational " institution or for the purposes of a " library or any exhibition show or " display or any club or entertainment " or for any recreation or sport or " amusement or for stalls or for " shops or for any purpose of public " utility instruction or benefit and " may authorise the lessees to erect " buildings and to make charges for " admission to any part of the palace " or the park let to them. Provided " that in setting aside any portion " of the park for any club the " trustees shall give a preference so " far as possible to those clubs whose " membership mainly consists of per" sons resident in the district of any " contributing authority: (4) They " may themselves provide and main" tain such educational institutions " in the palace and the park as " they think fit and may make " such charges to students attending " the same as they think fit: (5) " They may purchase and hire works " of art plant furniture and other " appliances and things and may " themselves provide such amuse" ments in the palace or the park or " any parts thereof as they think fit " and may supply or let the right of " supplying refreshments in any part " or parts of the palace or the park " together (if they think fit) with the " exclusive right to use any refresh" ment rooms or stalls and may " advertise the palace and the park " and the attractions thereof: (6) " They may appoint pay and remove " such officers and servants as may " be necessary for the purposes of this " Act: (7) They may raise on mort" gage of the palace and of the park " (excluding the lands coloured blue " on the signed plan) or any part " thereof any sums of money that " may be necessary for the purposes " of this Act and may sell exchange " or let on lease or otherwise any " portion of the park (excluding the " lands coloured blue on the signed " plan): (8) They may generally do " any act or thing which may in the " judgment of the trustees appear " calculated to promote the objects " and purposes of this Act: Provided " always that not less than twenty " acres of the park shall be open to " the public free of charge on every " day and the greater portion of the " lands coloured blue on the signed " plan shall be open to the public " free of charge on every day except " not more than fifty days in each " year of which fifty days not more " than fourteen days shall at any one " time be consecutive or be in any " one month ".

The Minister having held that, as a matter of law, the land was not land to which s. 85 applied, the trustees took out a summons, under s. 92 of the Act, and R. S. C., Ord. 55B, r. 79, for a declaration that it was held on charitable trusts and was and ought to have been held by the Minister to have been and to be land to which s. 85 of the statute applied.

Russell, K.C., and *Wilfrid M. Hunt* for the plaintiff trustees. The question is whether the words of the Crystal Palace Act, 1914, involve exclusively charitable trusts. Educational trusts and public recreation are clearly charitable: see *In re Hadden* (2). The promotion of industry and science is clearly within the preamble to the statute. A society for the promotion of the industry of agriculture, which is one of the most vital industries of this country, has been held to be charitable: see *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (3). It is clear, also, from *Royal Choral Society* v. *Inland Revenue Commissioners* (4), that the promotion of art is regarded as charitable.

Buckley for the defendant Minister. The Act of 1914 must be examined to ascertain whether the property can be used for any purpose which is not charitable. Recreation is admitted to be charitable, though there are types of recreation which are not charitable. There is a distinction between the promotion of industry and the improvement of agriculture. There has never been any decision supporting the view that the promotion of industry or commerce is charitable, except the case relating to the improvement of agriculture. This property is not property which is held exclusively for charitable purposes. [He referred to *Oxford Group* v. *Inland Revenue Commissioners* (5); *Tennent Plays Ld.* v. *Inland Revenue Commissioners* (6).]

Russell, K.C., replied.

DANCKWERTS, J. This is an appeal brought under s. 92 of the Town and Country Planning Act, 1947, from a decision of the Minister of Town and Country Planning on a question of law arising in relation to s. 85 of the Act. The question is whether the land owned by the trustees, consisting of the site of the buildings formerly forming the Crystal Palace, and the park and other lands adjoining, is land " an interest in which is held on " charitable trusts or for ecclesiastical or other charitable purposes " of any description " within the meaning of s. 85.

(2) [1932] 1 Ch. 133.
(3) [1928] 1 K. B. 611.
(4) (1943) 112 L. J. (K. B.) 648.
(5) [1949] W. N. 343.
(6) (1948) 92 S. J. 308.

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That this is a question of law appears clearly from the decision of the Court of Appeal in *Royal Choral Society* v. *Inland Revenue Commissioners* (7). If the land falls within the terms of s. 85, the result is that the owners escape the payment of charges which would otherwise be payable under the Act of 1947. On October 26, 1949, the Minister decided that the land was not held on charitable trusts or for charitable purposes within the meaning of the section.

The plaintiffs are a body of trustees who were incorporated by the Crystal Palace Act, 1914, and are, in effect, the successors of the Crystal Palace Company, which was incorporated by Royal Charter and owned and managed the site and grounds to which the building known as the Crystal Palace was removed after the close of the Exhibition of 1851.

The material provisions of the Crystal Palace Act, 1914, are as follows:—The title of the Act is: "An Act to constitute a "body of trustees for the purpose of acquiring the Crystal Palace "and Park and to empower them to hold and manage the same "as a place of public resort and recreation and for other purposes". The Act contains the following recitals: "Whereas "it would be of great local and public advantage if the lands and "buildings known as the Crystal Palace and Park . . . were "vested in a body of trustees to be maintained and managed by "them as a place for education and recreation and for the "promotion of industry commerce and art: And whereas it is "expedient to incorporate a body of trustees consisting of "representatives of the corporation of the City of London the "London County Council . . . and of certain other authorities "and persons as by this Act provided: And whereas it is "expedient to empower the trustees so incorporated to acquire "maintain and manage the said palace and park and other lands "and to execute and perform the powers and duties conferred "and imposed upon them by this Act: And whereas by the "Local Authorities Contributions (Crystal Palace) Act, 1913, and "the London County Council (General Powers) Act, 1913, the "authorities therein specified and other authorities were "empowered to contribute towards the acquisition of the Crystal "Palace and Park and have conditionally agreed to contribute the "sums which they are by those Acts respectively authorized to "contribute: And whereas certain private persons have made or "have agreed to make contributions for the like purpose: And "whereas it is expedient to empower the authorities in this Act "in that behalf mentioned to contribute towards the purposes of "this Act other than the acquisition of the Crystal Palace and "Park and to apply to such contributions certain of the provisions

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(7) (1943) 112 L. J. (K. B.) 648.

"of the Local Authorities Contributions (Crystal Palace) Act, "1913, as in this Act provided: And whereas it is expedient "to confer on the trustees such powers and to make such other "provisions as are in this Act contained: And whereas the "objects of this Act cannot be attained without the authority of "Parliament".

By s. 2: "Unless the context shall otherwise require in and "for the purposes of this Act the expression—'the Crystal Palace "'and Park' means and includes certain freehold lands buildings "and hereditaments commonly known as the Crystal Palace and "Park situate in the metropolitan boroughs of Camberwell and "Lewisham in the county of London and the urban districts of "Beckenham and Penge in the county of Kent containing two "hundred acres or thereabouts and delineated and coloured red "blue and yellow on a plan signed in triplicate by William Arthur "Mount Esquire the Chairman of the Committee of the House "of Commons to whom the Bill for this Act was referred and the "said expression also means and includes all the fixtures fittings "furniture statuary works of art machinery plant and all other "effects whatsoever in the said palace and park and all buildings "and other erections on the said lands".

A plan corresponding to that mentioned in the section was exhibited to an affidavit, and it is only necessary to mention that the part which is coloured yellow appears to be land which is not yet used for the purposes of the trusts, and is more or less used only as an investment, from which the trustees receive, I gather, rents from the houses, and other buildings which are on the land.

Section 2 goes on: "'The signed plan' means the plans so "signed as aforesaid; 'The palace' means and includes the "buildings commonly known as the Crystal Palace together with "so much of the lands now held in connexion therewith as "extends down to the lower terrace (including the lower terrace) "and delineated and coloured red on the signed plan; 'The park' "means and includes the lands now held in connexion with the "palace below the lower terrace and the lands now let on lease "or in hand for the purpose of such letting (being respectively "the lands coloured blue and yellow on the signed plan) and any "other lands other than the palace which may hereafter be "acquired by the trustees under the provisions of this Act".

"Contributing authorities" are defined as meaning the authorities mentioned in the first part of the First Schedule to the Act, and so on. "'Representative trustees' means trustees "appointed by contributing authorities; 'nominated trustees' "means the persons mentioned in the second part of the First "Schedule to this Act and any other person who shall hereafter "be co-opted by the trustees under this Act; and 'the trustees' "includes the representative trustees and nominated trustees for "the time being."

Section 4 provides: "There shall be for the execution of the "purposes and powers of this Act a body of trustees consisting of "representatives of the contributing authorities and the persons "mentioned in the second part of the First Schedule to this "Act". By s. 5: "The trustees thus constituted shall be a "body corporate by the name of 'The Crystal Palace Trustees' "with perpetual succession and a common seal and with power "to hold land for the purposes of their constitution without any "licence in mortmain and to dispose of or deal with land by way "of sale lease exchange or mortgage for any purpose not inconsistent with the objects of this Act".

Sections 6 and 7 provide for the representative and nominated trustees, and certain co-opted trustees. The next relevant section is s. 13, which provides as follows: "The trustees may purchase "by agreement subject to any existing leases tenancies licences "and agreements the Crystal Palace and Park and may also from "time to time purchase any lands adjoining any part thereof or "convenient to be held therewith and may enter into and carry "into effect any contracts or agreements necessary or proper for "the purpose and the trustees shall hold the palace and the park "for the purposes and subject to the provisions set forth in this "Act Provided that the price to be paid by the trustees for the "acquisition of the Crystal Palace and Park shall not exceed the "sum of two hundred and thirty thousand pounds".

Section 14 is an important section. [His Lordship read it.] By s. 19: "The councils of the counties of Middlesex Kent "Surrey and Essex and of any county borough borough urban "and rural district within those counties and of any metropolitan "borough or any of them may with the sanction of the Local "Government Board contribute towards the purposes of this Act "other than the acquisition of the Crystal Palace and Park and "the provisions of the Local Authorities Contributions (Crystal "Palace) Act 1913 shall so far as applicable apply to any contribution made under this section but nothing in this section shall "be deemed to impose any obligation so to contribute".

Section 21 provides: "The sums contributed by the contributing authorities and others for the purposes of this Act shall "be applied first in discharge of the purchase money to be paid "for the Crystal Palace and Park and the legal and other costs "charges and expenses of and incidental to the said purchase "and any surplus thereof and all other capital moneys revenue "and income received by the trustees shall be applied in the "exercise and discharge by the trustees of their powers and duties "under this Act and in the payment of all expenses properly "incurred by them and they may if they think fit establish and "accumulate a reserve and other funds to meet contingencies or "any extraordinary expenditure or purpose Provided that any "income derived solely from the use of the lands coloured blue on "the signed plan or any part thereof shall so far as the trustees "shall consider necessary for the proper upkeep be devoted "primarily to the maintenance thereof Provided also that any "interest paid by the trustees on moneys raised on mortgage shall "not be treated as an expense of maintenance".

So it appears that any moneys which are received by the trustees and are not actually expended in maintenance and other expenses will simply go back into the funds of the scheme under which the Crystal Palace is to be administered.

The First Schedule contains a list of the local authorities who contributed and the amounts of their contributions, and a list of the private individuals who, apparently, contributed and are referred to in s. 7 as nominated trustees.

The uses to which the buildings and grounds have been put appear to have been as follows:—For some years the Imperial War Museum was housed in the building. The building was used extensively for livestock shows, musical festivals, scientific, social and entertaining events, and rallies and demonstrations of the British Legion, the Primrose League, the Salvation Army, Toc H, and other organizations. Programmes of entertainments were staged on Bank Holidays and other public festivals, providing the public with a whole day's entertainment at the cost of 1*s.* In addition to providing the park, the grounds were, and are, used for tennis courts, bowling greens, boating lakes, a football ground and a speedway track, a sports ground, an exhibition of lifesize reproductions of antediluvian animals for the education of children and others, a maze for the amusement mainly of children, and band stands for the supply of music for the benefit of the public. In accordance with the provisions of s. 14 of the Act twenty acres of the park and certain other portions of the grounds have always been open free of charge to the public, and before the Crystal Palace building was damaged by fire in 1936 the normal charge for admission to the other parts of the property was 1*s.* for adults and 6*d.* for children. There is no doubt that the facilities and amenities thus provided were of great benefit to the public.

The rents received by the plaintiffs and their income from investments have been admitted by Inland Revenue Commissioners to be exempt from income tax under s. 37 of the Income Tax Act, 1918, as being vested in trustees for charitable purposes and only applied for such purposes.

It appears to be accepted by the Minister that, so far as the objects of the plaintiffs are the provision of a place for education and public recreation, they are charitable. The decision of the

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Minister was based on the inclusion among the objects of the promotion of industry and commerce, and it has been argued, on his behalf, that the promotion of art is also outside the scope of charitable trusts or purposes. It will be convenient to deal with this last point first, as it appears to me to be one which presents less difficulty than the two former matters.

Mr. Buckley, on behalf of the Minister, placed reliance on *In re Ogden* (8), in which a bequest in a will of a fund to be used "to encourage artistic pursuits or assist needy students in art" was held not to be a charitable gift. Mr. Buckley argued that the promotion of art meant the promotion of the interests or activities of artists rather than the benefit of the public at large. This does not seem to me to be the true meaning of the phrase. *In re Ogden* (8) is very inadequately reported, and it is impossible to ascertain properly the reasons which induced the Court of Appeal to reach the conclusion which they reached in that case. The decision was not favourably regarded by the Court of Appeal in *Royal Choral Society* v. *Inland Revenue Commissioners* (9), to which I have already referred, and, though the Court of Appeal in the latter case based their decision, to some extent, on the educational effect of the society's activities, it appears that the court regarded the promotion of the arts as a purpose which was for the benefit of the public at large and of a charitable nature. I do not find any real difficulty in reaching the conclusion that, so far as the objects of the plaintiffs involve the promotion of art, they are not other than charitable. Some assistance is, I think, to be obtained from the apparent recognition by the legislature in s. 7 of the Mortmain and Charitable Uses Act, 1888, that the promotion of art is charitable, but it is not in my view necessary to rely only on that factor.

As regards the promotion of industry and commerce, the position is more uncertain, and I do not think that the Minister was unreasonable in having felt difficulty in finding such purposes to be charitable.

For the plaintiff trustees Mr. Russell relied strongly on *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (10). That society's objects were, as appeared from its activities, the holding of an annual agricultural show and the promotion of agriculture. The claim of the society to exemption from income tax was resisted mainly on the ground that by reason of certain privileges which the members of the society possessed, the objects of the society were for the benefit of the members rather than the public welfare by the improvement of agriculture. The society was held to be entitled to exemption, and I think it clear

(8) (1909) 25 T. L. R. 382.

(9) 112 L. J. (K. B.) 648.

(10) [1928] 1 K. B. 611.

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that the Court of Appeal regarded the improvement of agriculture, or the promotion or advancement of the industry of agriculture, as a charitable purpose.

Mr. Russell argued that this was therefore a decision that the promotion of a particular industry was a charitable purpose, and that, accordingly, the promotion of industry or commerce at large must be a charitable purpose.

Mr. Buckley, however, argued that the promotion of industry or commerce amounted to no more than the promotion of the interests of those engaged in the manufacture and sale of their particular products, was not in any way concerned with any benefit to the public at large, and so could not be charitable. He argued, further, that the ambit of the plaintiffs' objects, as expressed in s. 14 of their Act, was so wide that they would be entitled to expend money or efforts in the promotion or advancement of political theories or purposes, which would be quite outside the limits of charitable activities. He relied, in particular, on the extensive nature of the powers contained in s. 14, and especially sub-s. 8, which he contended enabled the trustees to do whatever they thought fit, according to their judgment or opinion. In support of this proposition, he relied on the observations of Cohen, L.J., in *Oxford Group* v. *Inland Revenue Commissioners* (11).

As regards this last argument, it appears to me that the position in the *Oxford Group* case (11) was very different from that with which I am concerned, as the powers there were held to be independent objects, and in my view the powers conferred by the various sub-sections of s. 14 of the Act of 1914 in the present case are not objects in themselves, but are simply powers which are ancillary to and for the purpose of carrying out the objects expressed in the opening provision of the section.

As regards the construction which Mr. Buckley sought to put on the words "the promotion of industry and commerce", in my view, such a construction is contrary to the whole purpose of the Act and the creation of the statutory corporation represented by the trustees. I am entitled, where the terms of the trusts are not clear, to have regard to the attendant circumstances, including the nature of the trustees: see *In re Ashton* (12).

I find, on reading the Crystal Palace Act, 1914, that the trustees constituted by the Act are, to a large extent, representative trustees, representing the public authorities who contributed to the moneys required for the acquisition of the property, which property was to be administered by the trustees as a concern

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(11) [1949] W. N. 343; [1949] 2 All E. R. 537.

(12) [1938] Ch. 482.

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which would not distribute any profits, and in the title and the preamble, and throughout the Act, the note which is stressed is the provision of benefits to the public.

In those circumstances, it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees. It appears to me that the promotion of industry or commerce in general in such circumstances is a public purpose of a charitable nature within the fourth class in the enumeration of charitable purposes contained in *Pemsel's* case (13).

Therefore, while I appreciate the doubts which the Minister has felt as to the wholly charitable nature of the plaintiff corporation, I think that he came to the wrong conclusion.

Declaration accordingly.

Solicitors: *John Holmes, Son and T. Patteson; Treasury Solicitor.*

J. L. D.

(13) [1891] A. C. 531, 583.

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1950 *Oct.* 4, 5.

Reversed. C.A. [1951] 2 All E.R. 131.

In re WEBB'S LEASE. SANDOM *v.* WEBB.

Landlord and tenant—Easement—Demise of first and second floors of building—Advertisements on outside walls at date of lease—Implied reservation in favour of landlord—Derogation from grant.

A landlord, in August, 1949, demised the first and second floors of a building to a tenant for 21 years. At the date of the lease an advertisement of the landlord's business, which was carried on on the ground floor of the building, and an advertisement of a brand of matches were on the outside walls of the demised premises. The lease contained no mention of any advertisements, but it contained a covenant for quiet enjoyment.

Held, that there was an implied reservation in favour of the landlord that he was entitled to use, for the purpose of maintaining the two advertisements, those portions of the demised premises which were so used at the date when the term of the lease began, but that the right was confined to those two advertisements and did not extend to allowing the landlord to replace them by others or to add new ones.

Simpson v. *Weber* (1925) 133 L. T. 46, considered.

ADJOURNED SUMMONS.

By a lease dated August 11, 1949, the landlord, Sidney Webb, demised to the tenant, John Sandom, "all that the first and "second floors of the building situate and being No. 405 Foots "Cray Road, New Eltham, . . ." for twenty-one years from March 25, 1949, at a rent of 2*l.* a week. The tenant had previously been in occupation of the premises under an agreement in writing, dated February 10, 1939.

Since 1934 there had existed on the outside walls (a) an advertisement, which the landlord had caused to be painted, advertising his business of a butcher, grocer and provision merchant, which he carried on on the ground floor; and (b) an advertisement fixed to the west wall of the demised premises advertising Bryant and May's matches.

A dispute having arisen as to the landlord's right to maintain the advertisements on the outside of the premises, the tenant took out a summons to have determined whether the landlord was entitled, until the determination of the lease, to use, for the purpose of advertising, the outside walls, or any, and if so what portion or portions of the outside walls, of the premises demised by the lease without the consent of the tenant.

Mulligan for the tenant. The landlord's conduct in maintaining these advertisements on the outside wall of the demised premises is in derogation of his grant. [He referred to *Hope Brothers, Ld.* v. *Cowan* (1); *Goldfoot* v. *Welch* (2); *McLean* v. *McKay* (3); and *Robinson* v. *Kilvert* (4).]

There being no reservation and this being a lease, it does not matter what took place before the lease was granted. When it was granted, these advertisements were on the demised premises, and, if the landlord had intended to continue to take rent for the advertisement of the matches and to keep the advertisements on the walls, he should have said so in the lease; not having said so, he is estopped from saying so now. [DANCKWERTS, J., referred to *Simpson* v. *Weber* (5).] There is nothing here to justify the conclusion that the parties intended to allow the advertisements to remain on the walls. The landlord cannot be allowed in equity to let part of the property and yet make a profit out of that part.

Richmount for the landlord. On the true construction of the lease the tenant was granted the interior of the premises. Alternatively, if he was granted the interior and the exterior, this grant was subject to an implied reservation. It is possible to

(1) [1913] 2 Ch. 312.
(2) [1914] 1 Ch. 213.
(3) (1873) L. R. 5 P. C. 327.
(4) (1889) 41 Ch. D. 88, 95.
(5) (1925) 133 L. T. 46.

have reservations without any express words being contained in the lease. [He referred to Gale on Easements (11th ed.) p. 86.]

DANCKWERTS, J. The material facts in this case are that on February 10, 1939, an agreement was entered into between the present parties, that is to say the landlord, Sidney Webb, and the tenant, John Sandom, for a tenancy of the premises about which the dispute arises. The tenancy was to be for three years from March 6, 1939, the rent was to be 65*l.* a year, the tenant was to keep the interior of the demised premises in good condition and essential repair other than work of a structural nature, and he was to leave the premises in good and substantial repair. There was therefore no obligation on him to repair the outside of the premises. There was provision for continuing the tenancy for a further period of three years by giving the appropriate notice. The tenant did in fact, whether notice was given or not, remain in possession after the expiration of that first period of three years; and on August 11, 1949, a lease was entered into between the parties.

The lease contained a covenant by the tenant to repair the inside of the premises but no obligation to repair the outside. There were certain covenants by the landlord but no covenant to repair the outside of the premises. He did, however, covenant to pay " all costs charges and expenses incurred by the lessee " in abating a nuisance and executing all such works as may " be necessary for abating a nuisance in obedience to a notice " served by a local authority ", and to perform the obligations affecting the demised premises which were contained in the superior lease. There was the usual covenant for quiet enjoyment. The description of the premises, " all that the first and " second floors of the building situate in and being No. 405 Foots " Cray Road, New Eltham ", plainly, in the absence of any provision to the contrary, includes the whole of those floors including the outside wall. Really that is obvious without authority, but Mr. Mulligan referred to *Hope Brothers, Ld.* v. *Cowan* (6), where that construction was given to " the demise " of a floor or a room or an office bounded in part by an outside " wall " notwithstanding that the landlord in that case had covenanted to keep in repair the external parts of the demised premises and to permit the defendants, the lessees, to affix their trade signs, to be approved by the plaintiffs, on the outside wall.

That was in fact a stronger case, because there were provisions there showing that the landlord retained dominion over the outside wall. To me, therefore, it is quite clear that prima facie the tenant obtained a tenancy of the outside walls as well as of the interior of the first and second floors of this building. Mr. Richmount attempted to argue that that prima facie meaning should be restricted in the circumstances of this case, but I do not think that the argument can succeed.

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(6) [1913] 2 Ch. 312.

As regards the circumstances which are material, it was said by a great authority, Lord Wensleydale, in *Waterpark* (*Lord*) v. *Fennell* (7), " The construction of a deed is always for the court; " but, in order to apply its provisions, evidence is in every case " admissible of all material facts existing at the time of the " execution of the deed, so as to place the court in the situation " of the grantor. In deeds, as well as wills, the state of the " subject at the time of execution may always be inquired into ". Therefore I am entitled to look into the circumstances which existed at the date of the lease.

The tenant's particular business is apparently that of a hairdresser—presumably a women's hairdresser—and there are two advertisements of his business stating: " John Sandom, Hair " Stylist ". They are on the same outer wall as the other two advertisements, the presence of which is the subject of the present proceedings. It is contended on behalf of the tenant that, as the outer side wall is included in his tenancy, the landlord has no right to have these advertisements remaining on it, and that the tenant may in other proceedings, but not in these, be entitled to damages or an injunction.

It seems to me that, when I have ruled against Mr. Richmount on the question of what is included in the demise of the property, the other point which remains is whether there is to be implied in his favour some reservation of the right to have these advertisement frames upon the wall. I do not know whether Mr. Richmount intended to put his client's case any higher than to claim a right to retain the advertisements which existed at the date when the lease was entered into; but, if he did, in my view such a claim must fail. It seems to me that the right must be implied, if at all, from the situation as it existed at the date when the lease was entered into. It is contended that there is an implied reservation in favour of the landlord, the grantor, and, while there is no great difficulty—in fact it is supported by s. 60 of the Law of Property Act, 1925—in implying a right or easement of this kind in favour of the grantee, it is very difficult to imply reservations in favour of a grantor, whether a landlord or an ordinary vendor. Generally speaking, the only case in which such rights have been implied in favour of the vendor, as indeed Mr. Richmount admitted, is in the case of easements of necessity, where it is impossible to obtain access to the grantor's other property unless such a right be implied in his favour.

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(7) (1859) 7 H. L. C. 650, 684.

The right here claimed cannot be described as a right of necessity, but in my view the landlord may have some right to retain the advertisements. The nearest case to the present in any respect appears to be *Simpson* v. *Weber* (8), decided by a Divisional Court on an appeal from a county court in 1925. The facts, as stated in the headnote, were as follows: "Two "adjoining houses, originally belonging to one person, sub"sequently became vested in the plaintiff and defendant "respectively. For some years before the severance of owner"ship, a creeper had been growing in what was now the "defendant's garden with its foliage spreading along the wall "of the plaintiff's house. Also, again before the severance of "ownership, the post of a gate leading from what was now the "defendant's garden had been fastened by plugs and nails into "the plaintiff's wall. The growth of the creeper had from time "to time reached the plaintiff's gutter and he had been obliged "to cut it back. The plaintiff brought an action for trespass in "respect of the two above-mentioned acts, and the county court "judge found both acts to be trespasses. *Held*, both the growth "of the creeper on the plaintiff's wall and the fastening of the "gate to the plaintiff's wall would amount to trespasses, unless "they could be justified by the existence of an easement. The "implied reservation of an easement in a grant of property "depends on the common intention of the parties. Here there "was no evidence that it was not the intention of the parties "to the conveyance that creeper and gatepost should remain, "and therefore an easement in each case was impliedly reserved. "There was, however, a duty on the part of the grantee to use "care that the grantor's property was not unduly interfered "with. The defendant in allowing the creeper to obstruct the "plaintiff's gutter had failed to use necessary care, and as to "this part of the case the award as to damages must stand".

Salter, J., said (9): "Was the county court judge right in "holding that the defendant had no legal right of support against "the plaintiff's wall either for the creeper or the gatepost? "The case raises the question of the implied reservation of ease"ments in grants of property. I do not think it necessary to "refer to more than four cases. These are: *Wheeldon* v. "*Burrows* (10), *Jones* v. *Pritchard* (11), *Pwllbach Colliery Co.*, "*Ld.* v. *Woodman* (12), and *Schwann* v. *Cotton* (13). All these "cases lay down a general rule, which ought to guide me here. I

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(8) 133 L. T. 46.
(9) Ibid. 47.
(10) (1879) 12 Ch. D. 31.
(11) [1908] 1 Ch. 630.
(12) [1915] A. C. 634.
(13) [1916] 2 Ch. 120, 459.

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" have to ask, what was the intention of the parties in the present " case as to whether the creeper was to remain and grow against " the plaintiff's wall, and as to whether the gatepost was to " remain fastened to it. I doubt whether the finding of the " county court judge does not involve some question of fact; " but, upon the whole, I have come to the conclusion, in the " case of an easement so obvious as this, that there was no " evidence that it was not the intention of the parties that the " creeper and gatepost should stay. The basis of easements is " always the same—namely the common intention of the parties, " and this is most clearly expressed in the cases of an easement " of necessity and continuing easements ".

It may be said of that case that it certainly goes further in favour of an implied reservation than any other case that, so far as I know, appears in the books; and I think it may perhaps, with respect to the judge, be said that he expressed the matter in the opposite way to that in which it has generally been put. Instead of saying that there was no evidence that it was not the intention, I think the proper view is really that one should be able to find that there was an intention that the post and creeper or, in an appropriate case, an advertisement, should remain in the position in which they were. However that may be, that case does not appear to have been adversely criticized in any subsequent case, though I doubt whether it was cited in cases where perhaps it might have been subject to some discussion.

Liddiard v. *Waldron* (14) is one of the cases most usually referred to on the subject of reservation of easement in favour of the grantor. The headnote states: " A grantor cannot ordinarily " reserve an easement otherwise than by express words for the " benefit of land which he retains ". Therefore, it was held in that case that the right of way which was contended for as an easement by implied reservation was not sustainable. On the other hand, the Court of Appeal in that case did recognize that there were exceptions to the rule that an easement will not be implied in favour of the grantor as laid down in *Wheeldon* v. *Burrows* (15), and Greer, L.J., said (16): " The courts have been " faced with the question whether or not in some cases there " are exceptional circumstances which justify departure from " that rule ". Then he refers to one of the exceptional cases as being the case of *Thomas* v. *Owen* (17), which has often been referred to. It does seem to me that there may be exceptional circumstances in which it is only common sense to imply some reservation, for example, the circumstances of the present case. When I see that, when the parties entered into their transaction,

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(14) [1934] 1 K. B. 435.

(15) 12 Ch. D. 31.

(16) [1934] 1 K. B. 447.

(17) (1887) 20 Q. B. D. 225.

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there was an enormous advertisement painted on the wall advertising "Webb's for Meat, Grocery and Provisions", and a very large advertisement advertising "Brymay" safety matches, which had been there since 1939 and before, and nothing was said between the parties about the removal of those advertisements, it seems to me common sense to imply an intention on the part of the two parties to the document that those advertisements should be allowed to remain. Therefore, I am prepared to hold that there was implied in favour of the landlord in this lease an easement until the termination of the lease to keep those two advertisements in the position in which they are, and, of course, by necessary implication, a right to repair them, paint them, or do whatever may be necessary from time to time to preserve them as effective advertisements. But I do not think that there is any evidence which would justify me in going beyond that or which would justify the landlord in, for instance, letting out other parts of the wall for advertisements, or, indeed, which would justify him in removing the "Brymay" advertisement or his own advertisement and substituting advertisements for somebody else's goods. It seems to me that the only right which could be implied in favour of the landlord is one limited to those two advertisements which existed at the date of the lease, and I so hold.

Declaration accordingly.

Solicitors: *F. Duke & Sons; Neil Maclean & Co.*

J. L. D.

VAISEY, J.

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Oct. 11,
12, 16.

In re GREEN, DECEASED. LINDNER *v.* GREEN.

[1947. G. 1704.]

Mutual wills—Husband and wife—Agreement by each spouse to give effect to testamentary dispositions of the other—Absolute gift to survivor—Direction by survivor to divide residue into husband's and wife's moieties—Fresh will by survivor after accepting benefits—Deceased spouse's moiety subject to trust in hands of survivor.

A testator and his wife made mutual wills in like terms in 1940. They then had little property, but were, subject to a life interest, absolutely entitled in reversion to a substantial estate given to them in equal shares or to the survivor if only one of them survived the tenant for life.

In the will of 1940 the testator recited that "whereas my dear wife "has agreed with me that if she shall survive me and have the use "of all my property during her lifetime without any liability to "account she will provide in her will for the carrying out of my "wishes as expressed in this my will . . . and in consideration of "such promise by me she has agreed to leave me all her "property on my undertaking to provide for the carrying "out of the terms of her will . . . of even date . . . and for that "purpose I have provided as in clause 6 (b) and (c) hereof . . .". The testator then referred to their interests in reversion, and recited that they had similarly agreed to carry out the terms of each other's wills as to these interests, in the event of only one of them surviving the tenant for life, and succeeding to the whole estate, just as if both had survived.

By cl. 6 the testator provided (a) that his trustees should stand possessed of his residuary estate "upon trust for my said dear wife "if she survives me absolutely but if she shall not survive me upon "trust . . . to divide into two equal moieties or half-shares and to "hold the respective half-shares upon the trusts following . . . "(b) as to one such moiety or half-share which shall be considered "as my own personal estate as distinct from the other half-share "which shall be considered as equivalent to any benefit I have "received by the previous death of my wife or by reason of her "predeceasing the" tenant for life "my trustees shall hold such "share upon trust" for distribution as prescribed among a number of named individuals and charities "(c) as to the other moiety or "half-share which shall be considered as the benefit I shall have "received by virtue of my said wife having predeceased me in pursuance of the above recited premises my trustees shall hold the "same upon trust" for distribution as prescribed among other named persons and charities.

The wife died in 1942, her estate amounting to 1,500*l.*, to which the testator succeeded under the terms of her will. In 1943 the tenant for life died, and the testator received the whole estate, some 15,000*l.* in value. He remarried in September, 1945, made a second will on December 19, 1946, and died on December 27 of that year. By his second will he made a number of gifts to individuals and charities, some of which differed from the provisions of his first will, and he left his residue to his second wife. His estate amounted to some 17,000*l.* in personalty and 1,000*l.* in realty.

On a summons taken out to have determined under what trusts the testator's estate or part or parts of it were to be administered,

Held, that the effect of the mutual scheme entered into by the spouses, as expressed in the will, was that the wife's moiety was impressed with a trust binding on the testator, while the testator's moiety remained at his free disposition; and, accordingly, that the estate must be divided into two moieties, one of which was to be distributed in accordance with the trusts set out in cl. 6 (c) of the first will relating to the wife's moiety, while the other was to be distributed in accordance with the terms of the second will.

Observations of Lord Camden, L.C., in *Dufour* v. *Pereira* (1769) 1 Dick. 419; 2 Harg. Jurid. Arg. 304, applied.

In re Oldham [1925] Ch. 75, distinguished.

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ADJOURNED SUMMONS.

The testator, Thomas Green, and his first wife on August 31, 1940, made mutual wills in terms which were, mutatis mutandis, identical. They were at that date in modest circumstances, but were entitled in reversion, subject to a life interest, to the residuary estate of one Eleanor Hurst, the gift to them being in equal shares, or to the survivor absolutely, if only one should survive the tenant for life (as in fact occurred). The testator's first will, of 1940, provided by clause 3: "whereas my dear wife "has agreed with me that if she shall survive me and have the "use of all my property during her lifetime without any liability "to account she will provide in her will for the carrying out "of my wishes as expressed in this my will for the event that "I shall survive her and in consideration of such promise by "me she has agreed to leave me all her property on my under-"taking to provide for the carrying out of the terms of her will "as expressed in her will of even date for the event that she "shall survive me and for that purpose I have provided as in "clause 6 (b) and (c) hereof below set out and further whereas" [Eleanor Hurst had by her will left her residuary estate, subject to a life interest, upon trust for the testator and his wife] "absolutely in equal shares and if only one of them shall "survive" [the tenant for life] "for that one absolutely and "whereas if either I . . . or my wife . . . shall have predeceased" [the tenant for life] "the whole of the said residue will in con-"sequence of the above provision pass to the survivor and "whereas we" [the testator and his wife] "have agreed in that "event to provide in our respective wills for the carrying out "so far as applicable of the terms of each other's wills in so "far as they shall be capable of being carried into effect just "as if we had in any event both survived" [the tenant for life] "and received half her estate and for that purpose I have "provided as in clause 6 (b) and (c) hereof below set out".

By clause 4 he gave to his wife his furniture and personal effects, subject to which by clause 5 he gave the rest of his real and personal property to his trustees upon trust for sale. By clause 6 (a): "My trustees shall stand possessed of the residue "of the said moneys and of the investments for the time being "representing the same including my half-share in our residence "141 Billy Lows Lane Potters Bar (hereinafter referred to as "my residuary estate) upon trust for my said dear wife if she "survives me absolutely but if she shall not survive me upon "trust as to the entirety of the said premises and all the house-"hold furniture therein for the Potters Bar Hospital absolutely "and as to the remainder of my residuary estate upon trust to "divide into two equal moieties or half-shares and to hold the "respective half-shares upon the trusts following that is to say

" (b) as to one such moiety or half-share which shall be considered " as my own personal estate as distinct from the other half-share " which shall be considered as equivalent to any benefit I have " received by the previous death of my wife or by reason of her " predeceasing the [tenant for life of the estate of Eleanor Hurst] " my trustees shall hold such share upon trust " to distribute it among a number of specified individuals and charities; " (c) " (1.) as to the other moiety or half-share which shall be considered as the benefit I shall have received by virtue of my " said wife having predeceased me in pursuance of the above " recited premises my trustees shall hold the same upon trust " for distribution among other specified individuals and charities.

The testator's first wife died on April 28, 1942, leaving estate of the value of approximately 1,500*l.* The tenant for life of the estate of Eleanor Hurst died in April, 1943, and the testator as survivor received some 15,000*l.* On September 25, 1945, the testator married his second wife, the first defendant. He executed a second will on December 19, 1946, by which he made a number of dispositions in favour of individuals and charities and a residuary gift in favour of his second wife. His estate amounted to about 17,000*l.* in personalty and 1,000*l.* in real property. He died on December 27, 1946.

The plaintiff, who was a trustee under both wills, took out this summons to have determined whether he and his co-executor of the testator's last will held the estate or any and if so what part or parts of it upon trust to give effect to all or any and if so which of the provisions contained in (a) the last will or (b) the earlier will of the testator. The widow was the first defendant, the other defendants being persons and charities entitled under one or other or both of the wills.

J. V. Nesbitt for the plaintiff.

Jennings, K.C., and *I. A. C. Burgess* for the widow. A will is by its nature inherently revocable, and the mere fact that two persons make mutual wills does not suffice to prevent them from revoking their wills subsequently. The only case in which the survivor is precluded from revoking is where there is an expressed agreement not to revoke, which gives rise to a trust; but such a trust must be certain and unequivocal, which the recitals in the first will are not. The mere fact that the two wills are in identical terms does not indicate an agreement not to revoke: see *In re Oldham* (1), approved in *Gray* v. *Perpetual Trustee Co. Ld.* (2). But contrast *In re Hagger* (3), which shows the distinction which arises where there is a joint will expressed not to be revocable.

(1) [1925] Ch. 75.
(2) [1928] A. C. 391.
(3) [1930] 2 Ch. 190.

Here there is no certain and unequivocal trust expressed. The second will must prevail, because (1.) there is no agreement to make mutual irrevocable wills, or (2.) if there is such an agreement, it is not sufficiently certain to be enforceable.

Mark Nesbitt, *Lionel Edwards*, *Belsham* for further defendants.

Rawlence for further defendants. The bargain here was that the husband, if he survived, would dispose of the wife's moiety in accordance with her wishes, while he was free to dispose of his own moiety; the trust, accordingly, attaches to the wife's moiety only [he referred to *Dufour* v. *Pereira* (4)].

Bonner for further defendants.

Salt, K.C., and *T. Dewhurst* (*Wilfrid Hunt* with them) for further defendants. The provisions of the first will are subject to a trust, which came into effect on the death of the wife, that the testator would after his death give effect to the dispositions contained in the two wills as regards any property which he as survivor might hold at his death, after taking the benefit conferred by the wife's will. It is unnecessary that an obligation not to revoke should be expressed; it is sufficient if such an obligation is in fact implied. Such a doctrine is implicit in *Dufour* v. *Pereira* (4), which has often been followed, and never disapproved.

The mutual wills were made after the coming into effect of the Inheritance (Family Provision) Act, 1938, which would enable suitable provisions to be made for a future wife of the testator, irrespective of the trusts of the first will: see *Dillon* v. *Public Trustee of New Zealand* (5); the corresponding English and New Zealand Acts are so similar in language, that that case can be accepted as authority for the proposition that an English court has jurisdiction to apply the Act although the provisions of the will are subject to a trust imposed by a contract made by the testator inter vivos.

Here, on the face of each of the mutual wills, is a contract that the survivor of the spouses should be a trustee. The trust fund might fluctuate by savings or expenditure out of capital, but its subject-matter was sufficiently defined as the property of the surviving spouse at death.

L. H. L. Cohen and *B. S. Tatham* for further defendants.

VAISEY, J. [after stating the facts:] The question really is: am I to ignore altogether the first will of the testator, or does

(4) (1769) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

(5) [1941] A. C. 294.

the execution of that will contemporaneously with the corresponding will of his first wife operate by way of trust to any and if so what extent? The choice lies, I think, between three possibilities. First, it has been argued that whatever may be the moral consequences of what was done, nobody has any claim to any legacy under the testator's first will, which can be regarded as revoked first by his second marriage and again by his fresh will. Secondly, it may be said that the whole of the first will has to be carried into effect, both as regards what the testator called the moiety which he regarded as his own personal property, and as regards the other moiety which was to be considered as the benefit which he had received by virtue of his wife having predeceased him. Thirdly, it may be said with regard to this arrangement, for such undoubtedly it was, as is shown by the recital, that effect has to be given to that arrangement with regard to the wife's moiety and that moiety alone.

The authorities do not appear to give much assistance. First, there is *Dufour* v. *Pereira* (6), decided by Lord Camden, L.C., of which the fullest information can be obtained from the note in the Juridical Arguments and Collections by Sir Francis Hargrave. There the judgment is set out at length and is described as "full, energetic "and eloquent". Without reference to any of the eloquence at any length it is quite clear, I think, from that judgment that no reluctance was felt in saying that when a will had been created with a promise sufficiently definite and clear and for a proper consideration a trust could be raised quite apart from the character of the document. The Lord Chancellor said: "The parties by "mutual will do each of them devise, upon the engagement of "the other, that he will likewise devise in manner therein men-"tioned. The instrument itself is the evidence of the agreement: "and he that dies first does by his death carry the agreement on "his part into execution. If the other then refuses, he is guilty "of a fraud, can never unbind himself and becomes a trustee "of course. For no man shall deceive another to his prejudice. "By engaging to do something that is in his power, he is made "a trustee for the performance, and transmits that trust to "those who claim under him. This court is never deceived by "the form of instruments". I think that that remark is well described as energetic and eloquent. The judgment goes on: "The actions of men here are stripped of their legal clothing, "and appear in their first naked simplicity. Good faith and "good conscience are the rules by which every transaction is "judged in this court; and there is not an instance to be found

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(6) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

"since the jurisdiction was established where one man has ever "been released from his engagement after the other has per- "formed his part". Then: "I have perhaps given myself more "trouble than was necessary upon this point; because, if it could "be doubtful, whether after the husband's death his wife could "be at liberty to revoke her part of the mutual will, it is most "clear that she has estopped herself to this defence by an actual "affirmation of the mutual will, not only by proving it, but by "accepting and enjoying an interest under it. She receives this "benefit, takes possession of all her husband's estates, submits "to the mutual will as long as she lives, and then breaks the "agreement after her death. In this view the case falls within "the rule of *Noys* v. *Mordaunt* (7). She takes under the joint "will and can take no otherwise". Those observations, I think, are in point, and I confess the only difficulty I feel is whether effect ought to be given to the whole of the will, or only to that part which relates to the moiety which he has allocated to and associated with his wife.

I will now turn to the other authorities. First there is *In re Oldham* (8), of which it will be sufficient to read the headnote only: "A husband and wife made mutual wills in the same "form in pursuance of an agreement so to make them, but there "was no evidence of any further agreement in the matter. Each "gave his or her property to the other absolutely with the same "alternative provisions in case of lapse. The wife having sur- "vived and accepted her husband's property under his mutual "will subsequently married again, and made a fresh will ignoring "the alternative provisions of her own mutual will. *Held*, that "in the circumstances there was no implied trust preventing the "wife disposing of her property as she pleased". I would distinguish that case from the present, because here there is much more in the recitals expressed in similar form in the wills of the testator and his first wife, and those recitals show a very definite bargain that whoever died first certain consequences were to follow. It is to those consequences that it is suggested effect must be given.

A case not at all dissimilar from the present is *In re Hagger* (9). The headnote states: "A husband and wife made "a joint will, whereby they left certain property, which each "possessed at the time of the death of the spouse first dying, "to the survivor for life with certain absolute remainders over, "and they agreed that the will should not be revoked without "their mutual consent. The wife died first, and as from her "death the husband received the income from the whole estate

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(7) (1706) 2 Vern. 581.

(8) [1925] Ch. 75.

(9) [1930] 2 Ch. 190.

"until his death. *Held*, that from the death of the wife the "property of which the husband was then possessed was subject "to a trust under which the legatees in absolute remainder took "vested interests subject to the life interest of the husband". The decision in *Dufour* v. *Pereira* (10) was applied.

Finally, there is *Stone* v. *Hoskins* (11), where there is a dictum only which laid down that: "Where two persons have "made an arrangement as to the disposal of their property and "executed mutual wills in pursuance of that arrangement, the "one of them who predeceases the other dies with the implied "promise of the survivor that the arrangement shall hold good; "and if the survivor, after taking a benefit under the arrange-"ment, alters his will, his personal representative takes the "property upon trust to perform the contract, for the will of the "one who has died first has, by the death, become irrevocable". Then the headnote refers to the contrary position, that is to say, the case where the one who dies first has departed from the bargain by executing a fresh will, which is not this case.

I would observe here that in the present case the husband approved the wife's will which contained provisions corresponding to those appearing in the husband's will, and it might be said that he thereby showed in the clearest possible way his assent to the arrangement which the recitals in both wills appear to indicate. On the whole, although the point is difficult, I am of opinion that the arrangement was one which is binding in equity upon what is called the wife's moiety, and having regard to the form of the clause in the first will, I think that the true solution is this: that the husband's moiety was his own personal property to do as he liked with; and, if he chose after his second marriage to make other provisions as regards that moiety, he was at liberty to do so. It is not a very easy point, and it may be regarded as open to doubt.

Nothing could prevent the testator from revoking the will, as he in fact did by his second marriage. The only question is over what property any subsequent will operates. In my view it can only operate as regards the moiety which was under the testator's control at his death. With regard to the other moiety, which was notionally the property of his wife, the first will must take effect, not as a will, but as evidence of a trust which is plainly to be discerned in the two wills; that is, in the first will of the testator which, of course, never was proved as a will, and in the will of the first wife which was proved and is a matter of public record as to the dispositions which she made of her property.

The question in the summons is: "Whether the plaintiff and

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(10) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

(11) [1905] P. 194.

VAISEY, J.

1950

GREEN, DECD., *In re.* LINDNER *v.* GREEN.

"the defendant Charles William Townsend, as the executors of "the last will of the testator, hold the estate of the testator or "any and if so what part or parts thereof upon trust to give "effect to all or any and if so which of the provisions contained "in (a) the last will or (b) the earlier will of the said testator". In my judgment one moiety of the estate must be held upon the trusts declared by the first will. The other moiety passes under the provisions in the second will subject to this, that, before the moieties are ascertained, I think the first will is also operative so far as regards the property 141 Billy Lows Lane, the entirety of which is under clause 6 (a) of the will to pass with the furniture in it to the successor in title whoever it may be under the National Health Act of the Potters Bar Hospital absolutely. Accordingly, the executors hold this estate upon trust to give effect to clause 6 (a) and carry into effect the provisions of clause 6 (c) so far as regards one moiety of the estate.

Order accordingly.

Solicitors: *Julius White & Bywaters; E. Gordon Lawrence; Rye & Eyre; Rexworthy, Bonser & Wadkin; Baker, Freeman, Watson Hill, Bucknill & Co.; Gregory, Rowcliffe & Co.; Clayton, Sons & Fargus; May, May & Deacon; George W. Bower & Son; Edward F. Iwi; Cunliffe & Airy; Trotter, Leaf & Pitcairn.*

F. R. D.

ROMER, J.

1950 *Oct.* 12.

In re OAKES' SETTLEMENT. PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

[1950, O. 225]

Estate duty—Insurance—Life policies—Initial premiums not paid by assured—Donee's interest only contingent—Policies converted into fully paid-up policies by lump-sum payment—Liability to estate duty on death of assured—Customs and Inland Revenue Act, 1889 (52 *Vict. c.* 7), *s.* 11—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

On December 10, 1904, a deceased effected three separate policies of assurance on his life in consideration in each case of the payment of twenty-five annual premiums. The policies were taken out under s. 11 of the Married Women's Property Act, 1882, for the benefit of his wife in the event of her surviving him. If the wife did not survive him, the policies would be vested in the deceased. The first two annual premiums were paid by the wife's father. The Crown was willing to assume that the father paid the premiums from 1906 to 1908, although some uncertainty existed on this point. The deceased paid the premiums from 1909 to 1918 inclusive. On February 27, 1919, the policies were converted into fully paid-up policies in consideration of lump-sum payments by the deceased. On July 21, 1920, the deceased and his wife executed a voluntary settlement by which they, as beneficial owners, assigned the three policies to the Public Trustee on trust for their daughters and their daughters' issue. The deceased died on September 2, 1948. He was survived by his wife.

The Crown claimed that by reason of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, estate duty was payable on a proportion of the policy moneys which was equivalent to the proportion of the premiums paid by the deceased in keeping up the policies, treating the lump sums as premiums.

It was contended on behalf of the estate that s. 11 of the Act of 1889 did not apply for the following reasons: (1.) that the policies were not "effected" by the deceased as the wife's father had paid the initial premiums; (2.) that the policies were not kept up between 1919 and 1948, because a fully paid-up policy could not be kept up; (3.) that because the wife was only a contingent beneficiary, although a "donee" within the meaning of s. 11, she was not a "donee" for whose benefit the policy was wholly kept up within the meaning of the section; and (4.) that, on the assumption that s. 11 applied, it only applied to the premiums paid from 1909 to 1918, as the lump-sum payments made in 1919 were not "premiums" within the meaning of the section.

Held, (1.) That the policies had been effected by the deceased, and the payment of the earlier premiums by the wife's father was an irrelevant consideration. (2.) That the policies had been kept up by the lump-sum payments made in 1919, which were no more than pre-payments of the balance of the annual premiums payable under the policy, and were to be treated in the same way and as having the same effect as the periodic payment of the premiums on the stipulated dates, for it was not necessary in order to keep a policy alive that the periodic payment of the premiums should be continued until the policy matured. (3.) That the wife was a donee of the policies, which had been kept up by the deceased for her benefit, though not for her exclusive benefit; that it was not required, however, that a policy should be kept up for the exclusive benefit of the donee, for the word "wholly" in the phrase "where the "policy is wholly kept up by [the deceased] in favour of a donee" relates to the payment of the premiums and not the beneficial interest of the donee.

Barclays Bank Ld. v. *Attorney-General* [1944] A. C. 372, distinguished. *Attorney-General* v. *Meech* (1931) 15 Ann. Tax Cas. 619, applied.

ADJOURNED SUMMONS.

On December 10, 1904, the deceased, Montague Percy Rowland Oakes, effected three separate policies of assurance on his life for 2,000*l.*, 2,000*l.* and 3,100*l.*, with profits, in consideration of twenty-five annual payments of 74*l.*, 74*l.* and 114*l.* 14*s.* respectively. The policies were taken out under s. 11 of the Married Women's Property Act, 1882, for the benefit of his wife, Ellen Oakes, in the event of her surviving him. If the wife did not survive him, the policies would be vested in the deceased. The first two annual premiums on all the policies were paid by the wife's father, George Cawston, who was a person of considerable wealth. The Crown was willing to assume that he had also paid the premiums from 1906 until 1908, although there was some uncertainty on that point. The deceased paid the premiums from 1909 to 1918 inclusive. On February 27, 1919, the policies were converted into fully paid-up policies in consideration of a payment by the deceased of 558*l.* 8*s.* 11*d.* in the case of each of the policies for 2,000*l.*, and 860*l.* 18*s.* 10*d.* in that of the policy for 3,100*l.*

On July 21, 1920, the deceased and his wife executed a voluntary settlement by which they, as beneficial owners, assigned to the Public Trustee the three policies upon trust for their daughters and their daughters' issue. The deceased died on September 2, 1948. He was survived by his wife. The sum of 20,830*l.* was paid on the death of the deceased in respect of the three policies including bonuses. The estimated rate of estate duty payable on the property passing or deemed to pass on the death of the deceased was 40 per cent.

This summons was taken out by the Public Trustee to have determined whether the estate duty payable on the death of the deceased under the settlement of 1920 in respect of the policy moneys was chargeable on the capital moneys receivable under the policies under s. 2, sub-s. 1 (*c*) of the Finance Act, 1894 (1), which incorporated s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and if so, to what extent.

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(1) Finance Act, 1894, s. 2, sub-s. (1): "Property passing on the "death of the deceased shall be "deemed to include the property fol-"lowing, that is to say . . . (*c*) Pro-"perty which would be required on "the death of the deceased to be "included in an account under s. 38 "of the Customs and Inland Revenue "Act, 1881, as amended by s. 11 of "the Customs and Inland Revenue "Act, 1889, if those sections were "herein enacted . . .".

Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1: "Sub-section 2 "of s. 38 of the Customs and "Inland Revenue Act, 1881, is "hereby amended, as follows . . . "The charge under the said section "shall extend to money received "under a policy of assurance effected "by any person dying on or after "June 1, 1889, on his life, where the "policy is wholly kept up by him for "the benefit of a donee, whether "nominee or assignee, or a part of "such money in proportion to the "premiums paid by him, where the "policy is partially kept up by him "for such benefit".

The Crown contended that by reason of s. 11, sub-s. 1, of the Act of 1889, estate duty was payable on a proportion of the policy moneys which was equivalent to the proportion paid by the deceased of the total premiums paid on the policies treating the lump sums as equivalent to premiums.

Jackson Wolfe for the Public Trustee. Objection is taken to the claim to estate duty on four grounds. The initial premiums were paid by the wife's father; accordingly the policy was not "effected" by the deceased. The payment of the first premium was an essential ingredient in taking out a policy; the policies were, therefore, effected as much by the wife's father as by the deceased. The policies were not kept up after the conversion in 1919, when they became fully paid-up, and it was therefore no longer necessary or possible to keep them up. Moreover, if the policies were kept up, they were kept up jointly by the deceased and his wife and were settled by them jointly in 1920; therefore the policies were not kept up by the deceased within the meaning of s. 11.

The wife was only a contingent beneficiary, that is to say, her interest was contingent on her surviving her husband; if she predeceased him, he would be entitled to the policy moneys. Therefore the policy was kept up as much for the deceased as for his wife, and the policy was not wholly kept up for her benefit within the meaning of s. 11.

Alternatively, if the section applies to these policy moneys, the sums paid in 1919 for the conversion of the policies into fully paid-up policies were not premiums within the meaning of s. 11. A premium is essentially an annual or other periodic payment, made for the purpose of keeping a policy alive. These payments were made to establish the policies once and for all: they did not fulfil the requirements of a "premium", and any estate duty payable should be proportionately diminished. [He referred to *Lord Advocate* v. *Fleming* (2) and *Barclays Bank Ld.* v. *Attorney-General* (3).]

J. H. Stamp for the Crown. The policy was effected by the deceased under s. 11 of the Married Women's Property Act, 1882, for the benefit of his wife. It is clear from all the circumstances that the policy was effected by the deceased: the application for the policy was made by him; and the fact that the wife's father found the money to pay the first two premiums does not alter the position. It makes no difference that the donee had only a contingent interest. The cases throw no light on this point, but the word "wholly" in s. 11 relates to the

(2) [1897] A. C. 145.

(3) [1944] A. C. 372.

payment of the premiums and not to the interest of the donee. The word "benefit" in s. 11 does not mean that the donee must have the exclusive benefit under the policy.

The payment of lump sums in 1919 did not prevent the policies from being kept up for the purpose of s. 11. The lump-sum payments were premiums within the meaning of the section. They merely amounted to a pre-payment of the future outstanding premiums. They are not distinguishable from premiums paid annually.

There is no difficulty in calculating the duty on the basis claimed. The principle was stated in *Attorney-General* v. *Meech* (4), and approved in *Lord Advocate* v. *Inzievar Estates* (5).

ROMER, J., stated the facts and continued: The Crown contends that estate duty is payable in respect of these policy moneys upon a proportion of them which is equivalent to the proportion of the total premiums paid in keeping up the policies by the deceased; and the claim is founded upon the latter part of s. 11 of the Customs and Inland Revenue Act, 1889, which amongst other things amends sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881. [His Lordship read the relevant parts of s. 11 of the Act of 1889.]

The argument on behalf of the plaintiff, representing the estate, is that that taxing provision does not apply to the present case, for more than one reason. In the first place it is said that, because the wife's father paid the first two premiums, it cannot be said of the deceased that he was the person who "effected" the policy of insurance. It is said that, although it was the deceased who applied for the policy, and who presumably filled up the necessary form for obtaining it, nevertheless the payment of the first premium was an essential ingredient to the obtaining of the policy; and that accordingly the policy was "effected" as much by his father-in-law as it was by the deceased; and it is said that, in limine, the provision is not applicable to the facts of this case.

I am quite unable to accept that view of the matter. The mere fact that the father-in-law, who was a wealthy man and whose daughter was marrying a comparatively impecunious officer in the army, paid the first two premiums on this policy, which after all had been taken out for the benefit of his daughter, does not come within a long way of resulting in his "effecting" the policy.

The policy was, to my mind, undoubtedly "effected" by the husband, namely, the deceased; and the fact that his father-in-law was generous enough, or thought it proper, to pay the first two premiums is an irrelevant factor for consideration. In my judgment it is clear that these policies were effected by the deceased.

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(4) (1931) 15 Ann. Tax Cas. 619, 622.

(5) [1938] A. C. 402, 413.

On that view of the matter, it is necessary to consider the further language of this taxing provision. Mr. Jackson Wolfe argued that the policy was not "kept up" between 1919 and 1948 by the deceased at all, in the first place because it is impossible to "keep up" a policy which no longer requires to be kept up as it is a fully paid-up policy; and secondly because, if kept up, it was kept up, not by the deceased, but by the deceased and his wife, who executed a settlement of these policies and dedicated them to a certain trust.

Mr. Jackson Wolfe agreed that in 1919 the deceased made a payment for the purpose of converting these policies into fully paid-up policies; but he contended that that did not amount to a keeping up, which involves the payment of annual or other periodical premiums. I do not think that any significance can be attached to it, and indeed I do not understand the argument, except on the footing that you must go on "keeping up" a policy until the date when the policy moneys become payable, and that, unless it can be said of a policy that the premiums are payable for the purpose of keeping it up until maturity and the time arrives for payment, it is outside the section. That is putting a construction on those words which I do not think that they bear. There is nothing in the words about keeping up a policy until maturity: the reference is to moneys which, whenever payable, are paid for the purpose of keeping the policy on foot. Therefore no weight can be attached to that way of looking at the case.

Mr. Jackson Wolfe then said that the wife was not a "donee" for whose benefit the policy was kept up. He said, rightly, that the wife, although a beneficiary, was only a contingent beneficiary, and that, in so far as the policy was kept up at all at the instance of the deceased, it was kept up just as much for his own benefit as for hers, because he would be entitled to the policy moneys if he survived his wife. Although the wife was a donee within the meaning of s. 11—which expressly includes nominees or assignees—nevertheless the policy was not wholly kept up by the deceased for her benefit.

It forms a necessary part of the argument which was addressed to me by Mr. Jackson Wolfe on that point that this section must be read as though it said: "Where the policy is "wholly kept up by him *wholly* for the benefit of the donee"; and indeed, I think that Mr. Jackson Wolfe would be inclined to read the section as though the word "wholly" were transferred it could hardly be suggested that the payment of the fifteen small sums was the payment of premiums, but that the larger final payment was not a payment of premium. I think that that final payment would be a payment of a premium, just as much as the earlier ones.

In the present case, I come to the conclusion without any great hesitation that the payments made in 1919, which were merely pre-payments of the premiums, are to be regarded on the same lines as the payment of the annual premiums, had they been paid. All the points, therefore, upon which the objection to the payment of estate duty is founded fail, and accordingly liability to estate duty is attracted under this part of s. 11.

There is no difficulty in applying the result of the conclusions which I have reached, for the position was stated by Rowlatt, J., in *Attorney-General* v. *Meech* (8), in a passage commented on favourably by Lord Macmillan in *Lord Advocate* v. *Inzievar Estates* (9).

There Lord Macmillan, in considering the case then before the House, said (9): " Of the eleven premiums paid during that " period in the present case the deceased paid four and the donees " paid seven—that is to say, the deceased paid four-elevenths " and the respondents paid seven-elevenths of the premiums " falling due during that period. It follows, in my opinion, that " the part of the proceeds of the policy which is proportionate to " the premiums paid by the deceased within the meaning of the " statute is four-elevenths. I am fortified in this reading of the " sub-section by the fact that it also commended itself to " Rowlatt, J., who in the case of *Attorney-General* v. *Meech* (8), " said of the sub-section: ' I think it simply means that, where " ' after the assignment what has kept up the policies has been " ' provided partly by the assignor and partly by the assignee, " ' the policy moneys are to be subject to and escape duty in the " ' same proportion ' ". That is the principle which I think should be applied in the present case.

Declaration accordingly.

Solicitors: *Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

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(8) 15 Ann. Tax Cas. 619, 622.

(9) [1938] A. C. 402, 413.

In re SUIDAIR INTERNATIONAL AIRWAYS, LD. (APPLICATION OF VICKERS-ARMSTRONGS, LD.).

[No. 00264 of 1950.]

Company—Winding-up—Company incorporated in South Africa—Debt in England—Company wound up in South Africa—Seizure of company's goods by sheriffs in England—Claim by South African liquidator—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 325, *sub-s.* 1 (*c*).

Section 325, sub-s. 1 of the Companies Act, 1948, provides: " Where a creditor has issued execution against the goods or lands " of a company . . . and the company is subsequently wound up, " he shall not be entitled to retain the benefit of the execution ". . . against the liquidator in the winding-up of the company unless " he has completed the execution . . . before the commencement of " the winding-up: Provided that . . . (*c*) the rights conferred by this " subsection on the liquidator may be set aside by the court in " favour of the creditor to such extent and subject to such terms " as the court may think fit ".

A South African company with an office in England admitted that they owed money to the applicants in England and that they had so far done nothing but give promises and make evasions. The company defaulted on agreed instalments, and the applicants began an action to recover the amount alleged to be owing on the contract. Then, unbeknown to the applicants and to the company's office in London, a South African creditor presented in South Africa a petition to wind up the company there. Next, the applicants signed judgment in default of defence, the company issued a summons to set it aside, and, again unbeknown to the applicants and to the company's London office, a provisional winding-up order was made and a provisional liquidator appointed in South Africa. The applicants discovered this and issued writs of fieri facias to two sheriffs, who seized goods of the company. The company's summons to set aside the applicants' judgment was dismissed, a final winding-up order was made in South Africa, and the South African liquidator claimed the goods seized by the sheriffs, who took out interpleader summonses. Another English creditor presented a winding-up petition in England. The interpleader summonses were heard, and the South African liquidator's claim was barred. On the hearing of the winding-up petition, the company was wound up and the official receiver appointed provisional liquidator.

On a summons by the applicants for an order, under s. 325, sub-s. 1 (*c*), of the Companies Act, 1948, that they should be entitled to retain against the liquidator (the official receiver) the benefit of the two writs:

Held, in deciding that the application succeeded, (1) that, on the true construction of s. 325, sub-s. 1 (*c*), the court had jurisdiction in such a case to intervene at the applicants' request; and that it ought to do so, as it would be unjust not to exercise its jurisdiction in their favour, since the company were without merits and the applicants ought not to be deprived of the fruits of their judgment, which they would already have gathered in but for the company's conduct, by other creditors coming in and claiming through the company: *In re Grosvenor Metal Co., Ld.* [1950] Ch. 63, followed; (2) that the court ought not, by refusing to exercise its discretion in the applicants' favour, to give effect to South African law whereby the execution in England, which was put into force after the South African winding-up petition had been presented, would be void; (3) that the observations of Vaughan Williams, J., in *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394, and in particular his statement that the desire of the court to act as ancillary to the court of the country of the main liquidation would not make the court give up the rules governing the conduct of its own liquidation, were not confined to matters of procedure, but were intended to apply to the decision of all questions arising in the ancillary liquidation; (4) that, even if that statement could be read otherwise, the court ought not to distinguish between matters of procedure, in the narrow sense, and matters of substantive right. The court administered the assets of the foreign company (in the present case, the South African company) which were within its jurisdiction and, for that purpose, administered English law only.

ADJOURNED SUMMONS.

Before the summer of 1949, Suidair International Airways, Ld., a company incorporated in South Africa with an office in England, owed money to the applicants, Vickers-Armstrongs, Ld., for goods sold. On June 13, 1949, at a meeting between representatives of the applicants and representatives of the company, the latter admitted the company's liability for the amount unpaid and said that the company did not wish to avoid payment but needed time. It was agreed that the amount outstanding should be paid by instalments, but the debtor company defaulted. On August 3, 1949, the acting managing director wrote to the applicants: " . . . I am keenly aware . . . that your account has " been outstanding for an extensive period and also that to date " you have received nothing but promises and evasions . . . there " is no question of denying the account, nor is there any desire " on our part to avoid payment. The question that exists is " merely how this can be accomplished ".

On November 18, 1949, the applicants issued a specially indorsed writ in the King's Bench Division, claiming 8,788*l.* 8*s.* 10*d.* alleged to be outstanding under the contract in question. On December 7, 1949, in proceedings under R. S. C., Ord. 14, the debtor company were given leave to defend, the defence to be delivered within twenty-eight days.

On December 31, 1949, a South African creditor presented in South Africa a petition to wind up the debtor company there without the knowledge of the applicants or of the debtor company's office in London. On January 14, 1950, the applicants signed judgment in default of defence. On January 17 the debtor company issued a summons to set aside the judgment. On January 18, again without the knowledge of the applicants or of the debtor company's London office, a provisional winding-up order was made against the debtor company in South Africa and a provisional liquidator was appointed. On January 24, 1950, that came to the knowledge of the applicants, who took garnishee proceedings against the company's banking account, and also, on January 31, issued two writs of fieri facias to the sheriffs of London and Gloucester, respectively. The sheriffs seized the company's goods in their bailiwicks—the sheriff of Gloucester four aeroplane engines worth about 5,500*l.* and the sheriff of London office effects worth about 25*l.*

On February 10 the company's summons of January 17 to set aside the judgment of January 14 was dismissed. On February 14 a final winding-up order was made in South Africa, and on February 24 the liquidator in South Africa claimed the goods seized by the sheriffs, who took out interpleader summonses.

On March 28 a creditor in England other than the applicants presented a winding-up petition in England. On March 30 the sheriffs' interpleader summonses were heard, and on April 18 an order was made barring the South African liquidator's claim. On April 24 an order was made on the English winding-up petition for the compulsory winding up of the company, and the official receiver was appointed provisional liquidator.

By this summons, which was issued on April 26 and to which the official receiver was respondent, the applicants asked for an order under s. 325, sub-s. 1 (*c*), of the Companies Act, 1948, that they should be entitled to retain against the liquidator (the official receiver) the benefit of the two writs of fieri facias.

On July 12 the registrar adjourned the summons to the judge, before whom it now came on for hearing.

Megarry for the applicants. Two questions arise on this summons: first, can the court intervene on the applicants' behalf, and ought it to do so? Secondly, even if, under English law, it can and ought to do so, is not the proper course (since the English is subsequent to and therefore ancillary to the South African winding up) for the court to give effect to South African law, whereby the execution is void in South Africa?

On the first question, even before the coming into force of the Companies Act, 1948, the applicants in the present case would have been given leave to implement their execution: see

In re Imperial Steam and Household Coal Company, Ld. (1), per Malins, V.-C. The conduct in the present case is one on the same level as was the conduct in that case, and the same consequences ought to follow: see *In re London Cotton Company, Ld.* (2), and *Armorduct Manufacturing Company, Ld.* v. *General Incandescent Company, Ld.* (3), per Farwell, J. Under s. 325, sub-s. 1 (*c*), of the Companies Act, 1948, the powers of the court to allow a creditor to take the benefit of his execution are much wider than they were: see *In re Grosvenor Metal Co., Ld.* (4). That case shows that the court has a completely free hand to intervene, and that where, as here, there has been execution and subsequent action by the company seeking to delay it, the case is one in which it is proper for the court to exercise its discretion in favour of the creditor; and the earlier cases show that, prima facie, the present case is a very strong one for the exercise of that discretion by allowing the applicants to implement their execution.

On the question whether the court ought to give effect to South African law, the correct view is that South African law does not alter the position. Even if it be true that the English must be regarded as ancillary to the South African winding up, English law must nevertheless be applied, and the court will determine its own procedure: it will not "give up the forensic "rules which govern the conduct of its own liquidation": per Vaughan Williams, J., in *In re English, Scottish and Australian Chartered Bank* (5). [He referred also to *Antony Gibbs and Sons* v. *Société Industrielle et Commerciale des Métaux* (6).] The authorities do not support the view that South African law can affect rights in England, or the view that the liquidation in South Africa has any effect on proceedings over here.

Accordingly, the court both can and should exercise its discretion in the present case by allowing the applicants to implement their execution.

K. W. Mackinnon for the official receiver as liquidator. The case is not one in which, under the old law, the applicants would have been given leave to implement their execution. True, on the first question, the present case cannot, on the facts, be distinguished from *In re Grosvenor Metal Co., Ld.* (7), but the court is not bound to follow that case. [He referred to *In re Vron Colliery Co.* (8).]

On the second question, the matter is one, not of procedure, but of substantive rights. The company is South African, and it has been wound up in South Africa before the presentation of

(1) (1868) 18 L.T. 390, 391.
(2) (1866) L.R. 2 Eq. 53.
(3) [1911] 2 K. B. 143, 146.
(4) [1950] Ch. 63.
(5) [1893] 3 Ch. 385, 394.
(6) (1890) 25 Q. B. D. 399.
(7) [1950] Ch. 63.
(8) (1881) 20 Ch. D. 442.

the winding-up petition in England. The practice of the English courts, if the principal winding up is abroad, is to treat the English winding up as ancillary to it. *Antony Gibbs and Sons* v. *Société Industrielle et Commerciale des Métaux* (9) does not carry the matter very far, because in that case there had not been a winding up in England at all. In the present case, so far as there is a principal winding up in South Africa, the court will observe the rules that would be observed there. As the writs were issued and the goods seized in England at a date subsequent to that of the presentation of the petition in South Africa, the execution would be void there and the goods which have been seized would be available for all creditors as assets of the company.

Accordingly, the proper course is for the court to refuse the applicants leave to implement their execution.

Megarry in reply. Under the old law the applicants would have had leave and under the new law they ought to have it. The plain and simple thing to do, as was suggested by Vaughan Williams, J., in *In re English, Scottish and Australian Chartered Bank* (10), is to apply English procedure without regard to what might happen abroad. Rule 193 in Dicey's Conflict of Laws (6th ed.), p. 859, is: "All matters of procedure are governed wholly "by the local or domestic law of the country to which a court "wherein an action is brought or other legal proceeding is taken "belongs (*lex fori*). In this Digest, the term 'procedure' is to "be taken in its widest sense, and includes (inter alia)—(1.) "remedies and process; (2.) evidence; (3.) limitation of an "action or other proceeding; (4.) set-off or counterclaim".

Just as the question who are or are not creditors is a question of procedure, so is the question whether particular assets—in the present case the goods seized by the sheriffs—are or are not assets in a winding up: and in a matter of procedure the court is not required to transport itself to South Africa, but will decide in accordance with English law.

WYNN-PARRY, J. [after stating the facts]:—On those facts two points arise. First it is said for the liquidator that, even assuming that the matter is to be judged entirely by English law, the applicants should not be entitled to the order for which they ask. My attention was called to the recent case of *In re Grosvenor Metal Company Ld.* (11), which Mr. Mackinnon frankly admitted placed considerable difficulty in his way on this point. There a judgment creditor of the company having issued but failed to complete execution before the date on which Grosvenor

(9) 25 Q. B. D. 399.

(10) [1893] 3 Ch. 385, 394.

(11) [1950] Ch. 63.

Metal Company, Ld., went into liquidation, took out a summons for an order that, under s. 325, sub-s. 1 (*c*), of the Companies Act, 1948, the amount of their judgment debt, with interest, should be raised out of the proceeds of sale of the effects of Grosvenor Metal Company, Ld., and paid to the applicant company.

Vaisey, J., made clear in his judgment that the particular case raised no general question of principle, but he discussed the construction of s. 325, sub-s. 1 (*c*), with which I am concerned, and the question whether head (*c*) of the proviso had made any alteration in the existing law. He referred to *Armorduct Manufacturing Company, Ld.* v. *General Incandescent Company, Ld.* (12), and described that case as having been regarded hitherto as the high-water mark of this jurisdiction, and went on (13): "I think that before the passing of the Companies Act, "1948, nothing short of a trick, or some actual dishonesty, "would justify interference by the court. It is suggested "that this new head (*c*) of the proviso does no more than declare "the law as it existed before the passing of the Act of 1948, "and that I ought to proceed on the footing, as I should have "proceeded before the Act of 1948 came into operation, that in "view of the decision in *Armorduct Manufacturing Company, Ld.* "v. *General Incandescent Company, Ld.* (12), nothing short of "trickery would justify my interference. But when I look at the "words of head (*c*) of the proviso it appears to me that I am given "a wider jurisdiction, because it enables me to defeat the rights "conferred on the liquidator either wholly or partially, because "of the words 'to such extent'". Having given two examples of how he could so defeat the rights conferred on the liquidator, he concludes: "Therefore I hold that under this proviso I have "a wider discretion than I should have had before that proviso "became part of the law".

Mr. Mackinnon very properly desires to preserve his right to argue in a higher court the question whether or not the reasoning of Vaisey, J., and his conclusion were right in that case so far as concerns the construction of the section; but he is constrained to admit that he could not hope in this court to persuade me to differ on that point of construction from the judgment of Vaisey, J., and all that I need say is that, as at present advised, with all respect, I can see no ground on which I could be asked to differ from his conclusion on construction.

Vaisey, J., giving the reasons why he came to the particular decision in that case, said (14): "I am not going through the "facts of this case. I do not think anybody could say there was

(12) [1911] 2 K. B. 143.
(13) [1950] Ch. 63, 64.
(14) Ibid. 64.

"any trickery here; but I do think—and I hold as a fact—that "the applicants, Bebb Industries, Ld., were persuaded or induced "or requested to stay their hands in the matter of this execution. "While I acquit the officers of Grosvenor Metal Company, Ld., "of any kind of dishonesty, or impropriety, I think that, but for "their requests and but for the pressure they put upon the "applicants, this execution would have been completed before "the commencement of the winding up. I think that in this "case the rights of the liquidator must be set aside in favour "of the applicants, and I so decide".

At the end of his judgment he said (15): "The section seems "to give the court a free hand to do what is right and fair "according to the circumstances of each case. It is just because "the discretion is so wide and so uncontrolled, and because the "words are so lacking in any sort of guidance, that the exercise "of it is made so difficult. All I can say is that I have come "to the conclusion that in this case the applicants, in all the "circumstances, should succeed".

Counsel for the applicants referred to a number of authorities decided before the present Act and indeed before *Armorduct Manufacturing Company, Ld.* v. *General Incandescent Company, Ld.* (16), decided in 1911. In the view which I take of the matter, I need not now discuss those authorities. I am proposing to accept the construction which Vaisey, J., has placed on the sub-section, not merely because I feel bound in the circumstances which I have adumbrated to do so, but because I find myself, with all respect, in agreement with him. I propose, therefore, to treat myself as having, to use the judge's words, "a free "hand to do what is right and fair according to the "circumstances of each case". On that view, I find no need to investigate, discuss and reconcile the authorities to which I was referred.

I think that this case also is one in which I should intervene at the request of the applicants. The case, it is true, is not quite the same as that disclosed by the facts in *In re Grosvenor Metal Co., Ld.* (17). There the inducement or request to the applicants to stay their hands appears to have been made after the judgment was obtained. It was directed to induce the applicants in that case to refrain from proceeding with the execution. This, however, appears to me to be, if anything, a stronger case.

From the comparatively short review of the facts which I have made, it will have been observed that there was the clearest

(15) [1950] Ch. 65.

(16) [1911] 2 K. B. 143.

(17) [1950] Ch. 63.

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possible admission of liability in June, 1949, and a request, acceded to by the applicants, that the company should be given the indulgence of being allowed to pay by instalments. The admission of the debt by the managing director is in his letter of August 3, 1949, a letter in which he refers to the promises and evasions of his own concern. Nevertheless, when in November of the same year the applicants, having been compelled to do so by the default of the company to provide even the instalments agreed on, started the action to which I have referred, the company obtained leave to defend on an affidavit which categorically disputed the existence of any debt to the applicants, and asserted that everything had been paid under the contract and, indeed, that it was the applicants who were at fault in not having supplied the company with proper information and statements of account.

Thereafter every possible obstacle was raised to the applicants' first obtaining their judgment and secondly obtaining any fruits from that judgment. In those circumstances it appears to me that it would be quite unjust if I were to exercise my jurisdiction otherwise than in favour of the applicants because, in my view, the company have here less than no merits, and it would be quite wrong that the other creditors should come in and, claiming through the company, deprive the applicants of the fruits of their judgment, which they would have gathered in but for the conduct of the company to which I have referred.

The second point put forward by Mr. Mackinnon was this: the company is incorporated in South Africa and therefore domiciled there; the main liquidation is the liquidation in South Africa; the English liquidation, which is also later in point of date, is therefore to be regarded as an ancillary liquidation.

Evidence which is not disputed in its correctness by the applicants has been put forward on behalf of the official receiver in this liquidation that, according to the law in force in the Union of South Africa, the execution, which was put in force subsequent to the date of the presentation of the petition in the Union of South Africa, would be void—that is, void in South Africa—and of no effect whatsoever; that no leave could therefore be obtained to proceed with it; and that, in consequence the goods against which the execution has been put in force would become available as part of the assets of the company for the benefit of all the creditors thereof.

It is urged that, whatever be the view under English law, and even assuming that I were against Mr. Mackinnon on the first point, as I am, yet, in view of that evidence, I ought to refuse to exercise my discretion in favour of the applicants, thus giving effect to the South African law. On principle, I can see nothing whatsoever to recommend that proposition; but the matter does not stand entirely without authority.

In *In re English, Scottish and Australian Chartered Bank* (18), Vaughan Williams, J., in his judgment said: " . . . in construing " the statute, one must bear in mind the principles upon which " liquidations are conducted, in different countries and in different " courts, of one concern. One knows that where there is a " liquidation of one concern the general principle is—ascertain " what is the domicil of the company in liquidation; let the court " of the country of domicil act as the principal court to govern " the liquidation; and let the other courts act as ancillary, as far " as they can, to the principal liquidation. But although that is " so, it has always been held that the desire to assist in the main " liquidation—the desire to act as ancillary to the court where " the main liquidation is going on—will not ever make the court " give up the forensic rules which govern the conduct of its own " liquidation ". It appears to me that that must be the common sense of the matter, and that that passage enunciates a principle which, so far as I know, has never been doubted.

Then it is said that all that that passage refers to is questions of procedure; that s. 325 concerns a question of substantive law; and that therefore the passage, when properly regarded, is not any obstacle to the adoption by the court of the argument put forward on behalf of the liquidator.

To that I would make two answers: first, I do not read Vaughan Williams, J., as confining himself to what, on a narrow view, may be said to be matters of procedure. I think that he intended his observations and the statement of the principle to apply to the decision of all questions arising in the ancillary liquidation. Secondly, even if that passage could be read otherwise, I should be prepared for myself to say that I can see no sound reason for distinguishing between matters of procedure viewed in that narrow sense and matters of substantive right. It appears to me that the simple principle is that this court sits to administer the assets of the South African company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law; that is, primarily, the law as stated in the Companies Act, 1948, looked at in the light, where necessary, of the authorities. If that principle be adhered to, no confusion will result. If it is departed from, then for myself I cannot see how any other result would follow than the utmost possible confusion. Who could lay down as a clear

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(18) [1893] 3 Ch. 385, 391.

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and exhaustive proposition where the court was to draw the line in any particular case between administering the English law and the law of the main liquidation?

For those reasons, I am of the opinion that this application succeeds.

Application granted.

Solicitors: *George & George; Kenneth Brown, Baker, Baker.*

K. R. A. H.

HARMAN, J.

1950 Oct. 16, 17.

SMITH *v.* HAMILTON AND ANOTHER.

[1949 S. 3092.]

Vendor and purchaser—Contract for sale of land—Claim for return of deposit—Failure to complete on date fixed—Notice making time essence of contract—Validity.

On February 26, 1949, the plaintiff signed a memorandum acknowledging that she had purchased for 3,000*l.* a house belonging to the defendant, subject to the attached conditions. She paid a deposit of 300*l.* to estate agents who held the money as stakeholders. Completion with vacant possession was fixed for April 4, 1949. The conditions of sale adopted the National Conditions of Sale (15th ed.), so far as not inconsistent with the special conditions of sale.

The purchaser, having experienced difficulty in raising the rest of the purchase money, on March 29, 1949, wrote by her solicitors that it would not be possible for her "to complete the purchase on "the date fixed by the contract". The vendor thought that the purchaser would be unable to find the money, and on April 5, 1949, wrote by his solicitors that he could not ~~agree to an extension~~ of time to complete and that he reserved all his rights under the contract of sale; but he was, he wrote, prepared without prejudice to delay exercising those rights until April 19. The vendor refused the purchaser's application for an extension of time. By April 19, 1949, she had not completed the sale, and the vendor notified her that, as she had failed to complete, the deposit had become forfeit and the vendor proposed to exercise his right of re-sale forthwith. The purchaser was, by May 4, 1949, in a position to complete the purchase, but the property had been sold on April 21, 1949.

Condition 25 (1) of the National Conditions of Sale (15th ed.) provides: "If the purchaser shall neglect or fail to complete his "purchase according to these conditions, his deposit shall thereupon "be forfeited (unless the court otherwise directs) to the vendor . . . "and the vendor may, with or without notice or without previously "tendering a conveyance, re-sell the property at such time, and in "such manner and subject to such conditions as he shall think fit".

The purchaser by this action claimed the return of her deposit. The vendor counterclaimed for a declaration that the deposit was forfeited, contending that time was of the essence of the contract; that that could be inferred from the conduct of the parties before the contract was signed; that if time was not originally of the essence of the contract the purchaser's letter of March 29 had entitled the vendor to make it so; and that his letter of April 5 was a sufficient notice of that fact.

Held, (1.) that time was not of the essence of the contract, and there was nothing in the conduct of the parties before they signed the contract from which that condition could be inferred; (2). that, time not being of the essence of the contract, the vendor could not of his own volition make it so, unless the purchaser had been guilty of some impropriety, and the purchaser's letter of March 29 announcing the reasons for delay did not constitute such an impropriety; (3.) that if the purchaser's letter of March 29 did entitle the vendor to make time of the essence of the contract, the latter's letter of April 5 did not have that effect, merely stating as it did that the vendor would rely on his rights under the contract; and even if it had been intended to make time of the essence of the contract, it would have failed to do so, because fourteen days was too short a notice for that purpose; (4.) that the vendor's rights under the contract were governed by condition 25 (1); that the true construction of the condition was that the purchaser should complete on the day fixed or within a reasonable time thereafter; but that such a time had not elapsed and the remedies given by that condition did not become available until the purchaser had, by her delay, deprived herself of the right to specific performance, which would not be so at the end of only fourteen days after the date fixed for completion.

The purchaser was, therefore, entitled to return of the deposit.

Green v. *Sevin* (1879) 13 Ch. D. 589, and *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915) 32 T. L. R. 156, applied. *Howe* v. *Smith* (1884) 27 Ch. D. 89, considered.

ACTION.

The defendants, George Hamilton, and his wife, Esther Grace Hamilton, were the owners of a house known as Castle House, Parkhill, Bexley, Kent. The first defendant was at the material times a member of a London firm of solicitors. His wife took no part in the events giving rise to the action and is not further referred to in this report.

In 1948, the defendant wished to sell Castle House for 3,500*l*. Having at first been unsuccessful in his attempts, early in 1949 he instructed a company of estate agents to sell it by auction. The sale was advertised to be held on March 3, 1949, in Bexley Heath. Shortly before that date, the plaintiff decided that she would like to acquire the house, and on February 26, 1949, after an interview with the agents, signed a memorandum on the back of the auction particulars, acknowledging that she had "this day "purchased the property, subject to the attached conditions, "at the price of 3,000*l*.", and that she had paid 300*l*. by way of deposit to the estate agents.

She agreed to pay the remainder of the purchase money and to complete according to the National Conditions of Sale so far as they applied to a sale by private treaty. The 300*l*. which she paid as a deposit was held by the estate agents as stakeholders. Vacant possession was to be given by the vendor, who was in occupation, on completion of the purchase, which was fixed for April 4, 1949.

The conditions of sale incorporated the National Conditions of Sale (15th ed.), so far as not inconsistent with them. The National Conditions of Sale, so far as relevant, provide: "(1.) "The day fixed for completion shall be the day mentioned for "that purpose in the Special Conditions . . . ", that was, April 4. "(2.) On the day fixed for completion the purchaser "shall pay the remainder of his purchase money at the office "of the vendor's solicitor, or, if the vendor so requires, at the "office of the solicitors of his mortgagees . . . . (7.) (3) In respect "of the delivery of objections, requisitions and replies, time shall "be the essence of the contract . . . (25.) (1) If the purchaser "shall neglect or fail to complete his purchase according to these "conditions, his deposit shall thereupon be forfeited (unless the "court otherwise directs) to the vendor . . . and the vendor "may, with or without notice or without previously tendering a "conveyance, re-sell the property at such time, in such manner "and subject to such conditions as he shall think fit".

Having entered into that contract, the purchaser endeavoured to find the purchase money, but found it more difficult than she had supposed. Meantime, the title was investigated and that part of the formalities was completed within the time allowed. On March 29, 1949, an engrossment of the conveyance was sent by the purchaser's solicitors to the vendor's solicitors with a letter stating: " . . . our client . . . has had some "difficulty in connexion with the proposed mortgage and . . . "therefore it will not be possible to complete the purchase "on the date fixed by the contract". The purchaser had previously told the vendor that she would not be able to complete on the due date, and he had told her that he had made all his arrangements to leave and must insist on completion on the due date. She had then said she would make arrangements with her bank. The letter of March 29, therefore, surprised him, because he had thought, after his interview with her, that she would be able to complete in time. The vendor thereupon made up his mind that the purchaser would never find the money. He knew that there was another person, who had been willing to offer 2,750*l*. for the property. Accordingly he wrote to the estate agents that he was going out of possession on April 4, as he had arranged to do, sent them the keys, and enclosed a copy of a letter which he had written to his solicitor. He wrote: "In the event of [the purchaser] not "completing by April 19th, subject to my solicitor's advice you "are at liberty to sell at best advantage;" and reminded them of the other purchaser willing to pay 2,750*l*. On the next day, April 5, 1949, in accordance with their instructions, the vendor's solicitors wrote to the purchaser's solicitors with reference to the purchaser's letter of March 29th: "The vendors have instructed "us that they cannot agree to an extension of time to complete "and that they reserve all their rights under the contract of "sale. They are, however, prepared without prejudice to delay "exercising such rights until the 19th instant. We should be "glad to hear from you with a date for completion forthwith".

The plaintiff made various efforts to raise the money. She wrote to the vendor explaining her difficulties and her plans for re-sale of the property to Americans. He, having become increasingly convinced that he would never receive the purchase money from the purchaser, on April 7 wrote to her: ". . . I "cannot agree to any extension of the time for completing this "contract. Nor can I consent to giving possession till the pur- "chase price is paid. Even the present delay is causing me "serious inconvenience".

On April 13, 1949, the time not having then expired, the purchaser wrote by her solicitors that she was endeavouring to make other arrangements for raising the necessary finances, and hoped to be able to write to him further immediately after Easter. Immediately after Easter, on Tuesday, April 19, 1949, the vendor wrote by his solicitors "your client is still unable to offer a date "for completion and in these circumstances we are instructed to "notify you that as the purchaser has failed to complete her "purchase the deposit has become forfeited to the vendors and "the vendors are proposing to exercise their right of resale "forthwith". The property was in fact sold on April 21, 1949.

In consequence of that letter the purchaser took further steps, and on May 2, 1949, her solicitors wrote to the vendor offering to complete the purchase, which by May 4, 1949, she was in a position to do.

The plaintiff brought this action, claiming the return of the deposit and damages for breach of contract. The vendor counter-claimed for a declaration that the deposit was forfeited, and for damages for breach of contract.

Blackett-Ord for the purchaser. Time was not of the essence of this contract. It was an ordinary sale of a dwelling-house, in which time is not usually of the essence of the contract. The letter of April 5 was not a sufficient notice to make time of the essence: *Reynolds* v. *Nelson* (1). Notice to make time of the essence of the contract can only be given when there has been unreasonable delay in completing: see Fry on Specific Performance (6th ed.), p. 510. There must be unreasonable delay or default in completing before such a notice can be given, and the notice itself must specify a time for completion: *Green* v. *Sevin* (2). The time given must be reasonable, and what is a reasonable time is a question of fact. Here the purchaser was only given two weeks by the alleged notice, and the Easter holiday came within those two weeks. It was in effect a nine-day notice. The vendor was a business man; he knew that it would necessarily take some time to raise money from building societies, and that the time given was insufficient: see *Green* v. *Sevin* (3); *Howe* v. *Smith* (4); Williams on Vendor and Purchaser (2nd ed.), p. 1235, note (*i*).

J. G. Monroe for the vendor. Time was originally of the essence of the contract by reason of the circumstances. The vendor and his agents did their utmost to dissuade the purchaser from entering into the contract. Their apprehension was well founded, as she had difficulty in finding the money. The pre-contract circumstances may be looked at to see whether time is of the essence of the contract: *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (5). Having regard to what passed between the parties before the contract, time must be regarded as of the essence of the contract.

Reynolds v. *Nelson* (6) is an old case, and it is more in trend with current practice to regard the letter of April 5 as sufficient notice. In *Charles Rickards Ld.* v. *Oppenhaim* (7) an informal notice was accepted. With regard to the date on which notice can be given, it may be given as soon as the date for completion is past. It is different where both parties are badly out of time. There were five weeks between the date of the contract and completion. Where no time has been fixed, the notice has to be given within a reasonable time; and where there have been five weeks in which to complete it is perfectly reasonable that no more than one day should be given to make time of the essence of the contract. The letter from the purchaser of March 29 did not ask for any particular time in which to complete, therefore the vendor was entitled to serve his notice of April 5 making time of the essence. The notice required the purchaser to do something which she had already had plenty of time for doing. Fourteen days' notice making time of the essence is usual: see

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(1) (1821) 6 Madd. 18, 21, 26.
(2) (1879) 13 Ch. D. 589, 599.
(3) Ibid. 601.
(4) (1884) 27 Ch. D. 89.
(5) (1915) 32 T. L. R. 156, 157.
(6) 6 Madd. 18.
(7) [1950] 1 K. B. 616.

Soper v. *Arnold* (8). Lord Macnaghten there said that the deposit was rightly forfeited because the purchaser had entered into the contract without troubling to consider whether he could find the money. That is exactly what the purchaser has done here.

The position is governed by condition 25 (1) of the National Conditions of Sale. That condition makes it unnecessary to serve a notice to make time of the essence of the contract. The remedies under that condition become available as soon as the day for completion has passed. [He referred to *James Macara Ld.* v. *Barclay* (9).]

Blackett-Ord replied.

Harman, J. [after stating the facts]:—The question is whether, having regard to the terms of this contract, the vendor was in a position on April 19, 1949, to do what he purported to do, namely to rescind the contract and forfeit the deposit. This was a contract for the sale of land, and unless there was something special, the time limited in the conditions of sale for completion was not a date which, in the words of the old law, was of the essence of the contract. In other words, the equitable view which now prevails and has prevailed for a long time in the case of real estate, is that the court looks to the substance of the matter, and will not allow the existence of dates to alter the general view that the contract is to be performed if it is just and equitable so to do, notwithstanding that time may be overrun in certain respects.

There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence on a sale of licensed premises, or of a shop as a going concern, or, perhaps, it may be so on a sale of animals when they are in a certain place. But it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling-house with vacant possession.

It is true that the negotiations of the parties before the contract is made may have the effect of making time of the essence, and counsel referred to *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (10), where Lord Haldane, in delivering the judgment of the Judicial Committee of the Privy Council, made a number of illuminating observations on this subject.

It was an Indian Appeal, which turned on a provision in the Indian Contract Act, 1872. Lord Haldane said after reading the relevant section (10): "Their Lordships did not think that that

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(8) (1889) 14 App. Cas. 429, 432, 435.

(9) [1945] K. B. 148.

(10) 32 T. L. R. 156, 157.

" section laid down any principle which differed from those which " obtained under the law of England as regarded contracts to sell " land. Under that law equity, which governed the rights of " the parties in cases of specific performance of contracts to " sell real estate, looked not at the letter but at the substance " of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended " no more than that it should take place within a reasonable " time ". And he cited certain authorities for that.

Lord Haldane went on: " The special jurisdiction of equity " to disregard the letter of the contract in ascertaining what the " parties to the contract were to be taken as having really and " in substance intended as regards the time of its performance " might be excluded by any plainly expressed stipulation. But " to have that effect the language of the stipulation must show " that the intention was to make the rights of the parties depend " on the observance of the prescribed time limits in a fashion " which was unmistakable. The language would have that " effect if it plainly excluded the notion that those time limits " were of merely secondary importance in the bargain, and that " to disregard them would be to disregard nothing that lay at its " foundation. Prima facie, equity treated the importance of " such time limits as being subordinate to the main purpose " of the parties, and would enjoin specific performance notwithstanding that from the point of view of a court of law the " contract had not been literally performed by the plaintiff as " regards the time limit specified.

" That was merely an illustration of that general principle " of disregarding the letter for the substance which courts of " equity applied when, for instance, they decreed specific performance with compensation for a non-essential deficiency in " subject-matter. But equity would not assist where there had " been undue delay on the part of one party to the contract " and the other had given him reasonable notice that he must " complete within a definite time. Nor would it exercise its " jurisdiction when the character of the property or when other " circumstances would render such exercise likely to result in " injustice. In such cases, the circumstances themselves, apart " from any question of expressed intention, excluded the jurisdiction. Equity would further infer an intention that time " should be of the essence from what had passed between the " parties before the signing of the contract ".

I am invited here to say that what passed between these parties before the signing of this contract had that effect; I am entirely unable to do so, and I reject that suggestion. Nothing took place between these parties which would not take place normally between the ordinary vendor of a private house and a purchaser. If it be true that doubts were expressed about the purchaser's ability to find the purchase money, I cannot see that that has anything in it which would make time of the essence when it was not otherwise so. Under the National Conditions of Sale time is not generally of the essence, for in condition 7, where it is intended to make it so, it is expressly stipulated.

If time be not of the essence of the contract initially, it follows, in my judgment, that one party cannot, of his own motion, make it so; to say that by writing a letter one party can make time of the essence when it was not so before, may be a convenient but is an inaccurate way of putting it. That has been pointed out on many occasions, and amongst others by Fry, J., in *Green* v. *Sevin* (11).

Fry, J., said: "What right then had one party to limit "a particular time within which an act was to be done "by the other? It appears to me that he had no right so "to do, unless there had been such delay on the part of the "other contracting party as to render it fair that, if steps were "not immediately taken to complete, the person giving the notice "should be relieved from his contract. It has been argued that "there is a right in either party to a contract by notice so to "engraft time as to make it of the essence of the contract where "it has not originally been of the essence, independently of delay "on the part of him to whom the notice is given. In my view "there is no such right. It is plain upon principle, as it appears "to me, that there can be no such right. That which is not of "the essence of the original contract is not to be made so by the "volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You "cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct "on the part of the other as to justify the rescission of the "contract sub modo, that is, if a reasonable notice be not "complied with. That this is the law appears to me abundantly "plain".

Since, then, time not being of the essence, the vendor could not, of his own volition, make it so unless there had been some impropriety on the part of the purchaser. The day for completion being April 4, it is clear, in my judgment, that the vendor cannot, on the next day, April 5, serve a notice on the footing that there has been such impropriety on the part of the purchaser as entitles him, as it were, to engraft time on the contract. I do not think that it was suggested that there would be such a right apart from condition 25 of the National Conditions of Sale. It is suggested that the vendor had the right here because of the purchaser's letter of March 29, giving notice that she would not be able to complete on the day fixed. If that letter had said: "I shall not complete", or "I cannot complete", or "Heaven knows when I may be able to complete", that would perhaps have entitled the vendor to deliver an ultimatum. But in my judgment the letter of March 29, which merely said that she was very sorry but she could not complete just at the moment, was far from being an anticipatory breach of the contract, or even the kind of impropriety to which Fry, J., alluded in *Green* v. *Sevin* (12). It did not entitle this vendor, in Fry, J.'s words, to rescind the contract sub modo, that is to say, to introduce into it a new term that it must be completed within the next fortnight. Therefore, no right was introduced by the letter of April 5 to alter the contract in any way. That letter did no more than to say: "We stand on our contractual rights, but we will not seek to exercise them until April 19". It had not the effect of making time an essential part of the contract if it was not so before; it merely stated that the vendor stood on his contractual rights. Of course a vendor may rely on his contractual rights: the question is what they are.

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(11) 13 Ch. D. 589, 599.

If I am wrong about that, and the purchaser's letter of March 29 did entitle the vendor to issue a kind of ultimatum on April 5, the question then arises whether that was a proper ultimatum to issue? In other words, was it a long enough time to give the purchaser? Could it be said that a delay of fourteen days after the date fixed for completion was a sufficient delay to entitle the vendor to treat the purchaser as having broken the contract and to "claim the deposit accordingly"? It seems to me that the test of that may be, what the position would have been if the purchaser had, on April 20, issued a writ for specific performance of the contract? Would it have been a good defence for the vendor to say that the purchaser was not entitled to specific performance because she had repudiated the contract; and that the vendor had accepted her repudiation before the writ was issued; and that therefore she had no rights? It would be surprising if it were so. I can find no instance where a delay as short as a fortnight has been held to entitle either a vendor or a purchaser to rescind. It would be something entirely new to hold that within so short a time, there having been no express repudiation of the contract by the purchaser, the vendor could resist specific performance by saying that there had been a repudiation. Consequently, even if the letter of April 5 was an attempt to make time of the essence, I think that it was a failure in that respect. But, taking it as a declaration that the vendor intends to stand on his rights but not to exercise them for fourteen days, what were his rights at the end of those fourteen days? That depends on condition 25 (1).

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(12) 13 Ch. D. 589, 599.

That point seems to have been left open expressly by Fry, L.J,. in *Howe* v. *Smith* (13), which is always cited in actions relating to deposits. There there was this somewhat similar clause (14): "And it was further agreed (clause 8) that if "the purchaser should fail to comply with this agreement the "vendor should be at liberty to re-sell the premises in any "manner, and the deficiency on such second sale thereof, with "all the expenses attending the same, should be made good by "the defaulter at this present sale, and be recoverable as "liquidated damages". There was nothing about forfeiting the deposit there, but Fry, L.J., discussing that point, said (15): "Whether a clause such as the eighth in the present contract "gives the vendor a power of resale for a default in performance "on the very day named, it is not now necessary to inquire". He said that there had been a default in that case justifying rescission.

Where there is a provision in the special conditions which, on the face of it, entitles the vendor to forfeit the deposit and to re-sell—without notice, be it observed—can that right be exercised on the morrow of the day fixed for completion, or, as here, a fortnight later, where the vendor has said that, although he had an immediate right of forfeiture, he would wait a fortnight before exercising it? The condition which has to be satisfied is that the purchaser shall neglect or fail to complete his purchase according to those conditions. One of them is that the purchase shall be completed on the day named in the special condition, that is to say, April 4. But it is agreed that that date, except in special circumstances, is not an essential part of the contract, and therefore the condition is, I think—and I accept Mr. Blackett-Ord's argument on this point—that the purchase shall be completed on April 4 or within a reasonable time thereafter. Therefore the right to forfeit and re-sell in condition 25 does not accrue until there has been a default by the purchaser in completing either on the day fixed or within a reasonable time. That right does not in effect arise until a purchaser has deprived himself of the equitable remedy of specific performance by his delay or default, or by a repudiation, express or implied, of the contract.

Therefore it does not seem to me that the vendor can rely on condition 25, which is what he purported to do by his letter of

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(13) 27 Ch. D. 89, 90.
(14) Ibid. 90.
(15) Ibid. 105.

April 5. There had not been at that time such a delay or default on the part of the purchaser as would have disentitled her to specific performance, and therefore there was not a breach, which made condition 25 applicable.

If that be so, the purported forfeiture of the deposit was bad and the re-sale was wrongful. No question of specific performance has been raised here. The action is for the return of the deposit. The purchaser is entitled to have the deposit returned, but the stake-holder who is holding the deposit is not a party to this suit and therefore I can make no order to that effect in this action. All I can do is to declare that the purchaser is entitled to give a good receipt for the deposit to the stake-holder. I shall order the vendor to pay interest at 4 per cent. on the amount of the stake until it is released. The stake-holder is not bound to pay interest: he retains the benefit of it: that is his reward for holding the stake. The position seems to me an odd one, but I do not see why I should not order the vendor to pay interest on the money in the meantime.

The purchaser also asks for damages for breach of contract, and it may well be that in a proper case she would obtain them. General damages she could have; but she has entirely failed to prove what they would be. Vague hints are not enough. The special damages are in the form of certain survey expenses which were incurred by the building society surveyors who were contemplated mortgagees. Those, in my judgment, the purchaser cannot recover because one cannot recover as damages for breach of contract expenses incurred in trying to raise money to fulfil it. Those damages are too remote.

The purchaser also asks for certain legal expenses; but she is entirely unable to quantify them and apparently has not paid, or had rendered to her, any bill. In my opinion she has failed to prove that allegation. Therefore I do not award any damages for breach of contract, but merely give her a declaration that she is entitled to give a good receipt for the deposit. The vendor must pay her interest on the 300*l*. from February 26, 1949, until receipt of the deposit.

There is a counterclaim by the vendor. That is merely the other side of the contract. He claims a declaration that the purchaser is not entitled to recover the deposit, and damages for breach of the agreement. He is not entitled to such damages because there was no breach.

Judgment for plaintiff on claim and counterclaim.

Solicitors: *Kinch & Richardson, for T. G. Baynes & Son, Bexley Heath; Adler & Perowne.*

I. G. R. M.

In re YOUNG; YOUNG *v.* YOUNG.

[1950 Y. 621.]

HARMAN, J.

1950
Oct. 25.

Administration—Partial intestacy—Hotchpot—Trusts in favour of issue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 47, *sub-s.* 1 (*iii*) ; *s.* 49.

A testator directed his trustees to hold his residuary estate, after the death of his widow, in trust as to five-sevenths for five of his children in equal shares; to hold a further one-seventh share at their discretion to pay or apply the income or capital for the maintenance and support of X, another of his children, or any child or children of his during his life; and after his death to distribute any unapplied surplus between his children. The testator bequeathed the remaining one-seventh share on trusts for Y, another son, who, apparently without the knowledge of the testator, had died a bachelor before the date of the will, and his children, similar to the trusts respecting the child or children of X.

At the death of the widow, the testator having died intestate as to the share of Y, the question arose whether the legal personal representative of X was liable to bring into account the capital of the one-seventh share settled, after the widow's death, on X and his children, or was entitled to participate in Y's share without bringing anything into hotchpot.

Held, having regard to the fact that the legislation relating to the principle of hotchpot had been extended by the Administration of Estates Act, 1925, so as to include cases of partial intestacy, (1.) that X's one-seventh share was a "beneficial interest" within s. 49 (*a*) of that statute, which directed that the requirements as to bringing property into account should apply to "any beneficial "interests acquired by any issue of the deceased under the will of "the deceased"; (2.) that the word "issue" in that phrase meant "children or remoter issue"; (3.) that X and his children were the issue, who had between them acquired a beneficial interest, namely, the one-seventh share, and that share ought to be brought into account.

ADJOURNED SUMMONS.

By his will dated February 25, 1938, George Robert Young devised and bequeathed his residuary estate to his trustees and directed them to pay the income to his widow for life, and, after her death, as to five-sevenths of the trust funds, to stand possessed thereof for five of his children in equal shares. He then settled a further one-seventh share, directing his trustees at their discretion to apply the whole or part of the income or such part of the capital as they should think advisable towards the maintenance or support of his son Charles Albert Young or any child or children of his during his life and after his death to stand possessed "of the said share or so much thereof "as shall remain unapplied and the income thereof upon trust "for the child or children of my said son and if more than one "equally between them who shall attain the age of twenty-one "years". The testator then bequeathed "the remaining one-"seventh share of and in my trust funds and the investments "for the time being representing the same to my trustees upon "similar trusts for the benefit of my son Herbert Henry Young "and his children as are hereinbefore provided and declared res-"pecting the child or children of my said son Charles Albert "Young".

Charles Albert Young died on January 26, 1939, leaving two children who succeeded to the one-seventh share settled on him and his children. The testator died on January 9, 1939, and his widow died on July 21, 1948. Herbert Henry Young had died, a bachelor, on May 20, 1936.

The testator having thus died intestate as to the one-seventh share bequeathed to Herbert Henry Young, the trustees of the will took out a summons to have determined whether, on the distribution of that share, the legal personal representative of Charles Albert Young was liable to bring into account the capital of the one-seventh share settled by the will, after the widow's death, on Charles Albert Young and his children, or was entitled to share in Herbert Henry Young's share of the estate, without bringing anything into hotchpot.

E. M. Winterbotham for the plaintiff trustees.

G. A. Grove for the legal personal representative of Charles Albert Young. This defendant is entitled to his share without bringing anything into hotchpot. Section 47, sub-s. 1 (iii), of the Administration of Estates Act, 1925 (1) is only applicable to

(1) Administration of Estates Act, 1925, s. 47, sub-s. 1: "Where under "this Part of this Act the residuary "estate of an intestate, or any part "thereof, is directed to be held on the "statutory trusts for the issue of the "intestate, the same shall be held "upon the following trusts; namely: " . . . (iii) Where the property held "on the statutory trusts for issue is "divisible into shares, then any "money or property which, by way of "advancement or on the marriage of "a child of the intestate, has been "paid to such child by the intestate "or settled by the intestate for the "benefit of such child (including any "life or less interest and including "property covenanted to be paid or "settled) shall, subject to any con-"trary intention expressed or appear-"ing from the circumstances of the "case, be taken as being so paid or "settled in or towards satisfaction of "the share of such child or the share "which such child would have taken "if living at the death of the "intestate, and shall be brought into "account, at a valuation (the value to "be reckoned as at the death of the "intestate), in accordance with the "requirements of the personal repre-"sentatives".

S. 49: "Where any person dies

advances inter vivos. In the events which happened the children of Charles actually took the one-seventh share and not Charles. In any case all that he would have to bring into account would be his life interest, which would be of very little value.

The observations as to the bringing into account of property, which has been advanced, to be found in Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), vol. II, p. 1502, only apply to marriage settlements. Counsel referred to *Weyland* v. *Weyland* (2).

The type of provision in the present case cannot be regarded as an advance and the grandchildren's interests ought not to be brought into account.

Lightman for the legal personal representatives of another beneficiary. The share must be brought into hotchpot. The word "issue" is used in the phrase "any beneficial interests "acquired by any issue of the deceased" in s. 49 (*a*) to embrace every descendant of Charles Albert Young. Charles and his children—the testator's grandchildren—are all included in the term "issue" and, having acquired this beneficial interest, must bring it into account.

It is plain that this was the view of Clauson, J., in *In re Reeve* (3), though it is fair to say that counsel in the case, who were interested to argue to the contrary, appear to have conceded the point.

R. S. Lazarus for another beneficiary.

HARMAN, J., stated the facts and continued: It is a remarkable feature of the will that it makes provision for Herbert Henry Young and his issue, although one would have thought that it was within his father's knowledge that he had already been dead for some two years. The will makes provision for the widow, on whose death the estate becomes distributable. The will does not admit of any doubts: On the death of the widow, the fund is to go "as to five-sevenths thereof in trust for my said sons "Ernest Robert Young, Wilfrid George Young, Annie Amelia "Moon, Ethel Margaret Wood and Florence Mary Kay", treating the daughters as if they were sons, but that must be some slip in the will; anyhow, five children take five-sevenths. Then there

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"leaving a will effectively disposing "of part of his property, this "Part of this Act shall have effect "as respects the part of his property "not so disposed of subject to the "provisions contained in the will and "subject to the following modifications:—(*a*) The requirements as to "bringing property into account shall "apply to any beneficial interests "acquired by any issue of the "deceased under the will of the "deceased, but not to beneficial "interests so acquired by any other "persons . . .".

(2) (1742) 2 Atk. 632.

(3) [1935] Ch. 110.

is a provision for substitution, which did not take effect but which shows that the stock was intended to take the parent's share.

Then a further one-seventh share is settled on trust, at the discretion of the trustees, to pay or apply the income or capital for the maintenance or support of Charles Albert or any child or children of his during his life or to keep up a home for him or make any other like application of that income or capital, with a power, or rather a direction, that if they did not so apply the income, to distribute such part of it as should not be applied during the life of Charles, to the testator's other children. After the death of Charles, the trustees were to stand possessed "of the said share or so much thereof as shall "remain unapplied and the income thereof upon trust for the "child or children of my said son and if more than one equally "between them who shall attain the age of twenty-one years". Charles died leaving two children who obtained a vested interest. They therefore inherited his share on January 26, 1939, subject to the widow's life interest.

The testator then bequeathed "the remaining one-seventh "share of and in my trust funds and the investments for the "time being representing the same to my trustees upon similar "trusts for the benefit of my son Herbert Henry Young and "his children as are hereinbefore provided and declared respecting the child or children of my said son Charles Albert Young". Herbert Henry was already dead and had left no issue. Thus there was an intestacy as to one-seventh, subject to the widow's life interest. She having died, her estate receives 1,000*l*. and interest on that sum.

The question before me is what is to happen to the remainder of that one-seventh share. Under the old law there would not have been any difficulty: it would have been divided among the next-of-kin, because it was decided, under the old Statute of Distributions of Charles II—which involved the bringing in of portions, as they were called, on an intestacy—that it did not apply to a partial intestacy. But the draftsmen of the legislation of 1925, seeing, no doubt, that that produced some anomalies, thought that they would improve the position; but it seems to me that, in the result, a new crop of anomalies has been produced.

By s. 47, sub-s. 1 (iii), of the Administration of Estates Act, 1925: "Where the property held on the statutory trusts for "issue is divisible into shares"—as is the case here—[after reading the remainder of cl. (iii), his Lordship continued:] So far, that applies, as it seems to me, to money or property either advanced direct to a child or settled on him. I should have thought that in either event it was the capital sum so dealt with which was to be brought into account. Either it is a sum given to him or provided for him to set him up in life—that is to say, a direct application for his benefit—or it is a sum provided for his marriage settlement. That is only in line with the old cases, e.g., *Weyland* v. *Weyland* (4), which decide that money settled on a child by way of marriage settlement is to be brought into account under the old Act. Clauson, J., decided in *In re Reeve* (5) that the new Act has the like effect.

So far it is not difficult to understand what is meant. But turning then to s. 49, which is designed, according to the side-note, to apply the same principle to cases of partial intestacy, in other words, to remedy what was thought to be a defect in the old Statute of Distributions, it is provided: "Where any "person dies leaving a will effectively disposing of part of his "property, this Part of this Act shall have effect as respects the "part of his property not so disposed of subject to the provisions "contained in the will and subject to the following modifica-"tions". I do not think that there is anything in the will here which that touches in any way. One of the "following "modifications" is this: "(a) The requirements as to bringing "property into account shall apply to any beneficial interests "acquired by any issue of the deceased under the will of the "deceased, but not to beneficial interests so acquired by any "other persons".

It is said here that only he has to bring into account who has acquired a beneficial interest under the will, and that therefore Charles, the son, who takes a share as one of his father's next-of-kin, has nothing to bring into account because not he, but his children, took the one-seventh share in the events which happened, as he never had more than a very limited interest in the income of that share; or, at the most, that all that needs to be brought in against Charles is the interest that he took, such as it was, which must be valued as well as possible, and would, I suppose, be of very little worth. The result would be that almost the whole fund would go to Charles.

The contrary view is that this sub-section is meant to produce, as it were, a stirpital division, in equality so far as possible, and that that is why the word "issue" is used here, although the word "children" is used in s. 47. Any member of the family belonging to a certain branch must bring in everything that has been taken or acquired under the will by that branch. Therefore, his children having taken an absolute interest in the one-seventh share under the will, Charles, taking under the intestacy, should bring it into account. I am far from saying that Charles can be said to have "acquired" anything, but, on the whole, I

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(4) 2 Atk. 632.

(5) [1935] Ch. 110.

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prefer the view last stated. It seems to me that in the words "any beneficial interests acquired by any issue of the deceased", "issue" must mean children or remoter issue.

So it seems to me that what is to be brought into account is the beneficial interest which the issue acquired. Who are the issue in question? The father and children, the two generations between them, are the issue, and it seems to me, therefore, that anything that the father and children together acquired under the will is a beneficial interest acquired by the issue.

True, there was a power, or a trust, in the event of some income not being applied during the father's lifetime, to distribute it to other members of the family. But that trust never arose. It was never exercised and there was no occasion for its exercise; and I think that it should be ignored, and that in effect the father and his children between them had the one-seventh share, which was settled on them. That is what in my judgment ought to be brought into account.

Declaration accordingly.

Solicitors: *Butt & Bowyer for J. F. Latimer & Hinks, Darlington; Torr & Co. for A. R. Beavon & Littleford, Wolverhampton; Wrinch & Fisher for Freeman, Son & Curry, Darlington.*

J. L. D.

VAISEY, J.

1950
Nov. 23, 24.

In re HUNTER.
LLOYDS BANK *v.* GIRTON COLLEGE, CAMBRIDGE (MISTRESS AND GOVERNORS).

[1949 H. 1037]

Will—Gift to trustees of infirmary and dispensary in memory of testator's father—Nationalization before death of testator—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), s. 60.

A testator, who died on January 10, 1948, by his will, dated July 4, 1940, directed his executor to divide his residue into twenty-two equal portions or units. He gave one unit "to the trustees of "the Ingham Infirmary and South Shields and Westoe Dispen-"sary" in memory of his late father.

A summons having been taken out by the executor to have determined the effect of the gift, having regard to the National Health Service Act, 1946;

Held, that, although great differences had arisen as regards administration and ownership of property as a result of the passing of the statute, there was not in the present case, from the point of view of the testator, so much difference as to justify the court in holding that there was no object of the testator's bounty or that the gift failed; and that the gift, therefore, did not fail, but must be applied by being paid to the appropriate management committee, the hospital board not objecting, to be used for the purposes of the particular infirmary and dispensary.

In re Morgan's Will Trusts [1950] Ch. 637; and *In re Glass* [1950] Ch. 643, n., followed.

ADJOURNED SUMMONS.

By his will dated July 4, 1940, William Turner Hunter, who died on January 10, 1948, appointed Lloyds Bank Ld. executor and trustee and directed the bank to divide his residue into twenty-two equal portions or units; and he gave one unit "to "the trustees of the Ingham Infirmary and South Shields and "Westoe Dispensary" in memory of his late father.

The bank took out a summons to have determined (among several other questions) whether on the true construction of the will and of the National Health Service Act, 1946, (a) the right to receive this share was vested in the Minister of Health under ss. 6 or 7 of that statute or otherwise or was vested in the South Shields District Hospital Management Committee under s. 7 of the Act or otherwise, or (b) the plaintiff was required to apply the share in paying the capital and income to the Newcastle-on-Tyne Regional Hospital Board or the South Shields District Hospital Management Committee under s. 60 (1) of the Act, or (c) whether the share was held on some other and, if so, what charitable trusts, or was undisposed of and passed as on the testator's intestacy.

J. A. Armstrong for the plaintiff.

F. B. Alcock for the defendants, the Newcastle-on-Tyne Regional Hospital Board and the South Shields District Hospital Management Committee.

Denys Buckley for the Attorney-General.

Miss B. A. Bicknell; E. M. Winterbotham; D. H. McMullen; H. A. Rose; A. H. Droop; Sir Norman Touche for various defendants.

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(1) National Health Service Act, 1946, s. 60: "(1) Where property, "other than property transferred to "the Minister or to the Board of "Governors of a teaching hospital or "to a Hospital Management Com"mittee under s. 6 or s. 7 of this "Act, is held on trust immediately "before the appointed day, and the "terms of the trust instrument "authorize or require the trustees, "whether immediately or in the "future, to apply any part of the "capital or income of the trust pro-

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1950

HUNTER,
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VAISEY, J.: This case does not appear to be precisely covered by authority. It is not the same case as *In re Morgan's Will Trusts* (2), nor is it exactly like *In re Glass* (3). It is a simple gift to the trustees of a particular infirmary and dispensary of one of the twenty-two units into which the testator directed that his residuary estate should be divided. I suppose that, in one sense, there are not any trustees now; but it is obvious, especially with a will of this description, that the reception of the money by the trustee is mere machinery. The gift is really to the infirmary and dispensary, and the object of the gift was, I think, two-fold; first, to promote the beneficent work of healing carried on in this institution, and, secondly, to commemorate the testator's father, who, I think, was a missionary.

The passing of the National Health Service Act, 1946, undoubtedly made a very great and radical change from some points of view in the position of hospitals in general and this infirmary and dispensary in particular; but, although from many points of view the change was fundamental, from the point of view of an ordinary layman interested in the healing and care of the sick in the district in which he lived—for the testator did live in South Shields—and, from the point of view of a man who was desirous of commemorating his deceased father in conjunction with a place where such beneficent work was carried on, I do not think that the difference is very great.

There was undoubtedly a feeling at one time that the passing of the Act made a clean cut with the past, and that the hospitals of the future were not to be like the hospitals of the past, and the dispensaries of the future not to be like the dispensaries of the past; but, from many points of view, that is a completely fallacious idea. Although, from the administrative point of view and from the point of view of the ownership of the property of these charities, great differences have been pointed out, I do not think that, from the point of view of the testator making a gift of this kind, there is really sufficient difference to justify me in

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"perty for the purposes of any hospital to which s. 6 of this Act "applies, the trust instrument shall "be construed as authorizing or, as "the case may be, requiring the "trustees to apply the trust property, "to the like extent and at the like "times, for the purpose of making "payments, whether of capital or "income—(*a*) in the case of a hos"pital designated as a teaching "hospital . . . (*b*) in the case of any "other hospital, to the Regional "Hospital Board for the area in "which the hospital is situated or to "the Hospital Management Commit"tee for the hospital or for the group "of hospitals in which it is com"prised. (2) Any sums paid as "aforesaid to any such Board or "Committee shall, so far as practic"able be applied by them for the "purposes specified in the trust "instrument".

(2) [1950] Ch. 637.

(3) [1950] Ch. 643, n.

saying that there is no object of his bounty or that the gift failed.

I agree that there is no general charitable intention, but, apart from the particular institution and the work carried on there, I think it follows, from the two cases which I have quoted and on general principles, that here the gift does not fail but must be applied by the sum being paid to the appropriate management committee, the hospital board not objecting, to be applied for the purposes of the particular infirmary and dispensary, which, I understand, is admittedly still in the same building and carrying on, so far as those who come to it for its assistance are concerned, just as before the Act was passed.

Declaration accordingly.

Solicitors: *Ward, Bowie & Co., for George Scott & Son, South Shields; Shaen, Roscoe & Co.; Hewitt, Woollacott & Chown, for Scott, Meikle & Pool, Newcastle-on-Tyne; Boyce, Evans & Sheppard; Sidney Pearlman, for Grunhut, Grunhut & Makepeace, South Shields; Neave & Neave; Treasury Solicitor.*

J. L. D.

Affirmed.
[1951] 1 Ch. 661

In re COULTHURST, DECD.
COUTTS AND COMPANY *v.* COULTHURST AND ANOTHER.

VAISEY, J.
1950
Nov. 10.

[1950 C. 2556]

Charity—Charitable trust—Income of trust fund payable "to or for the benefit of . . . the widows and orphaned children of deceased "officers and deceased ex-officers" of a bank—Validity.

A testator by his will directed that certain income of a fund should be applied by a bank which was the trustee of the fund "to or for the benefit of such . . . of the . . . widows and orphaned "children of deceased officers and deceased ex-officers of the bank "as the bank shall in its absolute discretion consider by reason of "his, her or their financial circumstances to be most deserving of such assistance . . .".

Held, that the implications, taken together, of the expressions "widows and orphaned children", "financial circumstances", and "most deserving of such assistance" showed that the trusts of the fund were valid and effectual charitable trusts.

Gibson v. *South American Stores (Gath and Chaves) Ld.* [1949] Ch. 572; (C. A.) [1950] Ch. 177, applied, *In re Scarisbrick* [1950] Ch. 226, distinguished.

VAISEY, J.

1950

COULTHURST, DECD., *In re.* COUTTS AND COMPANY *v.* COULTHURST.

ADJOURNED SUMMONS.

By his will dated April 28, 1948, a testator provided in cl. 7: "I give . . . 20,000*l.* . . . to the bank and I direct that "the bank shall stand possessed of the said sum of 20,000*l.* . . . "as a permanent fund which be (sic) known and is hereinafter "referred to as 'the Coulthurst Fund' upon the trusts . . . "following . . . (i) The Coulthurst Fund shall . . . be invested "in the name or under the control of the bank in any investments for the time being authorized by law for the investment "of trust moneys . . . (ii) In this clause the expression 'deceased "'officer' means any officer (not being a director or auditor) or "clerk who was in the service of the bank whether at 440 Strand "or elsewhere at the date of his death at a salary calculated on "a monthly or larger periodic basis and the expression 'deceased "'ex-officer' means any retired officer (not being a director or "auditor) or clerk who at the time of his death was in the service "of the bank as aforesaid at a salary calculated on the foregoing "basis and who at his death was in receipt of a pension from "the bank and the expression 'orphaned child' shall mean the "child of any deceased officer or deceased ex-officer who is under "the age of 17 years and has lost both father and mother."

Sub-cl. (iii) provided that at the expiration of every six months calculated from the date of the testator's death "the "bank shall pay or apply the income earned by the Coulthurst "Fund during such period of six months to or for the benefit "of such one or more exclusively of the others or other of the "widows and orphaned children of deceased officers and deceased "ex-officers living at the expiration of such half-yearly period "as the bank shall in its absolute discretion consider by reason "of his, her or their financial circumstances to be most deserving of such assistance and so that the bank may pay any "income which it may decide to apply for the benefit of any "orphaned child without any further responsibility to see to the "application thereof."

Sub-cl. (iv) provided: "The decision of the bank as to who "are widows and orphaned children of deceased officers and "ex-officers within the meaning of this clause shall be absolutely conclusive and in arriving at any such conclusion the "bank shall have full power to act upon any evidence or information it may think proper to accept."

By sub-cl. (v), "The trusts, powers and discretions hereby "expressed to be vested in the bank may be exercised by its "board of directors . . . or by any committee of the board of "directors to whom the board may think fit to delegate the "same."

Sub-cl. (vi) provided that if the bank should go into liquidation or the trusts otherwise fail or determine the Coulthurst Fund should sink into the residue of the testator's estate and be held accordingly.

On June 14, 1949, the testator died. The bank applied to the Chief Inspector of Taxes to obtain his recognition of the right of the Coulthurst Fund to exemption of its income from income tax on the ground that it was applicable for charitable purposes only. By letter dated October 11, 1949, the Chief Inspector replied that in his view the trust was not legally charitable.

By this summons, to which the testator's widow, who was one of his executors, and the Attorney-General were defendants, the plaintiff bank, Coutts and Company, who was the other executor and was also trustee of the Coulthurst Fund, asked, among other things, whether the trusts of that fund were valid and effectual charitable trusts or were void as infringing the rule against perpetuity or otherwise.

It was stated in an affidavit by the manager of the trustee department of the plaintiff bank that the bank had existed as a bank since about the year 1700. It was originally carried on by a partnership but, in 1892, the partnership was converted into an unlimited company whose registered office was and had since 1904 been at 440, Strand. The bank had five branches all in England, had 439 employees in the position of officers or clerks (not including any director or auditor), and the position at the date of the testator's death was approximately the same.

The affidavit went on to state that it would be difficult to say how many deceased officers and deceased ex-officers (within the definition in the will) there were at the time who had widows and orphaned children, but that there must be a considerable number, and that the bank were aware that some widows and orphaned children were, and that many of them might well be, both at the date of the affidavit and in the future, in real need of assistance. The deponent expressed the view that if the trusts of the Coulthurst Fund constituted a valid charitable trust a real want would be and would continue to be filled. No other fund existed to provide exclusively for needy widows and orphaned children of deceased officers and ex-officers of the bank. There were, however, contributory pension schemes providing some, but not all, of the persons in that category with pensions, varying in amount, up to 200*l.* a year.

Wilfrid M. Hunt for the plaintiff bank.

Neville Gray, K.C., and *Rawlence* for the widow, solely interested in residue. These cannot be valid and effectual charitable trusts. There is no real element of poverty here. The intended beneficiaries, namely, widows and orphaned children of deceased officers and ex-officers of the bank, are a very limited class, and are certainly not a particular section of the poor; see *In re Scarisbrick* (1), which was concerned with a family trust; and no public advantage is served by providing for them as the testator has purported to do.

Denys Buckley for the Attorney-General. These are valid and effectual charitable trusts, as is shown both by older and by recent authorities.

In *Powell* v. *Attorney-General and another* (2) Sir William Grant, M.R., held that a bequest of residue " to the widows and " children of seamen belonging to the town of Liverpool " was a valid charitable bequest, and that the words of the bequest sufficiently described a certain charity in Liverpool. In *Attorney-General* v. *Comber* (3) the bequest was " to the widows and " orphans of the parish of Lindfield, Sussex ". It was contended that the description of the persons to be benefited was too general and uncertain, but Sir John Leach, V.-C., held that the gift must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and that it was necessarily confined to such of those two classes as were within the scope of general benevolence. He took the view that he must act as if the bequest had been " to the poor widows and orphans of " Lindfield ": and he held it to be charitable.

In *Gibson* v. *South American Stores* (*Gath and Chaves*) *Ld.* (4), the class of beneficiaries was described as " persons who " . . . are or shall be necessitous and deserving, and who for the " time being are or have been in the company's employ . . . and " the wives, widows, husbands, widowers, children, parents and " other dependants of any person who for the time being is or " would if living have been himself or herself a member of the " class of beneficiaries ". It was held that, in ascertaining the class to be benefited from the fund, the word " and ", in the expression " and the wives, etc.", must be read as " or who are " and that, so read, the trusts were clearly for the relief of poverty.

True, the number of possible objects of the trusts in that case was far greater than the number in the present case; but that is not to say that the class in the present case is not sufficiently wide to import the necessary element of public advantage, still less that the trust in the present case is analogous to the family trust in *In re Scarisbrick* (5) and so not a charitable trust at all. The whole wording of the trust in the present case indicates that it is a valid and effective charitable trust.

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(1) [1950] Ch. 226.
(2) (1817) 3 Mer. 48.
(3) (1824) 2 Sim. & St. 93.
(4) [1949] Ch. 572; (C. A.) [1950] Ch. 177.
(5) [1950] Ch. 226.

VAISEY, J. I feel considerable doubt on this question. [His lordship read the provisions of the will and continued:] I have to decide whether the object of this benefaction is or is not the relief of " poverty " in the proper sense of that word. Poverty, it is well settled, is something far short of, or far wider than, destitution: it includes straitened circumstances, financial stringency, pecuniary embarrassment, and so forth. The evidence shows that the bank is well known.

[His Lordship reviewed the evidence and continued:] I accept the supposition that at present there must be a considerable number who are, or are likely to be, in real need of assistance.

On the authorities, particularly *Gibson* v. *South American Stores* (*Gath and Chaves*) *Ld.* (6), poverty is indicated and there is a sufficiently wide class to enable a necessary element of public advantage to be discovered; there is strong reason to believe that in such a case there is a charity. In the present case, I rely on the fact that the will is dealing with widows and orphaned children, classes which may, and, in my view, must, include, if the class is sufficiently wide, many proper objects of charity in the legal sense. Even today the status of " widows and orphaned " children " suggests the possibility, or, perhaps, even the probability, of impecuniosity.

Also, " financial circumstances " are referred to as the point to which the bank, as trustees of this fund, have to direct their attention, and as the ground on which they are to consider and weigh the respective deserts of applicants for the testator's bounty. Again, in addition to the words " financial circumstances " and " deserving " there are the words " deserving " of assistance "; and I am inclined to think that " assistance " imports the idea of necessity.

Had the testator been more careful in phraseology and had he, in addition to " most deserving ", put " and most needy of " such assistance ", the case would have been easy: but, putting together the implications of all those expressions, " widows and " orphaned children ", " financial circumstances ", and " most " deserving of such assistance ", I conclude that a valid and effectual trust is indicated.

I am informed of the number of employees; though not of the probable number of eligible widows and orphans: but I cannot shut my eyes to what is generally known of the circumstances of those in the social and financial position of employees of a large bank, or doubt that the class intended to be benefited is substantial in numbers. Also, considering the amount of the fund, which is unlikely to produce more than 600*l.* or 700*l.* a

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(6) [1949] Ch. 572; (C. A.) [1950] Ch. 177.

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year, there is no risk of there not being a sufficiency of eligible objects.

It is a pity that the testator was not more careful in the framing of his trust, and I repeat that I am not altogether satisfied that another view might not be taken of the case. Although the number of the possible objects is far less than the number of employees in *Gibson* v. *South American Stores* (*Gath and Chaves*) *Ld.* (7) I think that, on the whole, it is sufficiently wide to import the element of public advantage, which is essential if a charitable trust is to be inferred.

To be contrasted with that is *In re Scarisbrick* (8) before my brother Roxburgh. That case concerned a family trust, the objects of which were such relations of the son and daughters as in the opinion of the survivor of them should be in needy circumstances. Roxburgh, J., held that, on the authorities, the recipients could not be regarded otherwise than as beneficiaries under the family trust; that they did not constitute a particular section of the poor; and that there must be a declaration that one half of the residuary estate, and no more, was effectively devoted to charity.

I will declare that the trusts are valid and effectual trusts.

Declaration accordingly.

Solicitors: *Farrer & Co.; Treasury Solicitor.*

K. R. A. H.

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(7) [1949] Ch. 572; (C. A.) [1950] Ch. 177.

(8) [1950] Ch. 226.

VAISEY, J.
1950
Nov. 23.

In re ROBINSON, DECD.
DAVIS *v.* ROBINSON.

[1949 R. 481]

Will—Charity—Executors not appointed trustees—Subsequent directions to "my trustees"—Whether executors also trustees—Gift for "the old people over sixty-five years of" a district—Whether charitable—Statute 43 *Eliz., c.* 4, *s.* 1.

By his will dated September 11, 1947, a testator appointed executors and gave his residue to a named charitable institution and to "the old people over sixty-five years of" a district "to "be given as my trustees think best". He did not appoint trustees.

Held, (1) that, on the construction of the will, the executors must also be regarded as trustees.

(2) That, as the words "aged, impotent and poor" in the preamble to the Statute 43 Eliz. c. 4 should be read disjunctively, "the old people over sixty-five years" were a class of persons just as much objects of charity as the poor of a parish, or the sick of a parish, and were, therefore, proper objects of the charitable purposes of the testator in regard to half of his residuary estate.

In re Glyn Will Trusts [1950] W. N. 373; *In re Bradbury* [1950] W. N. 558, followed.

ADJOURNED SUMMONS.

By his will dated September 11, 1947, John Robinson appointed executors and gave his residuary estate "to the Little "Sisters of the Poor of Longton and Stoke on Trent and the old "people over sixty-five years of Hazel Slade near Hednesford to "be given as my trustees think best". The testator died on May 8, 1948.

A summons was taken out by two of the executors to have determined the validity of the second part of the above bequest

A. A. Baden Fuller for the plaintiffs.

Denys Buckley for the Attorney-General.

H. G. Watson, *Maurice Berkeley*, *R. L. Stone* and *P. W. E. Taylor* for various defendants.

VAISEY, J. This summons raises a very short question of construction, although it is not perhaps an easy one. The testator, whose religious associations are, I think, properly described as interdenominational, for he made gifts to various religious denominations, gave "the remainder of my estate to "the Little Sisters of the Poor of Longton and Stoke on Trent "and the old people over sixty-five years of Hazel Slade near "Hednesford to be given as my trustees think best".

I consider first what he meant by "my trustees". The will begins by appointing three named persons to be his executors. Having appointed the three executors, he does not appoint them trustees. Later, however, the will contains these words: "My "trustees to receive expenses for carrying out work that might "be in this will". I think it plain that the testator in this home-made will did not understand the distinction between an executor and a trustee, and that, where he names three persons to be his executors, and subsequently refers to his trustees, according to the proper construction of this will, the appointment of executors is and must be read and construed as an appointment also of trustees. Therefore, having regard to the relevant provisions of the Trustee Act, to which I need not refer in detail, I think that by the expression "my trustees" he means that the persons named as executors in the will are to be regarded as trustees and to include the survivor or survivors of them or other the trustee or trustees for the time being of his will.

Having cleared that point, and having decided what is meant by "my trustees", I return to the residuary gift. Although there are here no words of severance, I think that this gift ought to be construed as a gift in equal shares between the two objects, both of which, in my judgment, are plainly charitable. I think that one-half of the ultimate residue goes to the institution known as the Little Sisters of the Poor, who are represented here by the mother superior of the institution which is identified by her evidence as St. Augustine's, Hanley, near Stoke on Trent, and which was founded and is managed by the order to which the testator was evidently referring.

That satisfactorily disposes of half of the estate, because in my opinion the concluding words "to be given as my trustees "think best", although they might grammatically be held to give some discretion to the trustees over and in respect of the whole of the residue, refer only to the second half of the estate, which the testator gives to the old people over sixty-five years of Hazel Slade, near Hednesford. I think that that gives the trustees a discretion as to the manner in which the old people, to whom the testator refers, are to be benefited.

A very pleasant little organization has been carried on for many years, interrupted by the war, although it has since been resumed, a village charity, called The Hazel Slade Old Folks Entertainment and Tea Fund; and there is a defendant representing that particular organization. The rule, as stated in a minute book which is before me, is that all old people must reside at least three months in the village and that, if they do that, they are entitled to come to the yearly Christmas party which this organization arranges and to have entertainment; and those who are qualified by their age have a "share out" in any surplus money.

It is suggested that when the testator said "the old people "over sixty-five years", he was referring to that organization and that the gift was to the tea and entertainment fund. I do not think so. I think that, according to the proper construction of the will, the gift is to the old people direct as a class, not as a class of individuals, but as a group of people, who are, within the Statute of Elizabeth, qualified not by poverty, sickness or impotence, but by age. It has recently been held by Danckwerts, J., that that statute brings within the ambit of "charity" those who satisfy any one of the three qualifications of age, impotence and poverty. He took that view in *In re Glyn Will Trusts* (1), and I followed that decision in *In re Bradbury* (2). In that case the testator directed that her residuary fund should be applied for the maintenance of an aged person or persons in a nursing home approved by her trustees. There again, although I conceive that the aged person in a nursing home may be a person not at all in need of any sort of pecuniary assistance, I nevertheless held, following the decision in *In re Glyn Will Trusts* (1), that it was a good charitable gift.

Here I think that "the old people over sixty-five years" in a particular parish are a class of persons just as much objects of charity, having regard to the preamble of the statute, as the poor of the parish or the sick of the parish. They are, I think, proper objects of the charitable purposes of the testator in regard to what I call the second half of his estate.

It will be observed that the testator appears to place great confidence in the discretion of his trustees; and, while I think that it would be proper in this case for a scheme to be brought into chambers and settled for the administration of the second half of the charitable gift, I see no reason why there should be any objection taken to leaving proper discretion in the hands of the trustees, whom I have already defined. I therefore hold that this is a proper charitable gift, but I shall require it to be defined by the appropriate method of a scheme which will be sanctioned by the court. Such a scheme must be brought into chambers by the trustees and it will receive due consideration by the Attorney-General.

Declaration accordingly.

Solicitors: *Gibson & Weldon, for Lloyd & Robinson, Stafford; Simmonds, Church, Rackham & Co., for P. J. McKnight & Ryder, Stoke-on-Trent; Treasury Solicitor.*

J. L. D.

(1) [1950] W. N. 373.

(2) [1950] W. N. 558.

VAISEY, J.

1950
Oct. 10, 11;
Nov. 23.

In re THE DUKE OF NORTHUMBERLAND, DECD.
HALIFAX *v.* NORTHUMBERLAND.

[1950 N. 753.]

Settled land—Expenditure on repairs by tenant for life—Farms let to tenants and cottages occupied by estate employees—Claim by tenant for life for recoupment out of capital moneys—What recoupment justifiable—Extent of obligation of trustees to accept directions of tenant for life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 73, *sub-s.* 1 (iv); *s.* 75, *sub-s.* 2*—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-s.* 1; *s.* 81, *sub-s.* 1; *s.* 94, *sub-s.* 1; *Sch. III, Pt. II, para.* 23.

The tenant for life of an estate comprised in a settlement of land had, for a period since 1945, expended on repairs and maintenance of the estate sums exceeding the net rents received. This expenditure was incurred in respect both of farming and market gardening properties let to tenants, and of cottages occupied by employees of the estate.

The tenant for life desired to be recouped in respect of this expenditure out of capital moneys. On the hearing of a summons to have determined the powers of the trustees in this respect in relation to (a) the nature of the properties repaired, and (b) the dates of expenditure on repairs, having regard (1.) to s. 73, sub-s. 1 (iv), of the Settled Land Act, 1925, together with s. 96, sub-s. 1, of the Agricultural Holdings Act, 1948, and para. 23 of Pt. II of Sch. III to that Act (which came into force on March 1, 1948, superseding the corresponding Schedule to the Agricultural Holdings Act, 1923); and (2.) to s. 75, sub-s. 2, of the Settled Land Act, 1925,

Held, (1.) that the trustees were entitled to apply capital moneys in payment of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after January 1, 1945, of such repairs as are specified in para. 23 of Pt. II of Sch. III to the Act of 1948 in relation to agricultural land, whether or not the land was comprised in a contract of tenancy or within the definition of "agricultural "holding" in s. 1 of that Act.

The word "landlord" in s. 73, sub-s. 1, of the Settled Land Act, 1925, bore the meaning assigned to it by ss. 57 and 94 of the Agricultural Holdings Acts, 1923 and 1948, respectively, viz.: "Any person "for the time being entitled to receive the rents and profits of any "land".

The definition of "agricultural holding" in s. 1 of the Act of 1948 (which would exclude property let to estate employees as such) had no relevance in the present connexion.

The date of January 1, 1945, was applicable, because (a) the evidence did not cover any earlier period, and (b) the recoupment of expenditure made more than six years previously appeared to be inconsistent with the principles laid down in *In re Borough Court Estate* [1932] 2 Ch. 39.

Held, (2.) that the trustees must comply with the directions of the tenant for life on being satisfied that the application of capital money was or would be within the relevant provisions of the Settled Land Act, 1925, and consistent with the present judgment.

Section 75, sub-s. 2, of that Act did not mean that trustees could accept the direction of the tenant for life blindly, or be absolved from the duty of ascertaining that the mode of application was within the provisions of the Act, a matter in which, in any case of doubt, they must have recourse to the professional advice of lawyers or surveyors.

ADJOURNED SUMMONS.

The plaintiffs were the trustees for the purpose of the Settled Land Act, 1925, of a settlement created by the codicil dated April 17, 1916, to the will of the seventh Duke of Northumberland, who died on May 14, 1918. The eighth duke died on August 23, 1930, and on his death his widow, the first defendant, became the tenant for life in possession under the settlement. The second defendant, the tenth duke, was tenant for life in remainder expectant on the death of the first defendant. His daughter, Lady Caroline Mary Percy, the third defendant, was tenant in tail in remainder expectant on the termination of the said two preceding estates for life.

The property which was the subject of the settlement included the Albury Estate in Surrey, which comprised about 3,500 acres, and was for the most part agricultural land. The tenant for life had informed the trustees that considerable sums had been expended by her in repairs to and in and about the maintenance of the estate in and since the year 1945, and that such sums had exceeded the net rents received from the estate during that period. It appeared further that a high rate of expenditure on such repairs was likely to continue for many years.

This expenditure related both to farm and market garden properties let to tenants, and to cottages occupied by the employees and workmen of the estate.

The tenant for life desired to have recouped to her out of capital a part of the cost of repairs executed during the years in question, and of the cost of repairs to be executed in the future. The trustees, who desired to have their powers and obligations in this respect elucidated, took out a summons in which the following questions were raised: (1.) whether by virtue of the Settled Land Act, 1925, the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, and in particular s. 73 of the Act of 1925, and s. 96 of the Act of 1948 (1), the plaintiffs as trustees for the purpose of the Act of 1925 of the settlement constituted by the codicil are entitled to apply capital money of the settlement in payment (as for an improvement authorized by the Act of 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after March 1, 1948, of such repairs as are specified in para. 23 of Part II of the third schedule of the Act of 1948 in relation to agricultural land which at the date of the execution of such repairs is comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord; (2.) if the answer to question (1.) is in the affirmative, whether the plaintiffs as such trustees are entitled to apply capital money of the said settlement in payment (as for an improvement authorized by the Act of 1925) of any money expended and costs incurred as aforesaid notwithstanding that at the date of the execution of the repairs the agricultural land is not comprised in a contract of tenancy or is comprised in a contract of tenancy under which the said land is let to the tenant during his continuance in an office, appointment or employment held under the landlord; (3.) whether by virtue of the said Acts the plaintiffs as trustees as aforesaid are entitled to apply capital money of the said settlement in payment (as for an improvement authorized by the 1925 Act) of any money expended and costs incurred by the tenant for life in or about the execution on or after January 1, 1926,

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(1) Settled Land Act, 1925, s. 73, sub-s. 1: "Capital money arising "under this Act . . . shall, when "received, be invested or otherwise "applied wholly in one, or partly in "one or another or others, of the fol- "lowing modes (namely):— . . . (iv). "In payment as for an improvement

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" authorised by this Act of any " money expended and costs incurred " by a landlord under or in pur- " suance of the Agricultural Holdings " Act, 1923 . . . in or about the execu- " tion of any improvement comprised " in Part I or Part II of the First " Schedule to the said Agricultural " Holdings Act ".

Agricultural Holdings Act, 1948, Sch. III, Pt. II, para. 23 [substituted by s. 96 of the Act for the equivalent Schedule to the Act of 1923]: " Repairs to fixed equipment, being " equipment reasonably required for " the proper farming of the holding, " other than repairs which the tenant " is under an obligation to carry out ".

S. 1, sub-s. 1: " In this Act " the expression ' agricultural hold- " ' ing ' means the aggregate of the " agricultural land comprised in a " contract of tenancy, not being a con- " tract under which the said land is " let to the tenant during his continuance in any office, appointment " or employment held under the land- " lord ".

S. 81, sub-s. 1: " Where under " powers conferred by the Settled " Land Act, 1925, . . . capital money " is applied in or about the execution " of any improvement specified in the " Third Schedule to this Act no pro- " vision shall be made for requiring " the money or any part thereof to be " replaced out of income, and accord- " ingly any such improvement shall " be deemed to be an improvement " authorised by Part I of the Third " Schedule to the Settled Land Act, " 1925 ".

Settled Land Act, 1925, s. 75, sub-s. 2: " The investment or other " application by the trustees [of " capital money arising under the " Act] shall be made according to the " direction of the tenant for life, " and in default thereof according to " the discretion of the trustees . . .".

and before March 1, 1948, of any such repairs as are mentioned in questions (1.) and (2.); (4.) if the answer to question (1.), (2.) or (3.) is in the affirmative whether the plaintiffs as trustees as aforesaid are bound from time to time under s. 75, sub-s. 2, of the Act of 1925, on the direction of the tenant for life to apply capital money in recouping to the tenant for life or paying any money properly expended or costs incurred by such tenant for life in or about the execution of such repairs as are referred to in the preceding questions, or whether the plaintiffs have a discretion as to such application.

Schedule III to the Agricultural Holdings Act, 1948, came into force on March 1, 1948.

J. A. Brightman for the trustees. The reference in s. 73, sub-s. 1 (iv), of the Settled Land Act, 1925, to the Agricultural Holdings Act, 1923, must now, by virtue of s. 96, sub-s. 1, of the Agricultural Holdings Act, 1948, be construed as referring to para. 23 of Pt. II of Sch. III to the latter Act. This reproduces the equivalent paragraph in the Agricultural Act, 1947, which introduced a substantial modification to the purposes specified in the Act of 1923. The new paragraph has been in force since March 1, 1948.

The first question relates to the powers of the trustees in relation to repairs which are limited in time to dates on and after the coming into force of the new paragraph, and limited in extent to the properties let to independent tenants, which satisfy the definition of " agricultural holding " contained in s. 1, sub-s. 1, of the Act of 1948.

The second question relates to powers in relation to properties let to estate employees; the third question relates to the powers in the period between the coming into force of the Act of 1925 and March 1, 1948; the fourth question relates to the duty of the trustees under the provisions of s. 75, sub-s. 2, of the Act of 1925.

E. I. Golding for the tenants for life in possession and in remainder. It is submitted that the first question must be answered in the affirmative. As regards the second question, the tenant for life is a " landlord " within the meaning of s. 57 of the Act of 1923 and s. 94 of the Act of 1948; that is, the person entitled to the rents and profits; that is so irrespective of whether the properties are let to independent tenants or to estate workmen.

Regarding question three, on March 1, 1948, a new list of improvements came into force, and the old list is not preserved for any transitional purposes. It cannot have been intended that capital money should not be applied in repayment of past expenditure. The date has relevance, not to the expenditure of the money by the tenant for life, but to the recoupment of the money by the trustees.

As to the fourth question, the tenant for life has power to direct the application of capital moneys. Under the Acts of 1947 and 1948 she is personally liable to carry out repairs of this type to agricultural properties.

MacMaster for the presumptive tenant in tail in remainder. It is not contended that the first question should be answered in the negative, but if a claim is to be made for past expenditure, the tenant for life should submit a scheme for the approval of the trustees: *In re Tucker's Settled Estates* (2).

[VAISEY, J. Schemes were provided for by s. 26 of the Settled Land Act, 1882: they have been abolished by s. 83, sub-s. 1, of the Act of 1925.]

The old scheme has been replaced by the certificate of a surveyor: see s. 84, sub-s. 2, of the Act of 1925. *In re Borough Court Estate* (3), shows that capital money may not be applied in recoupment of expenditure made long before. At the time when the repairs were executed, the present schedule of improvements was not in force, and there was no power to order recoupment in respect of them. The tenant for life must be presumed to have intended to make the expenditure her own.

As regards the fourth question, the trustees cannot be bound hand and foot; they must have a discretion in the matter. Section 84 of the Act of 1945 contains the word "may" in sub-ss. 1 and 2: if there was any compulsion in the matter, the wording would be different.

E. I. Goulding in reply.

Cur. adv. vult.

November 23. VAISEY, J., reading his judgment, stated the facts, decided a question not material to this report, and continued: Turning to the relevant statutory provisions, I observe first that capital money is applicable in payment under s. 73, sub-s. 1 (iv), of the Settled Land Act, 1925 "in payment as for "an improvement authorized by this Act of any money expended "and costs incurred by a landlord under or in pursuance of the "Agricultural Holdings Act, 1923 . . . in or about the execution "of any improvement comprised in Part I or Part II of Sch. I "to the said Agricultural Holdings Act".

The first question is the meaning of the word "landlord" in the sub-section. Is it necessary that there should be a contract of tenancy of any kind? The answer to that question seems to me to be that where the word is used in close conjunction with a reference to the Agricultural Holdings Act, 1923, it bears the meaning which is assigned to it in that Act, in s. 57 of which it is defined as " any person for the time being entitled to receive " the rents and profits of any land ".

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(2) [1895] 2 Ch. 468.

(3) [1932] 2 Ch. 39.

In Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), at p. 1098, there is a note to the sub-section suggesting that the point is doubtful. I must, therefore, resolve it, and I do so in the sense indicated. I may observe that a similar definition is contained in the subsequent Act. See s. 94, sub-s. 1, of the Agricultural Holdings Act, 1948, which I will call the Act of 1948.

It is to be noticed that s. 75, sub-s. 2, of the Settled Land Act, 1925, provides that capital money shall be invested or applied according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, and in my judgment that section is applicable here. That does not mean that the trustees can accept the direction of the tenant for life blindly or be absolved from the duty of ascertaining that the mode of application is within the provisions of the Act, a matter in which, in any case of doubt, they must have recourse to the professional advice of lawyers or surveyors.

Section 96 of the Act of 1948 provides, among other things, that references in any enactment to Part I and Part II of Sch. I to the Act of 1923, shall be construed as references to Sch. III to the Act of 1948 and to Part II of that Schedule respectively.

Paragraph 23 of Part II of the last-mentioned Schedule is in the following terms: " Repairs to fixed equipment, being " equipment reasonably required for the proper farming of the " holding, other than repairs which the tenant is under an " obligation to carry out ", and by s. 94 of the Act of 1948 " fixed equipment " is defined to include " any building or " structure affixed to land and any works in, on, under or over " land " and " anything grown on land for a purpose other than " use after severance from the land, consumption of the thing " grown or of produce thereof, or amenity ".

The Act of 1948 came into force on July 30, 1948. It was a consolidating Act, and it consolidated not only the Act of 1923, but also Part III of the Agriculture Act, 1947, which (by virtue of the Agriculture Act, 1947 (Commencement) No. 1 Order, 1948) came into force on March 1, 1948.

Section 22, sub-s. 4, of, and Sch. III to, the last-mentioned Act, correspond with s. 96 and Sch. III to the Act of 1948 respectively.

By s. 42, sub-s. 1, of the Agriculture Act, 1947, and s. 81, sub-s. 1, of the Act of 1948, it is provided that, where, under powers conferred by the Settled Land Act, 1925, capital money is applied in or about the execution of any improvement specified in Sch. III to such respective Acts, no provision shall be made for requiring the money or any part thereof to be replaced out of income and, accordingly, any such improvement shall be deemed to be an improvement authorized by Part I of Sch. III to the Settled Land Act, 1925.

This is, in my judgment, a very inappropriate and inconvenient use of what may be called "referential legislation". The Settled Land Act, 1925, concerns settled land, and the mutual rights and obligations of persons possessing particular estates and interests in such land. The Agricultural Holdings Act, 1923, Part III of the Agriculture Act, 1947, and the Act of 1948 all relate to agricultural holdings as defined in s. 1 of the Act of 1948, and particularly the mutual rights and obligations of landlords and tenants, and it would have been much easier to follow the meaning and purpose of the legislature if these very different subject-matters had been kept separate and distinct.

However, applying as best I can the law as it seems to me to emerge from this welter of confused and confusing enactments, I will answer the question raised by the summons as follows: under paras. 1, 2 and 3 of the summons, I will declare that under the enactments mentioned in para. 1 the plaintiffs, as trustees for the purposes of the Settled Land Act, 1925, of the settlement constituted by the codicil are entitled to apply capital moneys of the said settlement in payment (as for an improvement authorized by the Settled Land Act, 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life under the said settlement in or about the execution on or after January 1, 1945, of such repairs as are specified in para. 23 of Part II of Sch. III to the Act of 1948 in relation to agricultural land, whether the same be comprised in a contract of tenancy or not and whether within the definition of "agricultural holding" in the Act of 1948, s. 1 or not.

I interpose the comment that the last-mentioned definition cannot, in my judgment, be applicable in the present connexion. It reads thus: "In this Act the expression 'agricultural holding' "means the aggregate of the agricultural land comprised in a "contract of tenancy, not being a contract under which the said "land is let to the tenant during his continuance in any office, "appointment or employment held under the landlord".

It is further observed that I have chosen the date of January 1, 1945, first because the evidence does not deal with any earlier period, and secondly, because recoupment of expenditure made more than six years ago would seem to be inconsistent with the principles laid down in the case of *In re Borough Court Estate* (4).

Under para. 4 of the summons I will declare that the trustees

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(4) [1932] 2 Ch. 39.

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are bound to comply with the directions of the tenant for life upon being satisfied that the application of the capital money was or will be within the relevant provisions of the Settled Land Act, 1925, and consistent with this judgment.

Order accordingly.

Solicitors: *May, May & Deacon.*

F. R. D.

C. A.

1950 *Oct.* 9, 10, 11.

Evershed, M.R., Asquith and Jenkins, L.JJ.

In re BARON VESTEY'S SETTLEMENT. LLOYDS BANK LD. *v.* O'MEARA.

[1950. V. 269.]

Settlement—Trust of income for adult and infant beneficiaries—Resolution by trustees in successive half-years dealing with income—Part of income allocated in shares to infant beneficiaries—Resolution that as not required for maintenance shares on income to be accumulated in accordance with Trustee Act, 1925, s. 31—Section inapplicable—Validity of allocation—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

By a settlement dated November 15, 1935, property called Edmund's fund was settled for a specified period upon trust that trustees called Edmund's trustees should "pay or apply" the income of the fund "unto and in any manner for the support and benefit of" the wife of Sir Edmund Vestey, his children and two grandsons and their issue. Such "payment or application" was to be made "at and for such times in such shares in such manner and "upon any such terms or conditions whatsoever as Edmund's "trustees in their discretion shall from time to time think proper "and so that the same shall in no case give any right of continued "or future receipt or enjoyment of any income or the enjoyment "thereof". There was a further fund settled upon similar trusts by a deed of covenant dated March 30, 1942.

Three successive half-yearly accounts of both funds were prepared by a custodian trustee, the first being dated September 30, 1948. By successive minutes of the trustees the income then available was distributed in part to adult beneficiaries and the balance was declared to belong to the infant beneficiaries in the shares specified. The following appeared in each minute: "The trustees being of the "opinion that none of the income falling in the current half-year "to infant beneficiaries under the trustees' resolution . . . is "required for the maintenance of the beneficiaries, resolved that "such income shall be accumulated in accordance with s. 31 of the "Trustee Act, 1925". A summons was then taken out by the trustees to ascertain whether they had properly exercised their discretion. Harman, J., held that the trustees had not exercised their discretionary power in acting as they did. On appeal:—

Held, (1.) that the allocations to infant beneficiaries in shares were valid and effective exercises of the trustees' discretion under cl. 7 of the settlement as being applications for their benefit; but (2.) that s. 31 of the Trustee Act, 1925, did not apply to sums so allocated, for the result of the trustees' exercise of their discretion was not to give to the infants the right to say that they were persons who had acquired vested interests in shares of income flowing from the capital of the trust.

In re Peel [1936] Ch. 161, distinguished on the first point.

APPEAL from Harman, J.

By a settlement dated November 15, 1935, and made between Lord Vestey of the first part, his brother, Sir Edmund Vestey, of the second part and three successive bodies of trustees of the third, fourth and fifth parts of whom those of the fifth part were known as Edmund's trustees. In cl. 1 of the settlement it was provided: "(f) Edmund's fund means the moneys investments " and property which for the time being shall already have been " actually paid or transferred as capital to Edmund's trustees " under cl. 3 hereof and all moneys investments and property " at any time representing the same or added to the capital of " Edmund's fund "; " (g) the specified period means the period " from the date of this deed until the first day of January in the " year 2011 or until the earlier expiration of twenty years after ' the death of the survivor of the issue actually born before the " date of this deed of Lord Vestey Sir Edmund Vestey and His " late Majesty King Edward VII respectively ".

Clause 7 of the settlement provided: " During the specified " period and subject to the relevant payments directed by cl. 10 " hereof Edmund's trustees shall pay or apply the income of " Edmund's fund and all income to be paid to them under sub- " cl. (a) of cl. 3 hereof [being half the income arising from immovable property in China specified in the schedule and belonging at the date of the settlement jointly to Lord Vestey and Sir Edmund Vestey] " unto or in any manner for the support " or benefit of all or any one or more of the following persons " for the time being in existence (whether now living or here- " after to be born) namely (i) the present wife or any future wife " or widow (whether or not remarried) of Sir Edmund Vestey " (ii) his three children Hannah Vestey Gladys Muriel Fleming " and William Vestey (iii) the issue of his son Percy Charles " Vestey by such son's present wife . . . (iv) Sir Edmund " Vestey's two grandsons John Derek Vestey and Charles Gordon " Vestey and (v) the issue of Sir Edmund Vestey's said three " children . . . and two grandsons respectively and also (but " only in the event of and after the failure by death of all Sir

"Edmund Vestey's said three children and two grandchildren "and their issue and the issue of the said Percy Charles Vestey "by his present wife . . .) the issue of Lord Vestey such payment or application to be made at and for such times in such "shares in such manner and upon any such terms and conditions "whatsoever as Edmund's trustees in their discretion shall from "time to time think proper and so that the same shall in no case "give any right of continued or future receipt or enjoyment of "any income or the benefit thereof".

There followed a proviso in four paragraphs, and paras. (ii) and (iii) conferred on Edmund's trustees a discretionary power at any time during the specified period (and not prohibited by any statute in force) to accumulate the whole or any part of such income, any such accumulations to form part of the capital of Edmund's fund. Clause 8 of the settlement declared trusts of Edmund's fund after the termination of the specified fund, and cl. 9 contained an investment clause. By a deed of covenant dated March 30, 1942, Ronald Vestey covenanted with Sir Edmund Vestey and also separately with the Edmund trustees other than himself that he would pay the trustees the sum of 2,300,000*l.* by a first instalment of 1,000,000*l.* payable on or before July 6, 1942, and subsequent instalments payable as therein mentioned. By cl. 2 of the deed it was provided that Edmund's trustees should hold the said sums and interest by way of addition to and as part of the capital and income respectively of Edmund's fund as defined by the deed of settlement except that (a) the power given by the proviso forming para. (ii) of cl. 7 of the settlement should not apply; that (b) and (c) conferred extended powers of investment; and that (d) conferred a power up to July 1, 1957, to raise out of the capital of the sum amounts not exceeding 375,000*l.* and to apply the same as capital for the benefit of all or any of the issue of Sir Edmund Vestey (except Ronald Vestey and his issue).

By the year 1943 the sale of the property comprised in the settlement had been completed by trustees called the joint trustees who had paid or transferred to Edmund's trustees the requisite half share of the capital assets. There had been various changes in the Edmund trustees. Apart from Lady Vestey who had renounced all her interest, the class of permissible objects named or described in cl. 7 of the settlement consisted of eight adults and six infants.

The estimated approximate capital value of Edmund's fund was 1,900,000*l.* The present approximate value of the covenant fund was 2,750,000*l.*

Since 1943 when Lloyds Bank was appointed to be the custodian trustee, the bank had prepared half-yearly accounts

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and it had been the custom of Edmund's trustees to meet half-yearly for the purpose of considering the last half-yearly accounts and exercising in respect of Edmund's fund and the covenant fund the discretionary power conferred on them by cl. 7 of the settlement, and minutes were prepared and signed. A meeting of Edmund's trustees was held on February 2, 1949, at which the half-year's accounts to September 30, 1948, were produced showing the total income in hand to be 63,375*l.* (39,753*l.* in respect of Edmund's fund and 23,622*l.* in respect of the covenant fund), and after consideration of the question of distribution of income and the manner in which the discretionary power should be exercised in relation to the income in hand the trustees made the decisions and passed the resolutions set out and recorded in a minute. By this minute "the "trustees resolved in exercise of their discretionary power under "cl. 7 of the settlement that until further resolution of the "trustees the balance of income which the trustees shall decide "to be available for immediate distribution in each half-year, "after making such distribution (if any) to adult beneficiaries as "the trustees shall in each half-year in their discretion think "proper, shall belong to such of the issue of Sir Edmund Vestey "as are subjects of the said power and are under twenty-one "years of age at the date of the relevant half-yearly distributions, "and if more than one in equal shares except that John Vestey, "one of Sir Edmund's grandchildren, being the son of William "Vestey, shall be allotted two shares in such distribution". In each of the three successive half-yearly minutes there was the following statement: "The trustees being of the opinion that "none of the income falling in the current half-year to infant "beneficiaries under the trustees' resolution . . . is required for "the maintenance of the beneficiaries, resolved that such income "shall be accumulated in accordance with s. 31 of the Trustee "Act, 1925". Investments were accordingly made by the bank of the sums set aside in each half-year and of the accrued income in accordance with the statutory duties imposed by s. 31.

Acting on advice the trustees took out a summons asking whether the trustees were, in the exercise of their discretionary trust, (a) at liberty to allocate to any of the objects who were infants such part or parts of the income of Edmund's fund and the covenant fund respectively as the trustees thought fit notwithstanding that no present or immediate application thereof for the infants' maintenance was required; and, if so, whether any income so allocated was income held by the trustees in trust for those objects within the meaning of s. 31 of the Trustee Act, 1925, and accordingly the statutory powers of maintenance and accumulation conferred on trustees by that section were during the infancy of any such object exercisable by the trustees in relation to the income allocated to him or her.

Harman, J., said that the trustees desired to avoid distributing income so as to attract surtax. Therefore as regarded the infant beneficiaries their plan was to pay or apply their shares of income to or for the benefit of the infants and then to say that these sums were not needed for the benefit of infants' maintenance, and therefore that in the case of each infant the money was held " for a person " according to the Trustee Act and therefore that the statutory powers enabled each sum to be accumulated with the result that if the infant did not attain twenty-one there would be a reversion of the money.

The adult defendants said that the trustees had no power to act in this way having regard to cl. 7 of the settlement. The direction to " pay or apply " was mandatory and in words which had received statutory sanction from s. 31, sub-s. 1, of the Trustee Act, 1925. There were only two things the trustees could do with income: pay their shares to adults and apply their shares for the benefit of infants. He did not think that the trustees were either paying infants or, by accumulating, applying for their benefit. It was a retention, not an application. The infant beneficiaries appealed.

Sir Andrew Clark, K.C., and *E. I. Goulding* for the appellants. Harman, J., held that an appropriation in favour of an infant of a sum in excess of that required for his maintenance was not an application for his benefit and that accordingly the trustees had no power to make such an appropriation in favour of the infant beneficiaries. The judge felt bound by the decision of Eve, J., in *In re Peel* (1). It is submitted that he was wrong in reaching this conclusion. Two questions arise here: first, had the trustees power to make an appropriation to an infant; secondly, if they had such a power, did s. 31 of the Trustee Act, 1925, apply. Whether s. 31 applies to moneys so appropriated cannot affect the question whether the trustees had power to appropriate the moneys in the first instance. The first question is one of construction. If the judge is right it means that, should all the beneficiaries for the time being in existence be infants, they have only a right to be maintained and there is a resulting trust of the balance of the income for the settlor. Further, should there be one adult beneficiary only in existence and the other beneficiaries be infants, the whole balance of income not required for the infants' maintenance would have to be paid to the adult beneficiary. It is submitted that where a sum is allocated to an infant it is " paid " to him within cl. 7 of

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(1) [1936] Ch. 161.

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the settlement although he cannot personally give a receipt for that sum. Alternatively, it is submitted that if the allocation is not a " payment " it is an application of money for the infant's benefit.

On the question whether this allocation was a " payment " it is necessary to look at the scheme of discretionary trusts in cl. 7. These trusts are intended to be exhaustive. Harman, J., held that income cannot be paid to an infant because he cannot give a receipt. That is putting too narrow an interpretation on the word " payment ". Payment to trustees for an infant is payment to the infant. Nor is it necessary that there should be separate sets of trustees. Payment by trustees to themselves for the benefit of an infant is " payment " to the infant. *In re Banbury* (2) shows that transferring money from one account to another may be a " payment ".

The resolution of the trustees here in each half-year allocating part of the total income to the infant beneficiaries in shares gave them vested interests and it is an effective exercise of the discretionary powers conferred on the trustees by cl. 7 of the settlement. For it is clearly an application for the benefit of each infant, even though he cannot obtain possession of it till he attains twenty-one. Thus it falls exactly within the direction that the trustees should " pay or apply " the income for the " support or benefit " of beneficiaries at such times, in such shares and in such manner as the trustees in their discretion think proper.

Again, the accumulation of the sums allocated to the infants can validly be made under s. 31 of the Trustee Act, 1925, because as a result of that allocation the infants become persons whose vested interests are held in trust for them by trustees within s. 31, sub-s. 1. In *Tench* v. *Cheese* (3) Lord Cranworth saw no bar to saying that accumulation was a mode of applying for the benefit of a person. The sums allocated to the infants would primarily have been for maintenance, but as that was not required why should they not be accumulated? There is a power of accumulation in the settlement, but the time within which it was made exercisable has nearly expired.

Harman, J., however, felt it impossible, on the authority of *In re Peel* (4), to say that this would be an application for the benefit of the infants; but that was an entirely different case. The question of the application of s. 31 is of importance, first, as enabling accumulation to be continued so long as might be necessary, and secondly, as enabling investments to be made under s. 31, sub-s. 2, in those investments authorized by the settlement and not limiting them to what are investments authorized by law for the investment of trust funds. Section 31 is very wide and applies, by sub-s. 3, to contingent interests so that it clearly applies here: *Burrell* v. *Attorney-General* (5).

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(2) Ante, p. 1.

(3) (1855) 6 De G. M. & G. 433, 462.

(4) [1936] Ch. 161.

G. C. Dunbar for the adult beneficiaries. The provision made for the infant beneficiaries is unauthorized and void. The trustees' operations must be brought within what is authorized by the settlement. "Payment" is an operation as a result of which money passes to the recipient as it does in the case of the adult beneficiaries. It must thus be an operation under which a good discharge is obtained for the payment. That would be obtained in the case of payment to an infant by payment into court. To appropriate a sum to meet a legacy to an infant is not to make payment. Payment to an infant is only possible, apart from payment into court, where it is directly provided for and a means of giving a receipt is expressly provided for. If payment to the infants can be made under the settlement it must be effected by payment into court.

If that be the true view here, the court might intervene to say what was for the benefit of the infants or, perhaps, allot the whole income of the settlement to all the beneficiaries in equal shares.

The same order is sought as was made by Harman, J., namely, a dismissal of the appeal with liberty to apply.

[EVERSHED, M.R. Sir Andrew Clark said that the trustees by their resolution exercised a special power of appointment so that each infant could then say he had an interest, but that it was for the trustees to say what has to be done with it until the infant came of age.]

The answer is that the trustees' discretionary power to pay could only be given effect to in the case of an infant by payment into court. *In re Salaman* (6) shows that the setting aside of investments to meet a legacy is not payment of the legacy.

He also referred to Underhill on Trusts (9th ed.), p. 391, and Lewin on Trusts (14th ed.), p. 331. In effect here the trustees have retained the income in question so far as the infants were concerned, and have not paid it out. The only power is to "pay "or apply" and not to appoint. Assuming this argument to be correct, no question of s. 31 of the Trustee Act, 1925, arises.

Hubert Rose for the trustees.

E. I. Goulding replied.

EVERSHED, M.R. [after stating the facts]: There are, I think, two quite separate questions. The first is whether the operation of the trustees fell within the relevant words of cl. 7 of the settlement. Did the operation constitute either a payment to the infants, or an application for their benefit? It is not suggested that it could be an application for their support. Harman, J., was of opinion that it was neither, and that the operation, being outside the ambit of the discretionary trust, was wholly ineffective. He therefore did not have to consider the second question, namely, whether, assuming that it was effective, the trustees were right in their second resolution, which proceeded on the footing that, as the result of what they had done, s. 31 applied to the sums so set aside, and required, in the absence of maintenance demands, the accumulation of the income pursuant to that section.

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(5) [1937] A. C. 286, 291.

(6) [1907] 2 Ch. 46.

This further question emerged during the argument: suppose the right answer to be that the first part of the resolution was a valid exercise of the trustees' powers under cl. 7, but that they were wrong in supposing that s. 31 of the Trustee Act had anything to do with the result: is the proper conclusion that the original allocation stands as either a payment to the infants or an application for their benefit? Or is it that, since the trustees may be taken only to have exercised the discretion on the footing that the result produced would be an accumulation under s. 31, the whole operation ought to be treated as ineffective? The latter conclusion would accord with the result of Harman, J.'s decision.

Before I turn to s. 31, I think it might be convenient if I say a word about the next resolution passed by the trustees in respect of the next half-year's income, namely, that which had accrued to March 31, 1949. The language of the minutes is not quite the same.

[His Lordship referred to the language of the first of the three minutes and, after pointing out a slight difference in the language of the second and third minutes, continued:—] The wording is, of course, different; but for present purposes it does not seem to me that anything turns upon it. In each case there was a resolution wholly to dispose of, in favour of the infants, the sum of cash left over for that disposal.

I turn to the most difficult part of the problem, namely, the effect of s. 31. The argument of Sir Andrew Clark is that as a result of the first part of the resolutions, each infant in each case acquired a vested interest in a specific portion of the income for the particular half-year. Then he claims that the necessary result is to bring the case within s. 31 of the Trustee Act, 1925. The language of s. 31 is by no means easy to follow, nor does it seem to me that the section has been put together in a manner to make the task of apprehending its effect easy. Finally, the variations in language between this section and other sections in the same part of the Act add to the difficulties of the judge who is called upon to pronounce upon the effect of these provisions.

However, we can only do our best. The first sub-section is as follows: "Where any property is held by trustees in trust for "any person for any interest whatsoever, whether vested or "contingent, then, subject to any prior interests or charges "affecting that property", then certain provisions follow, including a provision for accumulation of income not required for actual maintenance. Then by the second sub-section provision is made for the eventual destination of the income so accumulated in the alternative event of the infant in question either attaining or failing to attain majority.

If Sir Andrew's argument were correct, it would follow that property was held by the trustees in trust for each infant for a vested interest under each resolution, with the result that, as stated in the second, the necessity for accumulation arose.

Sir Andrew Clark referred also to sub-s. 3, which concerns contingent interests. So far as relevant, it reads: "This section "applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of property"; and he argued that the class of infant beneficiaries, objects of the discretion, are, cumulatively and singly, persons of whom it may be said that they have a contingent interest in the trust premises. That, of course, would obviously not suffice to bring the section into operation of itself, because the sub-section in terms provides that in the case of a contingent interest its application is limited to cases where the intermediate income is carried by the contingent gift. But Sir Andrew Clark says that, as the discretion is exercised each year, the absence of the qualification required by sub-s. 3 is remedied.

I confess that if the word "sophisticated" be fairly applicable to any part of the argument in this case, it is, to my mind, applicable to this part of the appellants' case, for, ingenious as the argument is, it leaves me unpersuaded of its reality. We are dealing here with a sum of money which has been received by the trustees as income; it has accrued in their hands; they have imposed upon them the obligation under cl. 7 of the settlement to distribute it; and, when they exercise that discretion, the objects, of course, are entitled to receive the sums which the trustees decide to pay them. It seems to me inaccurate to describe the result of the exercise of this discretion as giving to the infants the right to say that they are persons who have acquired a vested interest in shares of income flowing from the corpus of the trust. That part of the argument fails to persuade me. I do not think that the case is thus brought within sub-s. 1 of s. 31, or indeed within s. 31 at all. It follows, in my judgment, that, assuming the resolution to be effective according to its terms, the conclusion recorded in the minutes that s. 31 thereupon operates is in my view erroneous.

I have perhaps gone too quickly, because if the first question is answered as Harman, J., answered it, the problem as to s. 31 does not arise. The question is whether the trustees made either a payment to each infant or an application for his or her benefit. Harman, J., gave a negative answer to both questions. He said that, according to the ordinary sense of our language, a resolution that a large sum of money should belong to infants, or be divided between them, followed by the method which had to be adopted because some of these infants were only two or three years of age and could not possibly give any kind of receipt, was not a payment in any ordinary sense of the word. Mr. Dunbar analysed for us the characteristics which, according to his argument, were necessary if it were to be said of an operation, that it amounted to a payment. For example, it must be postulated that the money paid passes altogether from the hands of the payer to the hands of the payee, and that all property in it goes to the payee; secondly there must be something in the nature of a discharge to the payer. I say "something in the nature of a "discharge" for Mr. Dunbar does not contend that there cannot be a payment without a receipt signed by a person of full years. Still, there must be something, he says, which constitutes a discharge, though it is not clear that it need necessarily be effected by any activity on the part of the payee. For myself, I incline to the same view upon this matter as Harman, J. I am not satisfied that this can fairly be described as a payment to any of these infants, or that the trustees ever so regarded or intended it. But I need not express a final view, because, whether or not it be a payment, I have come to the conclusion that these operations did amount to applications of these moneys for the benefit of these infants.

Upon that matter, Harman, J., after referring to Lord Cranworth's observations in *Tench* v. *Cheese* (7), which support the view that in certain circumstances an accumulation of money may have been properly described as an application for the benefit of the person on whose behalf the accumulation takes place, then felt constrained, as I read the note of his judgment, by the decision of Eve, J., in *In re Peel* (8), to hold that in this case what had been done could not be described as an application for the benefit of the infants. I think that he was influenced in arriving at that conclusion by supposing that the accumulation was the essential feature of these appropriations, so that what the trustees were in effect doing was no more than retaining the funds in certain proportions, and accumulating them

(7) 6 De G. M. & G. 433.

(8) [1936] Ch. 161.

in circumstances which left it still doubtful who would be the persons who would ultimately be entitled to take the money. I have already indicated, and it is for this reason that I discussed that matter first, that in my view s. 31 of the Trustee Act has no application to this case; and that, I think, is material in considering whether the allocation made by the trustees—I use for the moment a neutral word—could be described as an application for the infants' benefit. I think for myself that *In re Peel* (8) is in a vital respect wholly different from the present case. Sir Andrew Clark invited us, if necessary, to say that it was wrongly decided; and it would, of course, be open to this court, though not to Harman, J., so to hold. But I do not think that there is any necessity, or indeed ground, for holding that *In re Peel* (8) was on its facts wrongly decided; for the essential feature in that case to my mind is that the sum in question was a fund which had already been settled, in any event, on the infant in respect of whom discretion was being exercised.

The headnote to *In re Peel* (8) states: "On the marriage of "O. P. and V. J., H. P., the father of the husband, executed a ' deed whereby he covenanted with trustees that if the husband "should die in his lifetime he would pay them an annuity of "1,000*l.* in trust for V. J., so long as she should remain the "widow of O. P., and thereafter upon trust to pay or apply the "same for or towards the maintenance, education or benefit of "any of the infant children of the marriage as the trustees might "think fit". The husband had died, and the wife had, in fact, I think, ceased to be the widow of the husband, but there was one issue of the marriage, namely, the infant defendant in the action. In those circumstances, the covenant provided that the 1,000*l.* a year was to be applied for the maintenance, education or benefit of that child in any event. That being so, the effect of what the trustees did or sought to do in not paying it over to the child's mother, but accumulating it, was in truth mere retention. The essential difference in the case seems to be that in the present case it cannot be predicated of the income, or any part of it, that it is in any event given to any of these infants.

The first effect of the resolution of the trustees was to give to each infant a specific portion of the income; and without that resolution the infant was entitled to no part of it at all. That seems to me to provide a very marked difference enabling, and indeed, requiring, the court to say that what was here done cannot be regarded as mere retention, as was the operation impugned in *In re Peel* (9). If *In re Peel* (9) is out of the way, the question comes down to this, as a matter of common sense, and the ordinary use of language: is a provision, to take John

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(9) [1936] Ch. 161.

Vestey's case, that 12,000*l.* shall belong to John Vestey an application for his benefit? If the question be fairly posed in that way, it seems to me impossible to give any but an affirmative answer. It is surely for his benefit that the trustees should resolve that the 12,000*l.*, which it was in their discretion to apply to any one of a considerable number of persons, should belong to John Vestey. Therefore, with all respect to Harman, J., unfettered as I think by *In re Peel* (9), I come to the conclusion that the first part of this resolution did amount to an application for the benefit of the infants.

I have already indicated my view that, treating the resolutions as I think they should be, as amounting to dispositions of the trust fund in such a way as to appropriate out and out the particular shares to the particular infants, s. 31 does not come into the picture at all. I think that the effect of each of the resolutions was so to exercise the discretion that each one of these infants became absolutely entitled to a particular sum of money so appropriated, and s. 31 being inapplicable, those appropriated sums have now become part of the infants' respective estates.

That is so (and I come finally to the last point) unless the view which I have taken as to the non-application of s. 31 makes it necessary for the court to hold that there has been no effective exercise of the discretion on the ground that the trustees intended to undertake this operation on the footing that they were producing a specific result, and that, if they produced a wholly different result, it would not be right to say that they had exercised their discretion. I do not find that problem easy any more than any of the other problems in this case, and the way in which the matter was put in the affidavit of one of the trustees, has not, perhaps, made it any easier. I do not say that out of any discourtesy to him; he was stating what in truth happened, but regard must be had to the resolutions as a whole.

I am persuaded that Sir Andrew Clark is right when he says that the essential thing which the trustees were doing was to make a distribution intended to effect a final decision how these funds should go between the infant defendants. They were of opinion that the result would be, as the result of the ingenious encroachment upon the matter by s. 31 of the Trustee Act, that the sums prima facie vested in this way then became divested again and subject to the trusts imposed by the section; and therefore they later recorded, in order that those responsible should know what they had to do and how to do it, that they must deal with these sums as being subject to the provisions of the various sub-sections of s. 31. They were therefore only setting forth the mechanical results which had to be applied. I do not think that it can or ought to be said that if, as I hold, the trustees wrongly thought that s. 31 would operate, then a result is produced substantially or essentially different from that which was intended. In other words, I think that the discretion was validly exercised by applying—to take the first resolution—42,000*l.* for the benefit of six infants by appropriating 12,000*l.* to John absolutely and 6,000*l.* to each of the other infants absolutely as their respective absolute property. When that has been done, which I hold to be an application for their benefit, I think that that is the end of the matter.

Various examples were given of what might happen if the trustees had exercised the discretion in a somewhat different way, or, indeed, if the settlement had been different and had provided, not for the exercise of a discretion, but for a power of appointment. I do not propose to embark upon further discussion of those hypotheses. The settlement did not provide for a special power of appointment, but for the exercise of a discretion; and we must approach it on that footing. The language at the end of cl. 7 of the settlement is very wide, and it may or may not enable the trustees to apply sums for the benefit of the infants by creating, so to speak, sub-trusts of a very elaborate character. That is a matter, again, on which it is not, I think, for the court now to venture any views, still less to give any advice. The trustees will be well able to obtain any advice they require. If questions arise whether they have done something effective, no doubt on a future occasion some other judge will have the mental exercise of determining whether that has worked out quite as intended. I propose to confine myself to the particular problems now presented; and for the reasons which I have stated I would reverse the conclusion of the judge, and hold that the particular resolutions which I have mentioned operated as effective exercises of the discretion conferred by cl. 7 in that they operated to transfer the specified sums of money to the respective infants as their absolute property respectively; and in my judgment the view that s. 31 then proceeded to operate upon the sums so appropriated was erroneous, so that the part of the resolution recording the necessity for accumulation should, in my opinion, be disregarded. I have found the case difficult; but, with all due diffidence, having regard to the opposite view of the judge, that is my own conclusion.

ASQUITH, L.J. I respectfully agree with both the conclusions and the reasoning of my Lord.

JENKINS, L.J. I agree. As we are differing from the judge, I will add a few observations.

As regards the first question, namely, whether these allocations in favour of infant beneficiaries were within the power of the trustees under cl. 7 of the settlement, I entirely agree with what my Lord has said to the effect that they were, at all events, applications of income for the benefit of the infants in whose favour they were made. Apart from any such allocation, no infant had any right to claim any part of the income, but was merely eligible to participate in any authorized distribution that the trustees might from time to time determine to make. An allocation of the kind here carried out would have the effect of making a certain provision for the infant concerned, and I cannot doubt but that the making of such a provision would be the conferring of a benefit on the infant, so that the application of income for that purpose would be an application for the infant's benefit. I think that, in expressing the view in relation to this question that accumulation was not application for the benefit of an infant, the judge overlooked the important change of title in favour of the infant which such an allocation would bring about.

It is therefore unnecessary to decide whether these allocations might not also be justified on the ground that they were, within the meaning of cl. 7, payments to the infants. I agree that in a strict and literal sense there can be no payment unless there is not only a hand to pay but also a hand to receive, and a recipient capable of giving a receipt. Thus, in the strict and literal sense, there can be no payment to an infant; but words such as these must be construed in their context; and, inasmuch as this is a discretionary trust in favour of a class of persons which, ex necessitate, includes infant beneficiaries, I would be disposed, if it were necessary to do so, to put a wider interpretation on the expression " pay ", and to include in it the transaction consisting of the allocation of a share of any year's income to an infant absolutely, although, owing to his infancy, no receipt is possible. The different meanings that may be attached to expressions connoting " payment " according to the context in which they appear are illustrated, on the one hand, by *In re Banbury* (10), where a provision in the will under which the trustees were to set aside an annual sum of 15,000*l.* free of tax was held by Danckwerts, J., to be a provision for the payment of a stated amount free of income tax within the meaning of s. 25 of the Finance Act, 1941, though, in truth, the transaction was not in the strict sense of the word a " payment ", but merely the transfer of an amount from one account to another in the hands of the same trustees. On the other hand, in *In re Salaman* (11), it was held that the setting aside of investments to meet a legacy did not amount to payment of such legacy. Those cases illustrate the proposition that the meaning of the word " pay ", like any other word, must depend on the context in which it is used; and

(10) Ante p. 1.

(11) [1907] 2 Ch. 46.

therefore, speaking for myself, were it necessary to our decision to do so, I would be disposed to hold that the transactions here under consideration could be warranted as payments within the meaning of cl. 7. At all events, I entirely agree with my Lord that they were applications for the benefit of the infants. It therefore follows that these transactions had the effect of entitling the infants concerned absolutely to the amounts allocated to them respectively.

As to the second point, namely, the question whether s. 31 of the Trustee Act applies, it is to be observed that the section, as appears from the opening words of sub-s. 1, is directed to the case where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent. Where that condition is satisfied, then, subject to any prior interests or charges affecting the property during the infancy of the person, the income of that property is applicable at the discretion of the trustees for the maintenance, education or benefit of the infant. The vital provision for this purpose is not merely that income not so applied is to be accumulated under sub-s. 2, but that, under proviso (ii) to that sub-section, on the death of the infant under the age of twenty-one years the unapplied accumulations are to follow the destination of the property from which they arose. Thus, in the present case, if the section is applicable, the result would be that should any of these infants die under twenty-one, then the unapplied fund representing the income allocated to him or her on each occasion, plus the accumulations of it, would revert to the funds under the settlement, and follow the destination of the corpus of those funds.

Does s. 31 apply then in the circumstances of the present case to a sum of income allocated by the trustees to an infant? For that to be the case it must be found that there is property held by trustees in trust for the infant for some interest or other, and that the amount received is income of that property. So far as corpus is concerned, the infants here have, as I understand it, contingent reversionary interests, those interests being contingent upon their surviving the end of the specified period, when there will be, to put it shortly, a trust of the corpus for the issue of Sir Edmund then living per stirpes. But sums received by the infants under the exercise of the trustees' discretion cannot, in my judgment, be regarded as income of those reversionary interests. The reversionary interests in corpus do not carry the intermediate income at all, and are thus excluded from s. 31 by sub-s. 3. The whole of the intermediate income is exhausted by the discretionary trust, and the trust for accumulation where applicable. Such sums as may be received by an infant by an exercise of the trustees' discretion during the continuance of the specified period bear no relation whatever to that infant's contingent reversionary interest, and are taken by the infant under a different title, i.e., as an object of the discretionary trust, and not by virtue of his contingent interest in corpus.

Next, as to income, can it be said that the infant has an interest in the property by reason of something analogous to a life or other limited interest in income? In my judgment, on the language of this trust, that cannot be maintained. It may very well be that if there were a trust in the form that the trustees should hold income for a period in trust for a number of persons in such shares as the trustees might determine, the shares from time to time allocated to an infant member of the class of beneficiaries should be regarded as a life interest in income, albeit of varying amount, with the result that the sums from time to time allocated by the trustees to the infant's account would be subject to the provisions of s. 31; but in this case it is plain that no infant has, under the terms of the trust, any share or interest whatever in the income unless and until the trustees, in the exercise of their discretion, decide to pay or apply to or for the support or benefit of that infant some part of the income from time to time in hand. When the trustees decide to apply some part of the income in hand for the benefit of an infant, or to pay it to an infant, if the wider interpretation of that expression to which I have referred is admissible, then it seems to me that the infant becomes absolutely entitled to the amount in question by a new title consisting of the exercise of the trustees' discretion in the infant's favour, the infant having previously been merely a person eligible to benefit under the discretion. The infant, becoming entitled to the sum of income allocated to him or her under the trustees' discretion, must in my judgment become, in accordance with the terms of the allocation, absolutely entitled to that fund. So far as I can see, the fact that in origin it was income of the fund applicable at the discretion of the trustees for a class including the infant concerned is, for the purposes of s. 31, irrelevant. The only property in such circumstances held in trust for the infant for the purposes of s. 31 is, in my judgment, the sum of income allocated on the particular occasion.

The result may, no doubt, be that any income produced by the investment of that sum is income of property held in trust for the infant which will, therefore, become subject to s. 31; but in my judgment there is no room in such circumstances for the application of s. 31 on the footing that under the settlement the sum of income in question is itself income of property held in trust for the infant. The form of cl. 7 of the settlement, and the nature of the allocations here made, are wholly inconsistent with that view. The sums allocated become the absolute property of the infant, with the necessary consequence that any application of s. 31 in the sense contended for is impossible.

I also agree with my Lord on the third question debated, and the result, in my judgment, is that the allocations made are valid and must stand as absolute allocations to the infants of the amounts in question.

The appeal was therefore allowed to the extent that the allocations to the infants were held to be valid and effective exercises by the trustees of their discretion under cl. 7 of the settlement. But it was held that s. 31 of the Trustee Act, 1925, did not apply to the sums allocated.

Appeal allowed.

Solicitors for all parties: *Chas. H. Wright & Brown.*

H. C. G.

In re PRATT; *Ex parte* INLAND REVENUE COMMISSIONERS *v.* PHILLIPS.

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Oct. 20, 23.
Evershed, M.R., and Asquith and Jenkins, L.JJ.

Bankruptcy—Preferential debts—Income tax and sur-tax—Excess profits tax—"Assessed . . . up to April 5 *next before the date of the "receiving order"—Construction—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*).

The priority of the Crown under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, in respect of "all assessed taxes . . . "assessed on the bankrupt up to April 5 next before the date of "the receiving order and not exceeding in the whole one year's assessment" is not limited to taxes assessed in respect of the last fiscal year immediately preceding the receiving order: the Crown is entitled to select any fiscal year before the date of the receiving order and to claim priority for taxes assessed in respect of that year.

Gowers v. *Walker* [1930] 1 Ch. 262, and *In re Campbell* (1923) 10 Tax Cas. 585, considered.

Decision of the Divisional Court [1950] W. N. 414, reversed.

APPEAL from the Divisional Court (1) (Romer and Harman, JJ.).

On April 23, 1948, a receiving order was made against one L. H. Pratt, and he was adjudicated bankrupt on May 3, 1948. At the date of the receiving order no assessments had been made

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(1) [1950] W. N. 414.

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on him for a considerable period, but in July, 1949, the following assessments were made, for which the Crown lodged proofs, namely:—

Excess profits tax: chargeable accounting period ended December 31, 1944	5,000*l*. 0*s*. 0*d*.
Excess profits tax: chargeable accounting period ended December 31, 1945	222*l*. 0*s*. 0*d*.
Sur-tax, 1943–1944	139*l*. 15*s*. 9*d*.
Sur-tax, 1944–1945	792*l*. 4*s*. 0*d*.
Sur-tax, 1944–1945 (additional assessment, reduced from 712*l*. 3*s*. 0*d*.) .	704*l*. 9*s*. 0*d*.
Income Tax, Sched. D: 1943–1944 .	291*l*. 10*s*. 0*d*.
Income Tax, Sched. D: 1944–1945 .	1,156*l*. 0*s*. 0*d*.

By letter dated September 7, 1949, the Crown claimed 7,652*l*. 13*s*. 0*d*. for payment preferentially, being in the whole, it was alleged, an amount not exceeding one year's assessed taxation. That amount was made up as follows:—

Excess profits tax: chargeable accounting period ended December 31, 1944	5,000*l*. 0*s*. 0*d*.
Sur-tax, 1944–1945	1,496*l*. 13*s*. 0*d*.
Income Tax, Sched. D: 1944–1945 .	1,156*l*. 0*s*. 0*d*.

The sum of 653*l*. 5*s*. 9*d*., being the balance of the amounts for which the Crown proved, was claimed non-preferentially to rank with the other unsecured creditors.

The trustee admitted the Crown's claim to rank preferentially under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914 (2), in respect of the sur-tax and income tax. With regard to the excess profits tax, he stated in a letter dated October 13, 1949, that the Crown's preferential claim in respect of income tax, sur-tax and excess profits tax must be limited to precisely the same period in each case, and that he would therefore consider preferentially approximately three-quarters of the 5,000*l.* claimed for excess profits tax, i.e., the portion of it which referred to the same period as the other preferential claims.

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(2) Bankruptcy Act, 1914, s. 33, sub-s. 1: "In the distribution of "the property of a bankrupt there "shall be paid in priority to all "other debts—(*a*) All parochial or "other local rates due from the "bankrupt at the date of the receiving order, and having become due "and payable within twelve months "next before that time, and all "assessed taxes, land tax, property "or income tax, assessed on the "bankrupt up to the fifth day of "April next before the date of the "receiving order, and not exceeding "in the whole one year's assessment; "(*b*) All wages or salary of any clerk "or servant in respect of services "rendered to the bankrupt during "four months before the date of "the receiving order, not exceeding "fifty pounds; (*c*) All wages of any "labourer or workman not exceeding "twenty-five pounds, whether payable for time or for piece work, in "respect of services rendered to the "bankrupt during two months before "the date of the receiving order: "Provided that, where any labourer "in husbandry has entered into a "contract for the payment of a portion of his wages in a lump sum "at the end of the year of hiring, "this priority under this section shall "extend to the whole of such sum, "or a part thereof, as the court may "decide to be due under the contract, proportionate to the time of "service up to the date of the "receiving order; . . .".

By a notice of February 23, 1950, the trustee rejected the claim for 5,000*l.* on the ground that preferential claims had been made and conceded in respect of different periods. The commissioners applied to the county court to reverse that decision. In support of the application they filed an affidavit by an assistant solicitor of Inland Revenue stating that excess profits tax was not computed on the fiscal year beginning on April 6 one year and ending on April 5 the following year, but that it was chargeable upon a " chargeable accounting period ", which was normally a period of twelve months in respect of which accounts were made up, and that it was unrelated to the fiscal year.

Excess profits tax was first charged by Pt. III of the Finance (No. 2) Act, 1939. The chargeable accounting period could end on April 5 of any year or it might end on some other date. By s. 21, sub-s. 2, of the Act of 1939 it was provided that Sch. V to the Finance Act, 1937, should have effect with respect to excess profits tax as it did with respect to national defence contribution. Para. 5 of Pt. III of Sch. V to the Act of 1937 provides, so far as material, that in a bankruptcy the same priority shall be given to national defence contribution as was, by the enactments relating to bankruptcy, required to be given to income tax.

Judge Tudor Rees, sitting at Brentford County Court, refused to reverse the decision of the trustee in bankruptcy, and rejected the claim of the Crown to rank as a preferential creditor in respect of the sum of 5,000*l.* excess profits tax for the chargeable accounting period ending December 31, 1944.

The Crown appealed to the Divisional Court, where Romer and Harman, JJ., held, on the true construction of s. 33, sub-s. 1 (*a*), that the only right of priority given to the Crown was in respect of the last appropriate fiscal year immediately before the receiving order. They gave judgment on that footing. The Crown now appealed from that decision. It was conceded by the trustee in bankruptcy for the purpose of the appeal that, where different taxes were assessed in regard to different fiscal years, the Crown was not bound to bring all the taxes by apportionment or otherwise into a single fiscal year.

Sir Andrew Clark, K.C., and *J. H. Stamp* for the Crown. The first submission on behalf of the Crown is that s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, does not confer a right of

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priority on the Crown in respect of assessed taxes. On the contrary, the section cuts down the Crown's rights at common law. Apart from the section, the Crown has by virtue of the prerogative a right to be paid assessed taxes in priority to all other creditors: *New South Wales Taxation Commissioners* v. *Palmer* (3). Accordingly, the sub-section should be construed in case of doubt in favour of the Crown.

The Crown's absolute right of priority was first cut down by s. 166 of the Bankruptcy Act, 1849. Section 32 of the Bankruptcy Act, 1869, replacing s. 166, is in substantially the same form as s. 33 of the Act of 1914, and contained the same distinction between rates and assessed taxes. It was not until the coming into force of the Bankruptcy Act, 1883, s. 150, that the Crown became bound by the whole of the provisions of the Bankruptcy Acts. Section 32 of the Act of 1869 was re-enacted as s. 40 of the Bankruptcy Act, 1883, and subsequently as s. 33 of the Act of 1914. Excess profits tax is by the combined effect of s. 24 of, and Part I of Sch. V to, the Finance Act, 1937, and s. 21, sub-s. 2, of the Finance Act, 1939, given the same priority in bankruptcy as income tax.

On the construction of s. 33 it is submitted: (1.) that the words " all assessed taxes . . . assessed on the bankrupt up to " April 5 " next before the date of the receiving order " are a statement of the common-law right of priority of the Crown. The following words " and not exceeding in the whole one year's assessment " cut down that priority; (2.) the construction put on the sub-section by the Divisional Court gives no effect to these later words; nor does it give any effect to the words " all assessed taxes "; those words must mean all taxes assessed in respect of any period up to the date of the receiving order; (3.) the limitation on the priority given to rates to those due within twelve months next before the receiving order cannot be imported into the subsequent provision as to assessed taxes. The construction placed by the Divisional Court on s. 33 does violence to the language. It involves reading the section as referring to taxes assessed " in respect of the financial year ending on April " 5 " or " in respect of the accounting period next before the " receiving order ".

This point has never been expressly decided. The dicta of Eve, J., in *Gowers* v. *Walker* (4), and of Romer, J., in *In re Campbell* (5), show that both those judges were of opinion that the Crown could choose the year for which it claimed priority. [They referred to *In re Cockell* (6); *Attorney-General* v. *Irish Steel, Ld.* (7).] The practice of the past forty years has been

(3) [1907] A. C. 179.
(4) [1930] 1 Ch. 262, 267.
(5) (1923) 10 Tax Cas. 585, 588.
(6) (1932) 16 Tax Cas. 681.
(7) [1948] Ir. Tax Cas. No. 67.

to allow the Crown to choose the year for which priority is claimed.

J. H. Stamp following. There is good reason why s. 33, sub-s. 1, cuts down the right of priority in respect of rates to twelve months before the receiving order and of wages and salaries to four months before that order, and has placed no similar restriction on the right of the Crown. The liabilities which are limited to the immediate preceding period are debts which accrue rateably over a period of time. In the case of income tax it is frequently impossible for an assessment to be made for an appreciable time. When a trader is getting into financial difficulties, he is generally unwilling to allow any assessment to be made, and the Crown does not know for a considerable time after the tax falls due what the amount of it will be.

Salmon, K.C., and *C. H. Duveen* for the trustee in bankruptcy. Section 33 is not easy to construe, but its language is far more apt to express the meaning placed on it by the Divisional Court than that for which the Crown contends. The meaning for which the trustee contends is in accordance with reason and justice: the words "assessed up to April 5" naturally mean the assessment for the year ending April 5 before the receiving order. The words "not exceeding one year's assessment" are not mere surplusage. The assessment might cover a period of fifteen months. Eve, J., held in *Gowers* v. *Walker* (8) that the words "assessed up to April 5" meant "assessed for a period "ending April 5", the words being used in the accountancy sense. If s. 33, sub-s. 1, is read as a whole it appears that the priorities given are all priorities in respect of debts accruing due for a period immediately before the date of the receiving order. To hold that the priority of the Crown is not similarly limited would mean that the Crown by delaying the enforcement of its claim for income tax could enable the bankrupt to obtain additional credit to the prejudice of the other creditors. The priority of the Crown should be brought into line with the other priorities. If the Crown is allowed to go back any number of years, it may choose a year when a large sum is owing for tax, with the result that nothing may be left for the other creditors. It is submitted that the words of the sub-section are apt to give effect to the trustee's contention and that this construction leads to more equitable results.

This point has never been taken before. The facts that the Crown has adopted a practice for many years and that it has never been challenged do not mean that it is right. If there is any doubt as to the meaning of the sub-section, it should be construed against the Crown, since the result of allowing the priority on the Crown in respect of assessed taxes. On the contrary, the section cuts down the Crown's rights at common law. Apart from the section, the Crown has by virtue of the prerogative a right to be paid assessed taxes in priority to all other creditors: *New South Wales Taxation Commissioners* v. *Palmer* (3). Accordingly, the sub-section should be construed in case of doubt in favour of the Crown.

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(8) [1930] 1 Ch. 262.

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(7) [1948] Ir. Tax Cas. No. 67.

J. H. Stamp following. There is good reason why s. 33, sub-s. 1, cuts down the right of priority in respect of rates to twelve months before the receiving order and of wages and salaries to four months before that order, and has placed no similar restriction on the right of the Crown. The liabilities which are limited to the immediate preceding period are debts which accrue rateably over a period of time. In the case of income tax it is frequently impossible for an assessment to be made for an appreciable time. When a trader is getting into financial difficulties, he is generally unwilling to allow any assessment to be made, and the Crown does not know for a considerable time after the tax falls due what the amount of it will be.

Salmon, K.C., and *C. H. Duveen* for the trustee in bankruptcy. Section 33 is not easy to construe, but its language is far more apt to express the meaning placed on it by the Divisional Court than that for which the Crown contends. The meaning for which the trustee contends is in accordance with reason and justice: the words "assessed up to April 5" naturally mean the assessment for the year ending April 5 before the receiving order. The words "not exceeding one year's assessment" are not mere surplusage. The assessment might cover a period of fifteen months. Eve, J., held in *Gowers* v. *Walker* (8) that the words "assessed up to April 5" meant "assessed for a period "ending April 5", the words being used in the accountancy sense. If s. 33, sub-s. 1, is read as a whole it appears that the priorities given are all priorities in respect of debts accruing due for a period immediately before the date of the receiving order. To hold that the priority of the Crown is not similarly limited would mean that the Crown by delaying the enforcement of its claim for income tax could enable the bankrupt to obtain additional credit to the prejudice of the other creditors. The priority of the Crown should be brought into line with the other priorities. If the Crown is allowed to go back any number of years, it may choose a year when a large sum is owing for tax, with the result that nothing may be left for the other creditors. It is submitted that the words of the sub-section are apt to give effect to the trustee's contention and that this construction leads to more equitable results.

This point has never been taken before. The facts that the Crown has adopted a practice for many years and that it has never been challenged do not mean that it is right. If there is any doubt as to the meaning of the sub-section, it should be construed against the Crown, since the result of allowing the

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(8) [1930] 1 Ch. 262.

Crown to choose priority for any year's taxes may have unfortunate and capricious results. If the Crown allows a taxpayer to fall into arrears with his taxes the Crown should bear the resulting loss.

EVERSHED, M.R. The question here raised is whether the words of s. 33, sub-s. 1 (*a*) of the Bankruptcy Act, 1914, entitle the Crown to claim priority in regard to unpaid tax assessed, not in respect of the fiscal year immediately before the receiving order, but in respect of any earlier year. In a reserved judgment Romer and Harman, JJ., came to the conclusion in favour of the trustee in bankruptcy that, on the true construction of that paragraph, the Crown's right was limited to the tax assessed in respect only of the last fiscal year before the bankruptcy; and they held that the Crown could not claim priority in regard to tax assessed in respect of an earlier year, the assessment for the earlier year being, as may be regarded as natural in the circumstances, for a much larger sum.

As that was a reserved judgment, I had considered whether it would not be proper that this court should also reserve its judgment; but, having reached a clear conclusion upon what is after all a short point of construction of a few words in the statute, I feel that I can without disrespect to the judges below deliver my judgment now, though I have reached a different conclusion.

[His Lordship stated the facts and continued:—] In this court, and in the court below, there has been no question about the propriety of the Crown's claim under the paragraph to priority in respect of the sums assessed for surtax and income tax for the latter of the two fiscal years, although, as will be observed, that year was not in fact the last income tax year before the receiving order. As regards excess profits tax the figures worked out differently, for of the two years the tax due is far larger in the earlier. The assessment is for 5,000*l.* for that year, whereas for the year ended December 31, 1945, it is 222*l.*

The question in the appeal is whether the Crown can claim priority in respect of the 5,000*l.* excess profits tax assessed for the year ending December 31, 1944. When the matter first came before the county court, and also when it came before the Divisional Court, the question at issue was whether, having regard to the final words of the paragraph, a claim could be made in respect of that amount of excess profits tax though the tax claimed was in respect of a different year from that in reference to which sur-tax and income tax were claimed. It was suggested that, if for income tax and sur-tax purposes the fiscal year ending April 5, 1945, were taken, then all that the Crown could claim in priority by way of excess profits tax would be a proportion for the same fiscal year of the excess profits tax for the calendar year ended December 31, 1944. That argument has not been put to this court at all. It is conceded for the purposes of this appeal (though I am not to be taken as hinting that the concession is not properly made) that, where there are taxes differing in the respect that they are assessed in regard to different fiscal years, the Crown is not bound to squeeze all the taxes, by apportionments where necessary, into a single fiscal year. When the matter came before the Divisional Court the judges drew attention to the language of the paragraph and suggested that, on the true view of it, the only right to priority conferred upon the Crown in respect of any assessed taxes was in respect of the last appropriate fiscal year immediately before the receiving order, a point which had not been taken either in the county court or by counsel in the Divisional Court. The matter was debated, and the judges maintained the view which they had earlier indicated, and expressed it in their judgment.

The point being taken in that way and neither side having come prepared to argue it, there was no such investigation (as we have had) of the earlier history of this particular piece of legislation; and that, I think, had a very important bearing on the result. For my part, I agree with the argument of counsel for the trustee in bankruptcy that, whichever be the right construction of this paragraph, the language selected is not the happiest which could have been chosen. That may have to do with the history of the paragraph to which I shall have to refer later. I feel no doubt, having carefully read the judgments given in the court below, that the judges were influenced by the consideration that it appeared to them that, as a matter of policy and reading the whole section and not merely para. (*a*) of sub-s. 1, it was designed to give priority only to claims which, in the nature of events, the claimants could not have got in by ordinary means before the debtor became overwhelmed.

Pursuing that a stage further, Mr. Salmon urged that if the Crown's right is upheld to select the most fruitful of the tax years preceding the receiving order, then it will remove from the general pool for distribution among the whole body of creditors an unfairly large share of the bankrupt's assets. Romer and Harman, JJ., approached the section in the light of considerations of that kind, and, noting, as is natural enough, the imperfections of language, felt themselves constrained, if they could, to arrive at a conclusion which was in keeping with the scheme which they envisaged and which they felt would do most justice to all the various creditors concerned.

This court has had the advantage of an investigation of the earlier history of this legislation. That has made it plain beyond doubt that until the statutory and limited priority in respect of taxes was first introduced just over a century ago, the Crown,

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in right of the royal prerogative, was entitled to priority in respect of all assessed taxes: so that the statutory provisions now found in s. 33, having their remotest ancestry in s. 166 of the Act of 1849, operated as a limitation upon the Crown's prerogative right, a limitation to be observed in the final words, "not exceeding "in the whole one year's assessment".

Sir Andrew Clark was, therefore, fully justified in urging us to approach this problem of construction on the footing that, since the common-law right was being cut down, it must not be treated as cut down more than was required by the language used. I approach the matter from a somewhat different standpoint from that taken by the Divisional Court: I think that the problems of construction, which are certainly not free from difficulty, should be looked upon bearing in mind always that this paragraph has the effect quoad the Crown of limiting what would otherwise be the much wider right of the Crown.

So far as the pre-existing prerogative right is concerned, it is, I think, only necessary to refer to the statement to that effect in the judgment of the Privy Council delivered by Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer* (9).

One further general observation by way of preface: true, only during the last generation or so has the size of the income tax and the general burden of taxation become such as to make the particular problem in such a case as the present of great significance as between the Crown on the one hand and the rest of the creditors on the other. Still, we have been told that it has always been the view of those responsible for the collection of these taxes that the priority given was not limited to the last fiscal year, but gave a right to the Crown to select the most favourable year available. It does not, of course, follow that because that view has been taken and accepted for many years we must give to the paragraph a construction in conformity with that opinion. But there has also been some expression of judicial opinion which is to the same effect. The point has never come for direct decision before the court until the present case, in the sense that it never seems in any of the cases referred to to have been argued. But there has been a number of cases in which, had the point been thought of, it would inevitably have been argued.

Most often alluded to is *Gowers* v. *Walker* (10), which came before Eve, J. There, as here, apparently no assessments had been made on the bankrupt for income tax for a number of years before the receiving order. After the receiving order, assessments were made covering the five previous years. The question which came before the judge was whether the Crown was entitled to

(9) [1907] A. C. 179.

(10) [1930] 1 Ch. 262.

priority under the paragraph in respect of the second of those five years, that is, four years before the receiving order. The argument against the Crown's right was of a different character from that now put forward: it was suggested that the words "assessed "on the bankrupt up to the 5th day of April next before the date "of the receiving order" meant that the date of the assessment must precede April 5 next before the receiving order. Since in Eve, J.'s, case there had been no relevant assessment at all before the receiving order itself, it followed, if that argument were right, that no priority could be claimed for any of the assessments.

The judge rejected that contention, holding that the words "up to" were not synonymous with "before" but were used in the sense in which those words are used in accountancy matters, so that the formula "assessed on the bankrupt up to "the 5th day of April next before the date of the receiving "order" meant "assessed in respect of the period up to "April 5 next before the receiving order". Having reached that conclusion, the judge answered in the affirmative the particular question raised, and, of course, in so doing, incidentally answered the present question; for, as I have said, the year selected was not the last of the five years before the receiving order or before that April 5 which came immediately before the receiving order. It is quite true that the point was not argued. But the judge in the course of his judgment said (11): "The "priority is given in the case of rates only to so much as "remains unpaid, on the date fixed by sub-s. 5, of rates which "become due and payable within twelve months next before that "date and in the case of income tax to not more than one year's "assessment of the tax assessed on the company up to the end "of the financial year next before that date".

That statement and that conclusion have been treated as determining this particular matter by, for example, Clauson, J., in *In re Cockell* (12), and by the Supreme Court in Eire in the recent case of *Attorney-General* v. *Irish Steel, Ld.* (13).

It is said that, in so far as that statement by Eve, J., has been treated as authoritative, it should now be reviewed. It was not based on argument and was made, so Mr. Salmon says, per incuriam.

In *In re Campbell* (14) the question was whether an executor could exercise a right of retainer against the Crown. It is apparent from the facts and figures that it was a material consideration, assuming that such an exercise were permissible, in respect of what particular unpaid tax it would be exercised, because the Crown would naturally wish, when the retainer had been exhausted, to claim priority in respect of the most fruitful of the assessments remaining undischarged. Again, as in *Gowers* v. *Walker* (15), the point was there and was a material point to be argued if it had been thought of. Counsel appearing before Romer, J., were of experience, Mr. Farwell and Mr. Sheldon; yet there is no indication that this particular point was debated.

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(11) [1930] 1 Ch. 262, 267.
(12) (1932) 16 Tax Cas. 681, 687.
(13) [1948] Ir. Tax Cas. No. 67.
(14) (1923) 10 Tax Cas. 585.

Nevertheless, Romer, J., clearly expressed his view of the construction of the paragraph, for he said (16): " it appears that " under s. 33 of the Bankruptcy Act, 1914, where there is an " insolvent estate being administered by the court the Commissioners of Inland Revenue are entitled to claim priority in " respect of income tax, which would include super-tax, in " respect of any one year ending on April 5, before the death of " the testator ". At the end of the judgment, there was some debate about the form of order, and the judge, in the course of that debate, again alluded to that view of the construction of the section. It is fair again to observe that the point had not, so far as one can see, been raised before him. That judicial opinion, obiter though it may be, cannot be ignored, being in line with what we are told has been the regular practice for a great many years. At the least, this unanimity supports the view that intelligent men, applying themselves to the reading of the paragraph, have favoured the construction for which Sir Andrew Clark and Mr. Stamp now contend. Undoubtedly, however, Romer and Harman, JJ., were well entitled to regard the matter as free from authority binding upon them.

The present case is concerned with excess profits tax, whereas the cases above referred to concerned income tax. The reference to the " 5th day of April next " is particularly appropriate for income tax and sur-tax, but may not be appropriate at all to excess profits tax. The first enactment to be considered is s. 166 of the Act of 1849, a much briefer section. So far as relevant, it provided: " That the court, out of the estate and effects of " the bankrupt, shall order payment of all duties of assessed " taxes assessed on the bankrupt at the time of his bankruptcy " up to the 5th day of April next after the same shall have " happened such payment (not exceeding in the whole one year's " assessment) ", and so on. Whether with that form of words the same answer should be given to the question, what is the meaning of " up to April 5 ", as was given by Eve, J., to a similar question founded on the existing Act it is unnecessary to consider. It will, however, be noticed that the limitation " such " payment not exceeding in the whole one year's assessment " appears in parenthesis, and in a rather more natural context than

(15) [1930] 1 Ch. 262.

(16) 10 Tax Cas. 585, 588.

in the present section. The Act of 1849 is stating that the court is to order prior payment of all duties or assessed taxes, such payment not however to exceed in the whole one year's assessment.

It is unnecessary to take up further time in considering the true meaning of that section, for, from 1869 onwards, the relevant legislation has taken substantially the form that it takes today. Section 32 of the Act of 1869, having regard to the use of the words " up to ", might be regarded as differing from the existing legislation; but, at any rate from 1883, the paragraph has followed the same form. Para. (*a*) in s. 40, sub-s. 1, of the Bankruptcy Act, 1883, is almost identical with the corresponding paragraph in the present Act, and, so far as relevant, may be treated as identical. Therefore, ever since 1883 the problem now before the court has appeared upon the face of the statute. In the earlier Acts, as in that of 1914, provision is made for giving priority to various other items of indebtedness. Since some argument has been rested upon this, I should observe that since 1883 in all the other cases, except the tax cases, there appear words which limit the right to priority to sums which have accrued due within a definite limited period immediately preceding the receiving order. It was suggested in one case to which Mr. Salmon referred, *Ex parte Fox; In re Smith* (17), that there was not such uniformity, and that in the case of wages or salary to a clerk the expression " during four months before the " date of the receiving order " did not necessarily mean next immediately before; but the Divisional Court of the Queen's Bench Division decided that it did. Until 1883, the language was such that the four months' period might have been at any time before the receiving order; but a change was then made limiting it as it is now limited.

Excess profits tax, with which we are concerned, was introduced at one remove, so to speak, into the bankruptcy provisions by the combined effect of the Finance Acts of 1937 and 1939. The joint effect of those Acts is to give to excess profits tax the same priority, whatever it may be, as para. (*a*) gives to income tax. That way of introducing the priority has added complexity to the matter because the date mentioned " the 5th day of April next " before the date of the receiving order " would not, save in some cases by accident, be a relevant or proper or, indeed, a sensible date to mention in respect of excess profits tax.

The problem, like all questions of construction, may be capable of great elaboration and analysis in argument, but in the end comes down to the question what these few relevant words mean as a matter of English. The words are: " and all assessed

(17) (1886) 17 Q. B. D. 4.

"taxes, land tax, property or income tax, assessed on the "bankrupt up to the fifth day of April next before the date of "the receiving order, and not exceeding in the whole one year's "assessment".

Approaching the matter from the premise which I have indicated, the judges below came to the conclusion that the proper and fair meaning of those words was to limit the taxes to taxes assessed in respect of the financial year ending on April 5 next before the date of the receiving order. In arriving at that conclusion, they were not dissenting from the conclusion at which Eve, J., had arrived on the use of the words "up to"; but they thought—as Mr. Salmon expressed it—that to the question what were the assessed taxes of the bankrupt up to April 5, 1948 (the relevant date here), the answers would allude only to the taxes for the one fiscal year which ended on that date. That way of putting it ignores the significance of the word "all". The phrase is "and all assessed taxes" assessed up to April 5 next before the receiving order. I think that if the question were asked, not what is the income tax assessed up to April 5, 1948, but what are *all* the taxes assessed up to April 5, 1948, it would not be natural, without at least asking for further explanation, to give by way of answer a reference only to the last fiscal year up to April 5, 1948. Mr. Salmon accepted below, and accepts in this court, the validity of Eve, J.'s decision that "assessed up to the 5th April", etc., is a reference to the accounting practice and means assessed in respect of the year or period ending April 5 next before the date of the receiving order. A successful challenge of Eve, J.'s decision would dispose of the Crown's claim, but it would be much more difficult for Mr. Salmon to sustain his present argument if the words "up to the 5th day "of April", etc., were an allusion to the date of assessment. But we are proceeding (and I am casting no doubt on its soundness having heard no argument upon it) upon the view that the words "up to the 5th day of April" mean what Eve, J., said they mean. And I am not persuaded that the conclusion which Mr. Salmon invites us to reach does sufficient justice, or indeed any justice, to the use of the word "all" in this paragraph.

The next point which I think significant is this: if it be true that the meaning of the words is to confine the priority to the income tax assessed in respect of the year ended April 5 next before the date of the receiving order,—I take that by way of example—prima facie, there would appear no need to add the words at the end "and not exceeding in the whole one year's "assessment".

Mr. Salmon avoids that difficulty, as the judges below did, by saying that circumstances might arise in which the assessment in respect of that last period might be for more than one year. For example, a trader might change his financial year so that as a result the assessment for excess profits tax following the change would be not for a year, but, say, for a period of fifteen months. That, I agree, is a possibility in fact. On the view contended for, it seems to be the only case which can be thought of requiring, it is said, some limiting words so that the priority would be in respect of twelve months and not fifteen months. Assuming that that is right, I think that the words "and not "exceeding in the whole one year's assessment" are not then really appropriate. For in the case supposed, it would be necessary, assuming a fifteen months' period, to make an apportionment giving priority not to one year's assessment but to four-fifths of a fifteen months' assessment. Going back to the history of this legislation in the context in which this particular limitation has constantly appeared, it seems to me that these words "and not exceeding in the whole one year's assessment" are not properly consistent with the contention of the trustee in bankruptcy, but are an extremely powerful indication that what is being done is to secure that (though what has gone before gives priority for all taxes) the Crown is limited, nevertheless, to one year. That seems to me the natural sense to give to these words.

Then the judges thought that the copulative "and" was inappropriate on the view for which the Crown contends. I have observed that all the other debts given priority are by their language limited to specific periods immediately preceding the receiving order, so that this particular item of taxes is, on this view, distinct from the others. The judges thought that, if that were right, the word "but" should be expected to appear in the paragraph; but I think that that argument is sufficiently demonstrated as unsound if we insert the word "but" and then attempt to read the paragraph, which is grammatically impossible.

This part of the argument is no doubt nicely balanced. I appreciate the argument of those on whose banner is the inscription "noscitur a sociis". The banner on the other side may be said to bear the device "expressio unius exclusio alterius". I find that the second banner provides in this context the more persuasive motto.

Finally, there arises the further matter with which we are concerned, namely, the application of this paragraph, not to income tax, but to excess profits tax, which, as in this case and in the vast majority of cases, is not assessed in respect of a period ending on April 5 at all. If the view of the trustee is correct, we have not only to construe the material words of this paragraph as being equivalent to "assessed in respect of the "fiscal year ending next before the date of the receiving order", but you have to assume that those words are in fact used. For

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it is the result of the argument and the conclusion below that, where as regards any tax the fiscal year ends not on April 5 but on some other date, it is necessary to substitute that other date for April 5. In other words, as regards excess profits tax in the present case the paragraph must be read as "assessed on the "bankrupt in respect of the year ending December 31 next before "the receiving order". That seems to me to be a difficult operation. But if the words are so construed, as I think they should be, to give priority, subject to the prescribed limitation, to all taxes assessed in respect of the period before the relevant April 5, then the priority will cover one year's assessment of excess profits tax provided that the assessment relates to a year ending before April 5 next before the receiving order.

It would not generally be legitimate to place reliance upon statutes passed in 1937 and 1939 as influencing the construction of statutes passed in 1883 and in 1914. But we have been informed that even in early times the taxes referred to in this paragraph could not be treated as confined to income tax or similar taxes related to the fiscal year ending on April 5 in any year. We were told that there were at relevant dates taxes such as the window tax for which the fiscal year was different from that relating to income tax. I therefore think that the argument which emerges from excess profits tax can legitimately be used when applied to other taxes known or contemplated when the provision was first enacted.

For the reasons indicated, I think that the more natural construction is that for which the Crown has argued, and I regretfully, but clearly, come to a different conclusion from that at which the judges below arrived. I am much influenced to that end by a consideration of the earlier common-law right which was a matter not considered by them. If more general considerations are permissible, I also think that the suggestions which Mr. Stamp put forward are more persuasive on the whole than that of Mr. Salmon, that fairness and justice would be done by giving a much more limited right to the Crown and by proceeding on the view that there should only be priority in respect of debts which in the nature of the events the creditor had been unable to collect.

I think that there is great force in another view of the matter. Wages and similar debts accrue regularly and probably at a constant rate. Taxes are different: they are the subject of assessments which may be postponed by argument and other devices for years so that at any particular date it may be wholly uncertain what will be the debts due when the taxes have been finally assessed. It is likely indeed that at the date of the receiving order there will be more than one year's taxes to be accounted for. It is common knowledge that, as a trader—and, as Mr. Stamp observed, these bankruptcy provisions originally applied exclusively to traders—approaches his financial doom, he becomes less likely than ever to pay taxes, indeed less likely than ever to get his taxes assessed.

Finally, there is this consideration. As a trader approaches insolvency, the profits in respect of which taxes would be assessed will (presumably) be falling, so that if the last year were the one for which alone the Crown could claim priority, it would probably be getting a prior claim for the smallest of many years' taxes likely to be in arrear. But no such considerations apply, for instance, to the wages referred to in paras. (*b*) and (*c*). I do not wish to place any undue emphasis on this point, but at least it provides a sensible argument supporting the view that there is a valid distinction between state taxes on the one hand and other matters for which priority is given on the other. Those considerations may be fairly balanced against the points which Mr. Salmon urged.

However that may be, as a matter of construction, I have formed a different view from that formed by the court below, and I think that the Crown succeeds, and that this appeal should be accordingly allowed.

ASQUITH, L.J. I agree. In nearly forty years preceding the decision now under appeal, the Inland Revenue's construction of this section has not been challenged, and the soundness of that construction is assumed or is implicit in a number of decisions which are not directed to the precise point. Such considerations are, of course, not conclusive, but they are not without significance. The section is one which, as my Lord has pointed out, so far from conferring additional powers on the Crown, curtails its prerogative; hence there is no room in this case for the presumption that any ambiguity which the section may present should be resolved against the Crown.

The phrase to be construed is "all assessed taxes . . . assessed "on the bankrupt up to the fifth day of April next before the date "of the receiving order". That is in this case up to April 5, 1948. If the bankrupt has been assessed to and has failed to pay (for that is what "assessed" means at this point) the assessed taxes in respect of a whole series of years, all of them being years anterior to April 5, 1948, the words I have read, if they stood alone, would, as it seems to me, be apt in their plain and grammatical meaning to cover the whole of the years in question; and, but for the words which follow, the Crown could make its preferential claim in respect of all of those years. But there is the final phrase in the sub-section to be considered. The effect of those final words is to limit the Crown's priority to taxes assessed in respect of any one of the series of years. On Mr.

Salmon's construction, those final words "and not exceeding in "the whole one year's assessment" seem to me to be functionless. Mr. Salmon did suggest one state of facts in which they would have some meaning or operation, but it appears to me that Mr. Stamp's answer to that suggestion was convincing. On the other hand, on Sir Andrew Clark's construction, the meaning of these concluding words is clear and their presence makes a vital difference.

For these reasons, and those given by my Lord, I agree that the appeal should be allowed.

JENKINS, L.J. I also agree that the appeal should be allowed. As a matter of language, I entirely agree that taxes assessed for a series of financial years ending, as all such years do, on April 5 can properly be described as assessed up to the last day of the last of those years.

Moreover, the material part of s. 33 of the Act of 1914 concerns the indebtedness of the bankrupt in respect of assessed taxes. Assuming a bankrupt who had had tax assessed on him for each of the first four of the five financial years preceding the date of the bankruptcy, and assuming that he had a final year's trading down to April 5 next before that date in respect of which no liability to tax was attracted, the amount of the assessments for the four productive years being, shall we say, 1,000*l*. a year, and none of them paid; and supposing that the question were asked after the receiving order "What is the indebtedness of the bank-"rupt in respect of taxes assessed on him up to April 5 last?", I think that the answer "He owes nothing" would be an extremely surprising one; and yet it would be the true and correct answer on Mr. Salmon's argument.

That argument turns entirely on the reference to the 5th day of April next before the date of the receiving order, which the sub-section contains. Suppose that it had read, "assessed on "the bankrupt up to the date of the receiving order": it seems to me that there would then not have been a vestige of support for this argument. For obvious reasons of convenience, which were pointed out by Eve, J., in *Gowers* v. *Walker* (18), April 5 was selected as the date on which the line should be drawn because that is the end of the financial year. It is no doubt true that by a process of association of ideas April 5 suggests the preceding April 4, and all the painful associations connected with the period so measured; but in my judgment that association affords no real justification for holding that the phrase "assessed "on the bankrupt up to the 5th day of April next before the date

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"of the receiving order" means "assessed on the bankrupt for "the twelve months ending on that 5th of April".

Therefore, on a question which, in the end, as my Lord has said, is a short question of construction, and treating it purely as a matter of language, I come to the same conclusion as the other members of the court. I also think that, on the whole, the other considerations tending to support that conclusion outweigh those which the judges in the Divisional Court held to be decisive in the opposite sense.

I think that it would be an unreasonable result if, where a bankrupt with a diminishing income incurred large tax liabilities, say, two or three years before the date of the receiving order, and incurred no such liability in the financial year immediately preceding that date, there were no priority for any of that tax because (although it was unpaid tax which had been duly assessed on the bankrupt) it all related to a year or years earlier than the last complete fiscal year preceding the date of the receiving order. I think that this result of the construction placed on the subsection by the Divisional Court would really contradict the primary provision to the effect that all assessed taxes are to rank for priority subject to the qualification later imposed.

I also agree that, if there were any doubt as to the meaning of the words preceding them, the final words "and not exceeding "in the whole one year's assessment" are really decisive of the construction we are now adopting. Mr. Salmon sought to show that in certain cases they might not on his construction be wholly otiose; but I think that they really must be so, for his construction, as I understand it, involves nothing short of construing the reference to the assessment up to April 5 next before the date of the receiving order as a reference to an assessment in respect of twelve months ending on that date, and that in itself must necessarily limit the claim to one year's assessment.

Finally, I agree that the way in which other cases of preferential debts are referred to in the sub-section reinforces the conclusion to which we have come. That seems to me to be particularly striking in para. (*a*) itself, in which two types of debt are dealt with: the first is parochial or local rates; the second assessed taxes. The first branch of the sub-section provides that "All parochial or other local rates" are to have priority subject to two conditions: first, they must be due from the bankrupt at the date of the receiving order, and, secondly, they must have "become due and payable within twelve months next before that "time". The second branch of the sub-section deals with all assessed taxes, land tax, property or income tax, and in the like manner gives those claims priority subject to two conditions, the first being that they must have been assessed on the bankrupt up to April 5 next before the date of the receiving order, as opposed

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to being actually due at the date of the receiving order, which is the requirement in the case of parochial or other local rates; and, secondly, that they must not exceed in the whole one year's assessment.

The two conditions in the second branch of the sub-section are of an entirely different order, and expressed in entirely different language, from those in the first part. In particular, there is a conspicuous absence of any requirement to the effect that the tax must relate to some particular limited period preceding the date of the receiving order.

For the reasons given by my Lords, with the additional considerations which I have expressed, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; M. A. Jacobs & Sons.*

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C. A.

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Evershed, M.R., Asquith and Jenkins, L.JJ

BARRATT *v.* GOUGH-THOMAS.

Solicitor—Lien—Solicitor with lien on mortgagor's title deeds also acting for mortgagee—Deeds retained by solicitor on behalf of mortgagee—Mortgage transferred to solicitor—Redemption—Enforceability of lien against mortgagor.

When a client for whom a solicitor holds deeds mortgages the property comprised in them to another client of the same solicitor who acts for both parties, then, even though the deeds before and after the mortgage remain continuously in the solicitor's possession, he, after the completion of the mortgage, holds them exclusively in the right and on behalf of the mortgagee. The character and legal basis of his possession is precisely the same as if the deeds had been handed over to the mortgagee on completion of the mortgage and thereafter returned by him to the solicitor to hold on his behalf. In such a case a solicitor loses any lien he previously had on the deeds as against the mortgagor.

The plaintiff purchased certain property in June, 1912, and the defendant then acted as his solicitor. The plaintiff left the documents of title in the custody of the defendant, who was entitled to his ordinary solicitor's lien on the documents. When in December, 1919, the plaintiff mortgaged the property, the defendant acted for both parties, and, after the execution of the mortgage, the documents of title, including the mortgage deed, remained in the defendant's custody as solicitor of the mortgagee. The mortgagee died in 1941 and his will was proved by the defendant and three other persons. The plaintiff started proceedings for redemption against the defendant and his three co-executors. The defendant took a transfer of the mortgage from his co-executors and by this summons in the redemption proceedings sought a declaration that he was entitled to his solicitor's lien on the documents of title for the costs owing to him by the plaintiff.

Held, (1.) that the mortgage deed, from the moment of its execution and delivery, was the property of the mortgagee, and came into the defendant's possession simply in his capacity as solicitor to the mortgagee; that in those circumstances the defendant was not entitled to any lien against the plaintiff so far as the mortgage deed was concerned, his possession of that deed and the right to demand it from him of the plaintiff as a redeeming mortgagor being referable solely to the relationship of mortgagee and mortgagor and not to that of solicitor and client, which, as between the defendant and the plaintiff, never had any relevance to the receipt and retention of the deed by the defendant. *Sheffield* v. *Eden* (1878) 10 Ch. D. 291 followed.

(2.) That, from the moment of the execution of the mortgage, the defendant's retention of the documents of title was exclusively referable to his agency for the mortgagee, and the plaintiff had ceased to have any right or title to the documents from which any lien could be derived. For the lien had ceased because the conditions necessary to support it had ceased to exist. On redemption of the mortgage it was the mortgagee's duty to hand back the deeds to the plaintiff and that duty the defendant as the mortgagee's solicitor was bound to perform; and he could not discharge it by handing the deeds to himself on the plaintiff's behalf unless he had the authority of the plaintiff, as still being his client, to do so. *In re Nicholson* (1883) 53 L. J. (Ch.) 302, approved. *Colmer* v. *Ede* (1870) 40 L. J. (Ch.) 185, and *In re Messenger* (1876) 3 Ch. D. 317 overruled.

Per Evershed, M.R. There was no distinction between the position of the defendant as solicitor to the mortgagee and his position as mortgagee himself, either alone or jointly with his co-executors. His position was certainly not strengthened by his interest as mortgagee. The capacity in which the defendant held the deeds was of the essence of the matter, and an existing right or title to the deeds on his client's part was necessary to support the lien. The defendant's claim was gone whichever of the two capacities, agent or principal, he assumed: if, as solicitor to the mortgagee, he sought upon redemption to retain the deeds against the plaintiff, he involved his client, the mortgagee, in a breach of his legal obligations which a solicitor could not consistently with his duty as a solicitor do or be heard to suggest. On the other hand, if the defendant, as mortgagee, sought to retain the deeds upon redemption, he was himself asserting a right inconsistent with his legal obligations.

APPEAL from Romer, J. (1).

The defendant, William Gough-Thomas, who had formerly acted as solicitor for the plaintiff, Frank Digby Barratt, claimed a lien on certain documents of title relating to freeholds belonging to the plaintiff at Oswestry.

The following statement of facts is taken substantially from the judgment of Evershed, M.R.:—

On June 13, 1919, the sale of certain freehold property at Oswestry to the plaintiff in the action was completed, and the documents of title relating to that property were received by the defendant as the solicitor for the plaintiff. Six months later, on December 11, 1919, a first mortgage of the same property to a Mr. Reece was completed by the plaintiff. The defendant was also Mr. Reece's solicitor and on completion of the mortgage he continued to retain the original documents of title together with the mortgage, and he had in fact continued to retain them ever since. No special agreement was made at any time between the plaintiff and the defendant in regard to the defendant's rights to retain the documents against the plaintiff.

On February 13, 1941, Mr. Reece died. The defendant and three other persons duly proved his will. On June 12, 1943, the plaintiff served on the defendant and his three co-executors as successors in title to Mr. Reece notice to redeem the mortgage on December 14 following. At that time the defendant had ceased to act as the plaintiff's solicitor. On December 2, 1943, the plaintiff's then and present solicitors asked for a statement of account showing the sum which would be due for principal and interest on the redemption date. In reply, on December 4, the defendant claimed to be entitled to a lien upon the deeds of the property in respect of solicitors' costs incurred by the plaintiff both before and after the original deposit of the deeds in 1919, and asserted a right to withhold the deeds from the plaintiff on the redemption date, unless not only the mortgage debt and interest were paid to him and his co-executors but there were also paid by the plaintiff the amount due to the defendant for those costs. It was the validity of this claim for a lien which now, nearly seven years later, came to the Court of Appeal for determination and which for five years had held up the redemption of the mortgage. The first step in the litigation was the issue by the plaintiff on March 24, 1944, of an originating summons for redemption of the mortgage in which proceedings he joined the defendant and (later) his co-executors as defendants. It was thought possible and convenient to try the question of the validity of the lien as an issue in the action and the originating summons was accordingly adjourned into court and came on for hearing on July 10, 1945, before Vaisey, J. (2).

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(1) [1950] W. N. 178.

Vaisey, J., decided that, on the redemption of the mortgage, that is, on payment by the plaintiff of the sum due for principal and interest, the plaintiff was entitled to the delivery up of the documents of title relating to the property and that the defendant was not entitled to any lien in respect of those documents against the plaintiff. On an appeal by the defendant to the Court of Appeal (3), the order of Vaisey, J., was on October 19, 1945, discharged. The Court of Appeal expressed no view on the correctness, as a matter of principle, of Vaisey, J.'s judgment, holding that the matter could not properly be tried before actual redemption. It was pointed out in the course of his judgment by Lord Greene, M.R., not only that the interests of the defendant as solicitor were liable to be in conflict with the interests of his co-executors and himself as mortgagees, but also that at any time before actual redemption the defendant might have become bound to hand over the deeds to his co-executors or as they might direct, so that at the critical point of time the deeds would not be in the defendant's possession and no question of a lien could then arise.

On January 28, 1946, the defendant took a transfer to himself alone of the mortgage. He then became sole mortgagee and all conflict of interest between himself and his co-executors was resolved. On February 3, 1948, a redemption order was made and at the same time all further proceedings in the action against the defendant's three co-executors were stayed. The effect of the order was (or was treated by the parties as being) that the amount of interest in respect of the mortgage since December 14, 1943 (being the date of expiry of the plaintiff's original notice to redeem) and the amount of certain costs of the defendant were to be separately certified; but on the plaintiff's paying to the defendant the sum certified to be due for principal and interest on the mortgage up to December 14, 1943, and paying into court the remaining interest and costs to be certified, the property was to be re-conveyed to the plaintiff; but that the defendant was to be entitled to retain physical possession of the title deeds pending the determination of the question of the defendant's lien, for which purpose the parties were to be at liberty to apply by separate summons in the action. The certificate contemplated by the order was dated November 8, 1948. The plaintiff complied with the terms of the redemption order and redeemed the mortgage; and on February 7, 1949,

(2) [1945] W. N. 186.

(3) [1945] W. N. 213.

the defendant issued a summons in the action for the determination of his claim to a lien.

The summons came before Romer, J., on March 21, 1950. He expressed no opinion of his own but followed the view expressed by Vaisey, J., in 1945 and declared that the defendant was not entitled to any lien. Against that order the defendant now appealed.

Cross, K.C., and *Donald Cohen* for the defendant solicitor. It is claimed that the defendant is entitled to a solicitor's lien for costs on the plaintiff's title deeds, although, on his mortgaging the property, the defendant came to hold the title deeds on behalf of the mortgagee until the mortgage was paid off. As soon as the mortgage was redeemed, the lien, which had been suspended while the mortgage continued, was revived. Vaisey, J., decided this point in the negative in 1945 (4), but his decision was set aside as being an answer to a future question (5). It has become a present question, but Romer, J., merely followed Vaisey, J.'s decision (6). This decision is erroneous. The first point that arises is: whether a solicitor who comes to act for the mortgagee while retaining the title deeds originally entrusted to him by the mortgagor thereby loses any lien which he previously had against the mortgagor?

[EVERSHED, M.R. As soon as the solicitor acts for the mortgagee he must hold the title deeds solely on the mortgagee's account. Is not the real question whether the solicitor could set up his lien against the mortgagor as soon as the mortgage was redeemed, he having retained possession of the title deeds throughout?]

A solicitor's lien is on the true view only paralysed while the mortgage continues, and revives when it is paid off, assuming, of course, that the solicitor has had the title deeds in his possession all the time. It is the physical continuance of possession of the deeds that matters.

A separate point is relied on against the view that there was a lien: namely, that when the mortgagee died and the mortgage vested in his personal representatives, of whom the defendant was one, the lien could no longer exist. It is submitted that this is fallacious and that there is no reason why the right to a lien should be lost.

It may well be that the mortgage deed itself, which the defendant received only as acting for the mortgagee, would not be subject to the lien as against the plaintiff, though that cannot be expressly admitted. The lien arose for receiving deeds from and holding them for the plaintiff.

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(4) [1945] W. N. 186.

(5) [1945] W. N. 213.

(6) [1950] W. N. 178.

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BARRATT *v.* GOUGH-THOMAS.

There are a large number of cases on this question, and it is proposed to refer to them chronologically. *In re Mosely* (7), is not really helpful. *Colmer* v. *Ede* (8), and *In re Messenger* (9), are directly favourable to the present contention. In *In re Snell* (10), the point raised is really neutral in its application here. *In re Mason & Taylor* (11) purported to follow *In re Snell* (10). *Sheffield* v. *Eden* (12), is a decision of the Court of Appeal but is solely concerned with the mortgage deed, and it is on account of this decision that it is suggested that a mortgage deed might stand on a different footing from title deeds entrusted to the solicitor by the mortgagor. Next comes *Ex parte Fuller* (13), a case in which there was no initial lien. *In re Nicholson* (14), is similar to *In re Snell* (10) and is not reconcilable with *In re Harvey's Estate* (15), which directly supports the present contention as showing that the lien remains so long as the title deeds are under the charge of the solicitor. *In re Llewellin* (16) is not in point here, but it shows that a solicitor in reference to his lien has no higher right than his client has. *In re Walker* (17) is directly in favour of the defendant but it must be admitted that *In re Nicholson* (18) was not there referred to. *In re Stannard's Estate* (19) and *Drummond* v. *Muirhead & Guthrie Smith* (20), help the present appeal but they are Irish and Scottish cases respectively.

The foundation of the lien is that the title deeds came from the client against whom the lien is claimed. The cases principally relied on against the appeal are *Colmer* v. *Ede* (21), and *In re Nicholson* (18). *In re Messenger* (22) is directly favourable to the defendant.

Neville Gray, K.C., and *J. A. Brightman* for the plaintiff. A solicitor's lien is a right to retain documents in his possession belonging to another until his demands are satisfied. The nature of a lien was considered in *Hammonds* v. *Barclay* (23), per Grose, J., and *Gladstone* v. *Birley* (24). When the documents in his possession cease to belong to the person from whom the solicitor received them his lien ceases. It is of the essence of a solicitor's lien that the right of retention should be against someone to whom the deeds belong. It is suggested that there is something here in the nature of an equity of redemption in

(7) (1867) 15 W. R. 975.
(8) (1870) 40 L. J. (Ch.) 185.
(9) (1876) 3 Ch. D. 317.
(10) (1877) 6 Ch. D. 105.
(11) (1878) 10 Ch. D. 729.
(12) (1878) 10 Ch. D. 291.
(13) (1881) 16 Ch. D. 617.
(14) (1883) 53 L. J. (Ch.) 302.
(15) (1886) 17 L. R. Ir. 65.
(16) [1891] 3 Ch. 145.
(17) (1893) 68 L. T. 517.
(18) (1883) 53 L. J. (Ch.) 302.
(19) [1897] 1 I. R. 415.
(20) 1900 2 F. 585.
(21) 40 L. J. (Ch.) 185.
(22) 3 Ch. D. 317.
(23) (1802) 2 East 226, 235.
(24) (1817) 2 Mer. 401.

the defendant who acted for the plaintiff when the mortgage was executed and that his lien has revived. It is submitted that that is contrary to the principles on which a solicitor's right to a lien rests at common law, and that there is no such equity in the defendant. When a mortgage is paid off, it is the duty of the mortgagee to hand back the deeds to the mortgagor. The fact that the mortgagor's solicitor has become the mortgagee makes no difference.

When the authorities are considered it appears that they lay down no reliable principle. This point was never clearly considered in *Colmer* v. *Ede* (25), and the same objection applies to *In re Messenger* (26), where the judge assumed that the solicitor's lien constituted an incumbrance on the property. That view was wrong. The principle on which the Scottish case *Drummond* v. *Muirhead & Guthrie Smith* (27) is based is wrong in point of view of English law. The solicitor's lien was there treated as a charge. The two Irish cases, *In re Harvey's Estate* (28) and *In re Stannard's Estate* (29), should not be followed. It is submitted that the cases relied on by the defendant when considered have little substance in them. The plaintiff relies on the decision in *In re Nicholson* (30) which, it is submitted, was rightly decided. [They also referred to *In re Snell* (31), *In re Mason & Taylor* (32), *Ex parte Fuller* (33), and *In re Llewellin* (34).]

Cross, K.C., in reply. The ownership of deeds may be split up amongst a number of people. It is no adequate answer to a solicitor's claim to a lien that other persons may have an interest in the same deeds. It is clear that the decision in *In re Nicholson* (30) cannot stand with that of *In re Messenger* (35). It is submitted that the decision in *In re Nicholson* (30) is a break in the line of authorities and should not be followed and that is wrong. It is undesirable that there should be a distinction between the law of England and the law of Scotland in this matter and it is clear that in Scotland the defendant would be entitled to a lien on these deeds.

Cur. adv. vult.

October 24th. The following judgments were read.

EVERSHED, M.R. [after stating the facts]:—It is to be noted that it has been recently appreciated that the original conveyance

(25) 40 L. J. (Ch.) 185.
(26) 3 Ch. D. 317.
(27) 1900 2 F. 585.
(28) (1886) 17 L. R. Ir. 65.
(29) [1897] 1 I. R. 415.
(30) 53 L. J. (Ch.) 302.
(31) 6 Ch. D. 105.
(32) 10 Ch. D. 729.
(33) 16 Ch. D. 617.
(34) [1891] 3 Ch. 145.
(35) 3 Ch. D. 317.

to the plaintiff was dated June 13, 1919, and not (as had previously in the proceedings been supposed), immediately before the mortgage to Reece. The circumstance does not affect the question to be tried but has perhaps emphasized an important distinction between the title deeds, other than the mortgage deed, on the one hand and the mortgage deed itself on the other. There is no doubt that when the plaintiff deposited with the defendant as his solicitor the deeds (other than the mortgage), the deeds were the property of the plaintiff, who was immediately before that deposit entitled to their possession. There is, therefore, also no doubt that from the time of the deposit until the date of the mortgage the defendant was entitled to a lien on the deeds for his costs incurred for, and unpaid to him by, the plaintiff. But the mortgage deed from the moment of its execution and coming into existence as a deed was the mortgagee's, Mr. Reece's, property: and having regard to the decision of this court in *Sheffield* v. *Eden* (36) (to which I shall later refer), Mr. Cross felt unable to press any argument on the appellant's behalf for the existence of a lien as regards this document. Since the mortgage deed is now nearly thirty-one years old, it must be confessed that the result is to rob the case of a considerable measure of its reality. I observe finally that though the amount alleged by the defendant to be due for costs (much of which is, unless preserved by lien, said to be statute barred) is in dispute, it is conceded by the plaintiff that, if the defendant is entitled to his lien, there is some sum of costs in respect of which it may operate.

The essential features of this case are then: (1.) At the time of the original deposit of the deeds (other than the mortgage) the defendant was acting as the plaintiff's solicitor and he continued to act as such until some date after the date of the mortgage and before the notice of redemption; (2.) At the date of the mortgage and until the transfer to himself of its benefit on January 28, 1946, the defendant acted as solicitor to the mortgagee and (after the death of the mortgagee) to his estate, and; (3.) the defendant has until the present time retained continuously in his physical possession the title deeds of the property, as to all such deeds (other than the mortgage itself) from the date of their deposit with him by the plaintiff in June, 1919, and as to the mortgage deed from the date of its execution in December, 1919. In these circumstances Mr. Cross has contended (subject to the qualification already stated as regards the mortgage deed itself) that the lien, admittedly created by the plaintiff's original deposit, has never been lost and is available still to the defendant; and that it is immaterial that from and

(36) 10 Ch. D. 291.

after December 11, 1919, the defendant's possession of the deeds was attributable or (as Mr. Cross would have it) attributable primarily to his capacity as solicitor for the mortgagee or his estate, or his capacity as mortgagee or one of the mortgagees.

The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending (it has been said) upon implied agreement. It has not the character of an incumbrance or equitable charge. It is merely passive and possessory: that is to say, the solicitor has no right of actively enforcing his demand. It confers upon him merely the right to withhold possession of the documents or other personal property of his client or former client—in the words of Sir E. Sugden, L.C., "to lock them up in his "box, and to put the key in his pocket, until his client satisfies "the amount of the demand" (*Blunden* v. *Desart* (37)). It is wholly derived from and therefore co-extensive with the right of the client to the documents or other property (see the statement of Lord Cranworth, L.J., in *Pelly* v. *Wathen* (38), cited by Chitty, J., in *In re Llewellin* (39)).

When the characteristics of the lien have been stated, serious difficulties at once appear in the way of Mr. Cross's contention. In my judgment, the capacity by reference to which the documents are held is essential. The absence at any time of any right to or property in the documents on the part of the client seems, as a matter of principle, fatal to the continued existence of the lien. The fact that the mortgagee's solicitor is able to assert a lien against his client, the mortgagee, postulates a deposit of the deeds with the solicitor by the mortgagee, which appears necessarily inconsistent with the conception of a continuing deposit of the same deeds by the mortgagor. And since Mr. Cross admits that loss of possession in fact by the solicitor will (save in special circumstances) operate to determine the lien, its existence must to some extent be capricious and hazardous.

The matter is, however, not free from authority. Numerous cases were cited to us but, as regards the law in England, three only of the authorities or perhaps four are directly in point. The first case—and it is the foundation on which the defendant's argument is found to rest and the foundation of the Irish decisions to which I refer later—is *Colmer* v. *Ede* (40), before Stuart, V.-C. That was a foreclosure suit by a mortgagee, the defendants being the mortgagor's assignee in bankruptcy and Stretton, the solicitor. The essential facts were the same as those in the present case. It was held that Stretton's lien had not been lost. But there are two observations to be made on the case: First, the general question of principle does not appear at all to have been considered. The argument for the assignee in bankruptcy seems to have been that there had been a special agreement which negatived the lien. In default of such special agreement, the lien appears to have been conceded. Second—and perhaps as a consequence—Stretton was, as I read the judgment, treated as an incumbrancer or as having rights analogous to those conferred by an incumbrance. Indeed, according to the report in the Law Times (41), the form of order made gave to Stretton liberty to redeem the property.

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(37) (1842) 2 Dr. & W. 405, 418.
(38) (1851) 1 De G. M. & G. 16, 23.
(39) [1891] 3 Ch. 145, 148.
(40) 40 L. J. (Ch.) 185.

The second case, *In re Messenger* (42), came five years later, before Bacon, V.-C., sitting as chief judge in bankruptcy. The facts were, in essentials, again the same. The judge, founding himself on *Colmer* v. *Ede* (43), treated the law as settled. " The " law is clear that a person who from his position has a right of " lien, does not lose that right unless there is some special agree-" ment that he shall do so. . . . Is not then the result this, " that the property was subject to the mortgage and also to the " solicitor's lien. *Colmer* v. *Ede* (43) is a distinct authority " . . .". And the learned judge was prepared to accept the result that the mortgagee upon redemption and upon the mortgagor's demand for delivery of the deeds, could be heard to refuse the demand on the ground of the solicitor's lien " which " you have created and which I cannot destroy ".

Eight years later, in 1883, the point again came before the same judge in *In re Nicholson* (44). The essential facts were indistinguishable from those in *Colmer* v. *Ede* (43) and *In re Messenger* (45), and both those cases were cited in argument. But the judge felt no hesitation or embarrassment in delivering a judgment, wholly contrary in effect to his previous judgment in *In re Messenger* (45) and containing no reference either to that case or to its predecessor. He said (46): " A solicitor's right to " a lien on deeds and papers depends on his possession and on the " question for whom the deeds are held. There was a time when " these deeds belonged to Nicholson; but the time came when he " wanted money, and the appellants were requested to procure " him an advance on these deeds, which they did, obtaining the " money from another client. In so doing they undertook duties " of a twofold character. It was their duty to deduce a good " title for the mortgagee, and, when the money was paid, to " hand the mortgagor's deeds to him. If they had declined to " hand them over, the mortgagee could have compelled them to " do so; and his right to compel the handing over of these deeds

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(41) 23 L. T. 884.
(42) 3 Ch. D. 317, 318.
(43) 40 L. J. (Ch.) 185.
(44) 53 L. J. (Ch.) 302.
(45) 3 Ch. D. 317.
(46) 53 L. J. (Ch.) 302, 303.

"is totally inconsistent with any right being left in the mortgagor "to continue to hold them. The title-deeds, on payment of the "mortgage money, became the mortgagee's, and the mere fact "that they remained in the hands of his solicitors, who happened "also to be the solicitors for the mortgagor, cannot alter the "rights of the parties".

The fourth case to which I have referred is *In re Walker* (47), before Kekewich, J. The facts were somewhat special. The personal representative of a solicitor was claiming against the personal representative of a testator a lien on certain policy moneys. The moneys arose from policies which had been transferred by the testator to the solicitor to enable the latter to raise moneys in Ireland on his principal's behalf and subject thereto to hold the policies on trust for the testator. It is, however, true to say that the learned judge referred to *Messenger's* case (48) as authority for the proposition that the solicitor's lien in circumstances such as those now under consideration was not lost. "There is no case", said the judge, "against that view." *In re Nicholson* (49) was not cited. In my judgment *In re Walker* (47) cannot in the circumstances be regarded as providing any substantial or added support for the defendant's argument.

The four cases to which I have referred appear to be the only English cases in the books directly in point in this appeal—for the report of the earlier case of *In re Mosely* (50) is admittedly too unsatisfactory to be of value. The matter stands, therefore, thus on the authorities: on the one hand there is *Colmer* v. *Ede* (51), in which the question of principle was not apparently considered but which was followed and treated as authoritative by Bacon, V.-C., in *In re Messenger* (48) and by Kekewich, J., in *In re Walker* (47); on the other hand is Bacon, V.-C.'s later and quite contrary decision in *In re Nicholson* (49). Other cases were cited to us on other aspects of the solicitor's lien. They cannot therefore be regarded as authorities directly upon the point now in question. Yet they tend, in my view, in favour of Bacon, V.-C.'s later opinion. In *In re Snell* (52) the question was, upon the same essential facts, whether the solicitor could assert against his mortgagee client the lien which he claimed to have against his mortgagor client. No doubt if the true view be that a solicitor in such circumstances must be taken in any case (in the absence of some contrary agreement) to have lost his lien against the mortgagor, that would have been a short and complete answer to the solicitor's claim. It is also true that neither *Colmer* v. *Ede* (53) nor *In re Messenger* (54) were cited in the argument.

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(47) (1893) 68 L. T. 517, 520.
(48) 3 Ch. D. 317.
(49) 53 L. J. (Ch.) 302.
(50) 15 W. R. 975.
(51) 40 L. J. (Ch.) 185.
(52) 6 Ch. D. 105.

But Sir George Jessel, M.R., said in the course of his judgment (55): "If the solicitor chooses to act not only for the "mortgagee but for the mortgagor also, he is still equally bound, "as solicitor to the mortgagee, to see that his client obtains a "good security, including possession of the deeds; and if he has "a bill of costs against his mortgagor client, he, by acting for "both parties, loses his lien upon the deeds, and holds them for "his mortgagee client, unless his lien is expressly reserved. "He cannot say to his mortgagee client, 'I have been guilty of "'negligence; I do not hold the deeds on your account'. He "must be taken to have performed his duty, and to hold the "deeds for his mortgagee client. That is his duty; and the fact "that such client knew that he acted as solicitor for the mortgagor, and had a claim for costs against him, is therefore "wholly immaterial. Moreover, the mortgagor, having authorized his solicitor to prepare the mortgage, has by so doing "authorized him to act in a proper manner, that is, to do all "necessary acts for the completion of the security, which of "course includes handing over the title deeds. The solicitor "requires no further instructions for that; he holds them as "agent for the mortgagee client, and must therefore give them "up to him when required to do so".

Ex parte Fuller (56) came before Bacon, V.-C., in 1880—between his two decisions of *In re Messenger* (54) and *In re Nicholson* (57). In that case the judge rejected the solicitor's claim to a lien against the mortgagor in the case where the latter became his client after and not before the execution of the mortgage in favour of the solicitor's mortgagee client. And Mr. Cross accepts this conclusion, conceding that there must have been an original deposit of the deeds with the solicitor by the mortgagor and the existence of a lien before the transaction of mortgage. If the matter is to be judged by the standards of fairness and reason and if (as Mr. Cross contends) the conception is permissible of the solicitor's possession of the deeds being primarily attributable to his capacity as agent for the mortgagee but attributable also, and subject to the mortgagee's rights, to his agency for the mortgagor, the distinction seems to my mind a little capricious. However that may be, in *Ex parte Fuller* (58) Bacon, V.-C., says: "The plain law is this, that a lien can only "exist where there is a lawful possession of the thing upon which

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(53) 40 L. J. (Ch.) 185.
(54) 3 Ch. D. 317.
(55) 6 Ch. D. 105, 107.
(56) 16 Ch. D. 617.
(57) 53 L. J. (Ch.) 302.
(58) 16 Ch. D. 617, 619.

"it is claimed by the person who claims it. What rightful possession of the deeds had the solicitors in the present case? "The deeds were the deeds of the mortgagees, and they were "placed in the solicitors' hands only for safe custody. The "solicitors had the deeds in their possession, not in any right of "their own; their possession was that of the mortgagees, and "nothing more".

Finally, in *Sheffield* v. *Eden* (59), the question arose whether the solicitors, who were themselves the mortgagees, could assert a lien against their mortgagor client in respect of the mortgage deed itself. *Sheffield* v. *Eden* (59) is the only one of the cited cases which came before this court, and James, Baggallay and Thesiger, L.JJ., rejected the solicitor's claim. For that reason Mr. Cross has felt unable to press his argument as regards the mortgage deed in the present case. It is true that all three judges in their very short judgments were careful to confine themselves to the particular question they had to decide, namely, the alleged lien on the mortgage deed. *Colmer* v. *Ede* (60) had been cited to them. Nevertheless, their reasoning clearly indicated, in my judgment, as had the reasoning of Sir George Jessel, M.R., in *In re Snell* (61) and that of Bacon, V.-C., in *Ex parte Fuller* (58), that the capacity in which the solicitor held the deeds is of the essence of the matter and that agency for the mortgagee is incompatible with agency at the same time for the mortgagor.

"They might have had a claim", said James, L.J. (62), "against their client as mortgagor for their preparation" (of the deeds) "but when the deeds were executed they became the "deeds of the solicitors. A lien only attaches to documents "which are the client's property; it cannot extend to what is the "solicitors' own property." And similarly, Baggallay, L.J. (62): "Directly these deeds were executed they remained in the "possession of the solicitors, not in their capacity of solicitors "to the mortgagor, but as their own property as mortgagees. "The property was in them, not in their client".

In this state of the authorities, it is clearly open to this court to decide the present question as a matter of principle. That being so, I think the judgment of Bacon, V.-C., in *In re Nicholson* (63) was correct and ought to be preferred to his own earlier decision in *In re Messenger* (64), and to the decision in *Colmer* v. *Ede* (65) which in *In re Messenger* (64) he had followed and that the two latter cases must be treated as wrongly decided.

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(59) 10 Ch. D. 291.
(60) 40 L. J. (Ch.) 185.
(61) 6 Ch. D. 105.
(62) 10 Ch. D. 291, 293.
(63) 53 L. J. (Ch.) 302.
(64) 3 Ch. D. 317.
(65) 40 L. J. (Ch.) 185.

In my judgment, from the moment of the execution of the mortgage, the solicitor's retention of the documents of title must be exclusively referable to his agency of the mortgagee and the mortgagor has ceased to have any right or title to the documents from which any lien could be derived. The lien has ceased because the conditions necessary to support it have ceased to exist. On redemption of the mortgage, it is the mortgagee's duty to hand back the deeds to the mortgagor: see *Graham* v. *Seal* (66). That duty the solicitor, as mortgagee's solicitor, is bound to perform. He cannot discharge the duty by handing the deeds to himself on the mortgagor's behalf, unless he has the mortgagor's authority, as being still his client or otherwise by agreement, so to do.

I think, accordingly, that the view suggested in Cordery on Solicitors (4th ed.), p. 458, is erroneous and that the doubts expressed in the note (*m*) to the text are well-founded.

Mr. Cross says that it is hard on the solicitor thus to lose his lien. But if it be relevant to consider hardship, I cannot agree. It is open to the solicitor, who acts also for the mortgagee, to make it plain to his mortgagor client that before the mortgage is effected his bill for costs must be met or a special agreement made so as to preserve his lien. The opportunities of protecting himself are, I should have thought, less rather than more difficult for the solicitor where the proposed mortgagee is another of his clients.

I have earlier referred to the Irish decisions which followed *Colmer* v. *Ede* (67). Two Irish cases were cited to us, both at first instance, namely, *In re Harvey's Estate* (68) and *In re Stannard's Estate* (69). I think it would be possible to distinguish both cases on their facts from the present case. But undoubtedly in both the learned Irish judges treated *Colmer* v. *Ede* (67) as authoritatively stating the law applicable to such a case as the present. (See per Monroe, J. (70), in the first case in which *In re Nicholson* (71) was not cited, and per Ross, J. (72), in the second case, where he expressly preferred *In re Messenger* (73) to *In re Nicholson* (71).) With all respect to those two judges, I am, for the reasons I have given, unable to agree with them and I do not think their conclusions should now be followed in England.

We were also, finally, referred to the Scottish case in the Court of Session of *Drummond* v. *Muirhead & Guthrie Smith* (74). The essential facts are indistinguishable from those in this appeal and the Court of Session, affirming the opinion of the Lord Ordinary, decided in the law agent's favour. Both Bacon, V.-C.'s decisions were cited to the Lord Ordinary but he, like Ross, J., in Ireland, expressed his preference for *In re Messenger* (73).

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(66) (1918) 88 L. J. (Ch.) 31, 36, 38.
(67) 40 L. J. (Ch.) 185.
(68) 17 L. R. Ir. 65.
(69) [1897] 1 I. R. 415.
(70) 17 L. R. Ir. 65, 67.
(71) 53 L. J. (Ch.) 302.
(72) [1897] 1 I. R. 415, 419.
(73) 3 Ch. D. 317.
(74) 1900 2 F. 585.

The decisions of the Court of Session are not, of course, binding upon us. They are entitled to great respect and I am certainly not at all inclined to create divergencies between the law of England and the law of Scotland upon such a matter as the general lien of a solicitor or law agent. But, having given the matter my best consideration, I am unable to reconcile the judgments of the Scottish judges with the principles which I think are applicable to such a lien in England. I think Mr. Gray may be justified in suggesting that the Scottish judgments proceed on the basis that the right of the solicitor is in character analogous to that of an incumbrancer. And so it may be by the law of Scotland—at any rate the lien in Scotland cannot rest on the English common law.

I have not so far distinguished the position of the defendant as solicitor to the mortgagee from his position as mortgagee himself either alone or jointly with his co-executors. In truth there is for present purposes no distinction—certainly his position is not strengthened by his interest as mortgagee. If I am right in thinking that the capacity in which he holds the deeds is of the essence of the matter and that a present right or title to the deeds on the client's part is necessary to support the lien, the solicitor's claim is gone whichever of the two capacities, agent or principal, he assumes. If as solicitor to the mortgagee he seeks on redemption to retain the deeds against the mortgagor, he involves his client, the mortgagee, in a breach of his legal obligations, which the solicitor cannot, consistently with his duty as solicitor, do or be heard to suggest. On the other hand, if as mortgagee he seeks to retain the deeds on redemption, he is himself asserting a right inconsistent with his legal obligations.

I therefore agree with the decision of Vaisey, J. (75), when this matter was before him in 1945. At that time the defendant had not taken a transfer of the mortgage to himself alone, as he has since done. In my judgment Vaisey, J., correctly anticipated the result of the transfer. "Suppose", he said, "that "the claimant in the lifetime of Reece had taken a transfer of "the mortgage, thereby becoming sole mortgagee, and then "suppose that the plaintiff had sought to redeem. In such a "case the claimant would, in my judgment, have been bound "not only to re-convey or otherwise release the mortgaged "property to the plaintiff but also to restore to him the title "deeds. Redemption involves the return by the mortgagee not

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(75) [1945] W. N. 186; 61 T. L. R. 534, 535.

"only of the estate but of the indicia of the title to the estate. "It seems to me that the claimant could not, in the case supposed, have been heard to say that in his capacity of solicitor "he was entitled to preclude himself from discharging in full his "duties as mortgagee—chiefly, as I think, for the reason that "he would not be holding the deeds as solicitor at all but solely "as mortgagee."

In the passage which follows that which I have cited, I think, the judge went somewhat further than was justified or necessary for his decision. But I think that his decision was right and that the present appeal ought to be dismissed accordingly.

ASQUITH, L.J. I agree with the judgement just delivered by the Master of the Rolls. I also agree with the judgment about to be delivered by Jenkins, L.J., which I have had the advantage and pleasure of reading.

JENKINS, L.J. The defendant, William Gough-Thomas, who formerly acted as solicitor to the plaintiff, Frank Digby Barratt, claims a lien on the documents of title relating to certain freehold property of the respondent at Oswestry, in the county of Salop, in respect of the costs, charges and expenses which became due from the plaintiff to the defendant while so acting, and the question for decision is whether in the circumstances I am about to mention this claim is well founded.

[His lordship stated the facts and continued:]

While the present appeal is in form an appeal from Romer, J.'s order, in substance it involves a review of the reasoning which led Vaisey, J., to decide the matter adversely to the defendant on the previous occasion.

The documents over which the lien is claimed comprise not only the title deeds originally left by the plaintiff in the hands of the defendant as his solicitor on the occasion of the plaintiff's purchase of the property, but also the mortgage deed subsequently executed by the plaintiff, and when executed left in the hands of the defendant as solicitor to Mr. Reece, the mortgagee. Vaisey, J., seems to have drawn no distinction between the former and the latter. There is, however, a distinction of some importance. The documents originally deposited with the defendant on the occasion of the purchase were, of course, the property of the plaintiff when so deposited, and admittedly then, as against the plaintiff, became subject to the ordinary solicitor's lien in the defendant's favour, the question so far as these documents are concerned being whether that lien has remained in existence notwithstanding the subsequent events above referred to, involving as they did changes in the ownership and

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right to possession of these documents and the capacity in which they were held by the defendant.

As will be seen hereafter, that question is not free from difficulty, and has been the subject of a remarkable conflict of authority. The mortgage deed is in a different position. It never was the property of the plaintiff at all. From the moment of its execution and delivery it was the property of the mortgagee, and it came into the defendant's possession simply in his capacity as solicitor to the mortgagee. Whatever the position may be as regards the other documents, I think it is clear both in principle and on authority that in these circumstances the defendant is at all events not entitled to any lien against the plaintiff so far as the mortgage deed is concerned. The defendant's possession of this deed, and the right to demand it from him which the plaintiff now has as a redeeming mortgagor, are referable solely to the relationship of mortgagee and mortgagor, and not to that of solicitor and client, which as between the defendant and the plaintiff never had any relevance to the receipt and retention of this deed by the defendant: see *Sheffield* v. *Eden* (76), a decision of the Court of Appeal which apparently was not cited to Vaisey, J. I am accordingly of the opinion that the defendant's claim must fail as regards the mortgage deed.

As regards the other documents, the argument for the defendant requires more detailed examination. It proceeds substantially on these lines:—(i) a solicitor who in his professional capacity receives deeds from a client becomes entitled to a lien over them so long as they remain in his physical possession; (ii) the lien so acquired continues to be available against any claim to possession of the documents by that client or any person claiming through him so long as physical possession of the documents is retained by the solicitor, and is not destroyed by any intermediate change in the ownership of the documents or in the identity of the person for whom the solicitor holds them; (iii) thus, if a client deposits title deeds with his solicitor and subsequently mortgages the property comprised in them to a third party for whom the solicitor also acts, and the solicitor without ever parting with physical possession of the documents retains them on behalf of his mortgagee client, his lien against the mortgagor client survives, though postponed to the paramount claim of the mortgagee to possession of the documents unless and until the mortgage is redeemed; (iv) further, in such a case the mortgagor client of the solicitor retains an interest in the documents corresponding to his equity of redemption in the mortgaged property, and it may thus be said that the solicitor, while holding the documents primarily for the mortgagee, yet continues to hold them quoad this subordinate interest for the mortgagor from whom they were originally received; (v) it follows that when the mortgagor redeems the mortgage, and becomes entitled to possession of the documents, the solicitor is entitled to assert the lien to which they became subject at the time of the original deposit, and this notwithstanding the cesser in the meantime of the relationship of solicitor and client between himself and the mortgagor.

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(76) 10 Ch. D. 291.

The defendant's argument finds support in a number of authorities. In *Colmer* v. *Ede* (77), the solicitor's lien against the mortgagor was upheld; but the lien seems there to have been disputed only on the ground that the deeds had been deposited with the solicitor for the specific purpose of preparing the mortgage, and not on the more general grounds advanced by the present plaintiff. Next in order of date is *In re Messenger* (78), a decision of Bacon, V.-C., as chief judge in bankruptcy, which is closely in point and which, if accepted as a correct statement of the law would conclude the present appeal in favour of the defendant.

It should, however, be observed at once that in the later case of *In re Nicholson* (79), the same judge on substantially similar facts and after argument in the course of which *In re Messenger* (78) was cited, came to precisely the opposite conclusion. In *In re Walker* (80), Kekewich, J., followed *In re Messenger* (78), though it is fair to say that the facts differed in a possibly material respect from those in *In re Messenger* (78) and *In re Nicholson* (79), and that according to the report the latter case was not cited. There are also two Irish cases, *In re Harvey's Estate* (81) and *In re Stannard's Estate* (82), of which the latter in particular affords strong support for the defendant's contention, to which should be added the Scottish case of *Drummond* v. *Muirhead & Guthrie Smith* (83) to the like effect.

The argument for the plaintiff proceeds substantially as follows: (i) retention of physical possession of documents of title by a solicitor acting for the two parties to a disposition of the property comprised in them does not necessarily preserve his claim to a lien against the party for whom he held the documents before the disposition. Regard must be had to the person for whom and the capacity in which the solicitor holds the deeds at the time when possession is claimed, and the lien can only be asserted if the solicitor then holds the documents in his capacity as solicitor to the party seeking to recover them; (ii) a solicitor's lien is a mere passive right to retain the documents, conferring no proprietary interest or charge, and available only against an owner of the documents entitled but for the lien to claim them as documents belonging to him and held on his behalf by the solicitor in the capacity of solicitor to the claimant. Thus, when the ownership of documents in a solicitor's possession passes from one client to another, with the result that he holds the deeds for the latter in place of the former, his lien against the former owner is necessarily destroyed, and can only be revived if and when the deeds once more become the property of the former owner and are once more held by the solicitor in the capacity of solicitor to that owner; (iii) in circumstances such as those of the present case, the mortgagor's right to recover possession of the deeds on redemption is a right against the mortgagee, whose duty it is to return them to the mortgagor, and whose right to possession of them is admittedly paramount to any lien the solicitor may have had against the mortgagor prior to the mortgage; (iv) where, as here, the solicitor himself takes over the mortgage, his possession of the deeds becomes possession in his own right as mortgagee, not possession in right of and as solicitor to the mortgagor, and accordingly he can claim no lien against the mortgagor on redemption by the latter.

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(77) 40 L. J. (Ch.) 185.
(78) 3 Ch. D. 317.
(79) 53 L. J. Ch. 302.
(80) 68 L. T. 517.
(81) 17 L. R. Ir. 65.
(82) [1897] 1 I. R. 415.
(83) 1900 2 F. 585.

As regards the authorities more or less directly in point, the plaintiff's sheet anchor is *In re Nicholson* (84), and we are invited on his behalf to accept that decision as correctly stating the law in preference to the three English, two Irish, and one Scottish decisions the other way. For my part I think that of the English cases *In re Nicholson* (84) should be regarded as of the greatest weight. As a later decision of the same learned judge, it must I think clearly be regarded as supplanting *In re Messenger* (85), especially as that case was cited to him in *In re Nicholson* (86). *In re Walker* (87), apart from the difference in the facts, loses much of its force from the circumstance that *In re Nicholson* (86) was not referred to. *Colmer* v. *Ede* (88) was, as I have said, argued on a different ground. The Irish and Scottish cases are no doubt worthy of the greatest respect, but I see no ground for preferring them to *In re Nicholson* (86), and the Scottish case may have turned to some extent on conceptions different from those of English law as regards the nature of liens and mortgages.

The authorities standing thus, I conceive myself free to decide this case as it seems to me right in principle; and, regarding it in this way, I have little hesitation in rejecting the defendant's

(84) 53 L. J. (Ch.) 302.
(85) 3 Ch. D. 317.
(86) 53 L. J. (Ch.) 302.
(87) 68 L. T. 517.
(88) 40 L. J. (Ch.) 185.

claim. I see no justification in principle for holding that the mere accident of continued physical possession of deeds by a solicitor in circumstances such as the present necessarily involves the continuance of his lien against the original depositor. No doubt he loses his lien if he parts with possession, but this is far from establishing the converse proposition that if he retains possession his lien is necessarily preserved. When a client, for whom a solicitor holds deeds, mortgages the property comprised in them to another client of the same solicitor who acts for both parties in the matter, then, even though the deeds before and after the mortgage remain continuously in the solicitor's possession, it is plain that after the completion of the mortgage the solicitor holds them exclusively in the right and on behalf of the mortgagee, and that the character and legal basis of his possession is precisely the same as if the deeds had been handed over to the mortgagee on completion of the mortgage and thereafter returned by him to the solicitor to hold on his behalf. I find myself in complete agreement with the view expressed by Bacon, V.-C., in *In re Nicholson* (86), to the effect that, in these circumstances, the mere fact that the deeds remain in the hands of the solicitor because he happens to be solicitor to both parties cannot affect the result, and with his conclusion to the effect that in such a case the solicitor loses any lien he previously had against the mortgagor.

It is not in dispute that a solicitor can acquire a lien on deeds in his possession against a new owner of them without any change in their physical possession. Thus, in circumstances such as those now under consideration, the solicitor would have a lien against his mortgagee client for costs owing to him from that client from the moment that he began to hold the deeds in the right and on behalf of the mortgagee. Again, it is plain that the solicitor can lose a lien on the deeds, without parting with physical possession of them. Thus, from the moment he holds the deeds in the right and on behalf of the mortgagee, he loses as against the mortgagee his lien for costs owing by the mortgagor: see *In re Snell* (89) and *In re Mason & Taylor* (90). Similarly, when the mortgage has been paid off, the solicitor cannot assert against the mortgagor client a lien claimed in right of the mortgagee for costs owing to him from the latter, although he originally received the deeds as solicitor to the mortgagor and they have thereafter remained continuously in his possession. See *In re Llewellin* (91). Again, mere possession of a client's deeds will not necessarily give the solicitor a lien on them: see *Ex parte Fuller* (92), where solicitors holding the deeds of mortgaged property received from a mortgagee client were held to have no lien on the deeds against the mortgagor for costs due to them from him, because they never held the deeds as his solicitor.

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(89) 6 Ch. D. 105.
(90) 10 Ch. D. 729.
(91) [1891] 3 Ch. 145.
(92) 16 Ch. D. 617.

The right conclusion seems to me to be that a solicitor can claim a lien on deeds against a person demanding their delivery if, but not unless, at the date of such demand his possession of them is referable to the relationship of solicitor and client between himself and the claimant. If this condition is not satisfied the solicitor cannot make good his lien by showing that he originally received the deeds from the claimant as his client, and has since retained physical possession of them, down to some past date in the right and on behalf of the claimant, but thereafter and at the date of the demand in right and on behalf of some other person through whom the claimant now makes title. This may be illustrated by the imaginary case of a sale of property by "A" to "B", the same solicitor acting for both parties and holding the deeds continuously for "A" down to the date of the sale and thereafter for "B". After the sale "A" changes his solicitor, and later repurchases the property from "B". On completion of his repurchase "A" demands the deeds. In such circumstances, it is obvious that "A's" former solicitor (holding the deeds for "B") cannot assert any lien against "A" for costs due from him, the fact that the solicitor originally received the deeds from "A" as his solicitor and held them in that capacity down to the date of the sale to "B" and had never since parted with physical possession of them being wholly irrelevant.

Precisely the same reasoning seems to me to apply in the case of a mortgage. The fact that the mortgagor retains an interest in the form of his equity of redemption is I think immaterial. That gives him no right to possession of the deeds unless and until he redeems the property, and such right when it arises is a right against the mortgagee, not against the solicitor, who is simply bound to deal with the deeds as the mortgagee may direct and cannot set up against him or any person claiming through him any lien he formerly had against the mortgagor. I think this is borne out by the reasoning on which the judgment of Chitty, J., in *In re Llewellin* (93) proceeds although the lien there unsuccessfully asserted against the mortgagor was a lien claimed in right of the mortgagee for costs due from him to the common solicitor. There was on the facts of the case no question of any lien in respect of costs owing to the solicitor from the mortgagor personally, as admittedly none were so owed. But the judge said (94): "I will assume in favour of the respondent"

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(93) [1891] 3 Ch. 145.

(94) Ibid. 147, 148.

(i.e., the solicitor) "that among the documents he holds there "are some which relate to the title to the mortgaged property, "and that though he received them originally from the "applicant" (i.e., the mortgagor), "the custody was changed; "that he afterwards held them as solicitor for the mortgagee. "The lien claimed on the documents of title is thus a lien "in virtue of the right of the mortgagee to hold such documents". Then he says of the lien: "It does not confer "on the solicitor any higher right to retain deeds than "the client himself has", and after citing a number of authorities in support of this proposition continues: "From these "it follows, that when the mortgagor has paid to the mortgagee "all that is due to him . . . and the mortgagee has given the "mortgagor a release, the mortgagee's solicitor has no right to "retain the deeds as against the mortgagor, even for costs due "to the solicitor from the mortgagee for work done relating to "the mortgaged property pending the mortgage".

By parity of reasoning, and, indeed, a fortiori, it seems to me that the solicitor holding the deeds in virtue of the right of the mortgagee to hold them cannot set up against the mortgagor a lien for costs due from the latter, which not only could not be set up by the mortgagee himself against the mortgagor, but could not even be asserted by the solicitor against the mortgagee. *In re Llewellin* (94) thus in my view bears out the direct authority of *In re Nicholson* (95). The same may, I think, be said of the ratio decidendi in *Sheffield* v. *Eden* (96), although (as appears above) the actual decision in that case is confined to the mortgage deed itself.

The theory that the solicitor's lien against the mortgagor client survives after his custody of the deeds is changed to that of solicitor for the mortgagee client, though subject to the paramount right of the mortgagee to their possession, seems to me clearly inconsistent with the nature of the lien as defined in *In re Llewellin* (94) and the cases there cited, particularly *Blunden* v. *Desart* (97) and *Pelly* v. *Wathen* (98). The lien being neither the result of contract, nor an equitable charge, nor an incumbrance on the estate, but merely a right for the solicitor "to "keep back from his client the deeds and papers, which he holds "as solicitor, until his bill of costs is satisfied" (per Lord Cranworth, L.J., in *Pelly* v. *Wathen* (98)), it is difficult to see how once the solicitor has ceased to hold the deeds for the mortgagor and then holds them for the mortgagee, whose right to possession completely ousts that of the mortgagor and is free from any lien the

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(94) [1891] 3 Ch. 145, 147, 148.
(95) 53 L. J. (Ch.) 302.
(96) 10 Ch. D. 291.
(97) 2 Dr. & W. 405.
(98) 1 De G. M. & G. 16, 23.

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solicitor could previously have asserted against the latter, the lien against the mortgagor can fail to be completely extinguished, not merely as against the mortgagee but against the mortgagor also. A new lien against the mortgagor might no doubt arise if in the circumstances of the particular case the solicitor could be shown after the discharge of the mortgage to have resumed custody of the deeds in the capacity of solicitor to the mortgagor. But no such circumstances exist in the present case.

In the course of his argument for the defendant, Mr. Cross pointed out that a solicitor's lien against his client may continue though the relationship of solicitor and client has ceased, as for example where the client changes his solicitor, or on the death of the solicitor or the client. But this carries the defendant's argument no further. In such cases the possession of the deeds on the strength of which the lien is asserted is still referable entirely to the relationship of solicitor and client formerly subsisting between the original parties even though that relationship has been brought to an end; and the rights appropriate to possession so referable survive accordingly. In the type of case now under consideration, there is not merely a cessation of the relationship of solicitor and client between the solicitor and the person for whom the deeds were held, but a change in the character of the solicitor's possession of the deeds from possession as solicitor to and on behalf of the original client (the mortgagor) to possession as solicitor to and on behalf of a different client (the mortgagee), and it is by this change that the solicitor's lien against the mortgagor is destroyed.

It follows from what I have said above, that I am in substantial agreement with Vaisey, J.'s views on the aspect of the case which he made a subsidiary basis of his decision (i.e., the effect on the lien of the mortgage transaction in which the defendant acted for both parties). Logically, however, I think this aspect of the case comes first, as, if the defendant lost his lien from the moment he held the deeds as solicitor to and on behalf of the mortgagee, it is unnecessary to consider whether, apart from this, the lien would in any event have been lost when the defendant subsequently assumed office as one of the four executors of the mortgagee and later (since the date of Vaisey, J.'s judgment) took a transfer to himself of the mortgage. At all events, it is abundantly plain that neither of these subsequent events can have improved the defendant's position in regard to the lien he claims. Accordingly, while by no means dissenting from what has been said by the Master of the Rolls on this aspect of the case, for my part I find it unnecessary to express any opinion on the effect of these later transactions as it might have been if the case had depended on them alone.

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In the result I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Rooke & Sons for William Gough-Thomas, Ellesmere, Salop; Field, Roscoe & Co., for Batten & Whitsed, Peterborough.*

B. A. B.

In re DULLES SETTLEMENT. DULLES *v.* VIDLER.

[1948 D. 231.]

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Oct. 24, 25.
Evershed, M.R., Asquith and Jenkins, L.JJ.

Infant—Maintenance—American father resident abroad—Appearance by counsel to oppose application made against him—Extension of jurisdiction possible by submission to jurisdiction—Whether in fact submission—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 5*—Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 3, *sub-s.* 2.

An infant, by his mother as next friend, applied for and obtained her appointment as guardian and the gift to her of his custody. He further asked for an order for maintenance. The application was addressed to his father who was an American citizen resident abroad; and, without his coming to England, the father appeared by counsel to oppose the application. Romer, J., held that he had no jurisdiction to make an order for maintenance under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925, against the father as a person out of the jurisdiction, even though he might be said to have submitted to the jurisdiction. On appeal by the infant:—

Held, (1.) that, although English statutes would not prima facie be treated as extending to jurisdiction beyond English territory (*Ex parte Blain* (1879) 12 Ch. D. 522, and *Cooke* v. *Charles A. Vogeler Co.* [1901] A. C. 102), an individual outside the jurisdiction could voluntarily submit to it either by coming to England or, where a case was heard by the High Court and concerned a question arising under a statute not expressly limited in its jurisdiction, by choosing in his absence abroad to be represented by solicitors and counsel to contest a case arising under the statute: *Forsyth* v. *Forsyth* [1948] P. 125, 132, distinguished; (2.) that there was, on their true construction, no such special limitation as to jurisdiction in the Guardianship of Infants Acts, 1886 and 1925; (3.) that, having regard to R. S. C., Ord. 55, rr. 2 and 3, it was impossible to sustain the technical objection that, because the mother did not apply for the custody of the infant in accordance with s. 5 of the Act of 1886, the infant's application for maintenance under s. 3, sub-s. 2, of the Act of 1925 could not be maintained; and (4.) that, in view of the very special facts, which were best known to Romer, J., the case must be remitted to him to ascertain whether the father had in fact submitted to the jurisdiction.

APPEAL from Romer, J.

In proceedings to have an infant made a ward of court the infant, Frank William Harrison Dulles, by his mother, Gweneth Betty Dulles as next friend, made an interlocutory application asking that the mother might be appointed to be the infant's guardian under the Guardianship of Infants Acts, 1886 to 1925, and be given his custody. An order for maintenance of the infant was also sought. The summons was shortly afterwards addressed to the infant's father, Leib Harrison Dulles, an American citizen residing abroad. The father was represented by counsel in opposing the application.

Romer, J., made an order appointing the mother as the guardian of the infant and giving her his custody; but he refused to make the order for maintenance, on the ground that there was no jurisdiction under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925, to make the order against a person out of the jurisdiction. Even though the father had submitted to the jurisdiction of the court, that had no application to a case where the jurisdiction was conferred and limited by statute. The infant appealed.

Michael Albery for the infant. Romer, J., was mistaken in holding that there was no jurisdiction to make an order against the father. There are two classes of person, those within and those without the jurisdiction; but a person outside the jurisdiction can submit to it: *Manitoba & North West Land Corporation* v. *Allan* (1). Romer, J., was mistaken in saying that the jurisdiction under the Guardianship of Infants Acts, 1886 and 1925, could not be extended by submission: see general principle No. 4 in Dicey's Conflict of Laws (6th ed.), p. lxvi: "The courts "of any country have a right to exercise jurisdiction, i.e., "are courts of competent jurisdiction, over any person "who voluntarily submits to their jurisdiction". That applies to the jurisdiction of the High Court. If an Act were to say expressly that the relief under it was restricted to persons within the jurisdiction, it would be different. Romer, J., held that, in the absence of an express provision, the Acts could not be enforced against a person out of the jurisdiction even though he submitted to the jurisdiction. It is contended, however, that the principle of submission applies. He relied on *Forsyth* v. *Forsyth* (2). Tucker, L.J.'s judgment related to inferior courts which normally have jurisdictions limited to specific areas. Thus, it is to be noted that s. 9 of the Guardianship of Infants Act, 1886, limits the jurisdiction of county courts but says nothing of this kind as to the High Court. Section 3, sub-s. 2, of the Act of 1925 confers on an infant the right to maintenance, but Romer, J., relied on s. 8, sub-s. 1, which provides that any person ordered to pay money must give notice of any change of address as showing that any order for maintenance must be made against a person within the jurisdiction. That is intended, of course, to facilitate enforcing the order; but where a person out of the jurisdiction has property within the jurisdiction that difficulty does not arise.

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(1) [1893] 3 Ch. 432, 434.

[ASQUITH, L.J. Is it not a recognized principle that where the effectiveness of the order clashes with the jurisdiction the court will do nothing?]

That is a matter of the court's discretion. *Hope* v. *Hope* (3) raised a question of jurisdiction in regard to infant cases.

[EVERSHED, M.R. That case related to the custody of an infant in England.]

[JENKINS, L.J., referred to *Rex* v. *Sandbach Justices* (4).]

The question is what gloss should be put on "father" in s. 3, sub-s. 2, of the Act of 1925. It is clear that in s. 2 a father of any nationality is meant. The ordinary rule as to jurisdiction is extended to a person outside the jurisdiction by his submission to the jurisdiction, and that applies here.

Bonner and *C. P. Hutchinson* for the father. A submission to jurisdiction is not enough to confer jurisdiction on a judge of the High Court to make an order against a person outside the jurisdiction to pay maintenance. Section 8, sub-s. 1, of the Guardianship of Infants Act, 1925, supports that view. It has been contended by the other side that when a section refers to the father of an infant it should be construed widely. That is contrary to *Ex parte Blain* (5), which says that there is no jurisdiction in bankruptcy against a person out of the jurisdiction. He cannot surrender to the jurisdiction so as to enlarge it. See also *Cooke* v. *Charles A. Vogeler Co.* (6). The jurisdiction given by the statute could not be extended by agreement: *In re Aylmer* (7).

[JENKINS, L.J. An act of bankruptcy has to be committed in this country. But here the mother and child are in this country and the father could so easily come here. It seems

(2) [1948] P. 125.
(3) (1854) 4 De G. M. & G. 328, 344.
(4) [1951] 1 K. B. 62.
(5) (1879) 12 Ch. D. 522.
(6) [1901] A. C. 102.
(7) (1887) 20 Q. B. D. 258.

strange if the same result cannot be obtained by his instructing agents.]

It is sought to set up the universal rule that the jurisdiction of the court applies only to persons in this country and cannot be extended by submission. That, at any rate, is true in the case of an application under the Guardianship of Infants Act, 1925, s. 3, sub-s. 2. No authority has been found on behalf of the father making the distinction that where there is an objection to the jurisdiction under the statute it can be waived. There cannot be an enlarging of the jurisdiction by consent. An irregularity can be overcome, but not a nullity. It is sufficient here for the father to say that he was never in this country. It would be futile here to make an order for maintenance against him, for it could not be enforced. The probability that a foreigner will not have assets in this country is very strong.

[EVERSHED, M.R. Suppose that an application had been made at an earlier stage for the father to give security for costs?]

An order to that effect would, perhaps, have been submitted to, as service of the summons had been accepted.

[ASQUITH, L.J. Could not the jurisdiction have been demurred to while service of the summons was accepted?]

An application for custody of an infant must under s. 5 of the Act of 1886 (8) have been made by the mother. Here there was no such application but an application by the infant. His application for maintenance under s. 3, sub-s. 2, of the Act of 1925 (8) therefore cannot be granted. That is an additional reason why no order for maintenance could be made against him. This application having been made by the infant, there was no jurisdiction to make an order for custody under s. 5 of the Act of 1886. It follows that the essential condition for making an order on the father to pay maintenance under s. 3, sub-s. 2, of the Act of 1925 has not been complied with.

Albery in reply. The difficulty arising from the fact that this application was made by the infant and not by his mother in accordance with s. 5 of the Guardianship of Infants Act, 1886, must be met. It is, however, a technical point, and its importance should not be magnified. There is no reason why the legislature should have allowed an application to be made by the mother and not by the infant. R. S. C., Ord. 55A, r. 3, provides that an application under the Act of 1886 may be made by the infant. On its true construction, s. 11 of the Act of 1886, which gives power to the rule-making body to make rules for regulating practice and procedure under the Act, authorized that body to make a rule enabling an application under the Act to be made by an infant. It is submitted that, on the true construction of the Act of 1886, the rule-making body had power to make a rule authorizing applications under s. 5 by an infant as an alternative to the mother. Moreover, as this application was made by the infant acting by his mother as next friend, the mother also must be treated as an applicant. Alternatively, it is submitted that, if the court takes the view that an order for custody should not have been made under s. 5 of the Act of 1886, there has been no appeal from that order, so that it stands, and there is nothing to prevent the court from making an order for maintenance under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925. The objection has been taken that, unless an order for custody is made under s. 5 of the Act of 1886, no order can be made for maintenance under s. 3, sub-s. 2, of the Act of 1925. An order for custody having been made, there is jurisdiction to order maintenance.

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(8) Guardianship of Infants Act, 1886, s. 5: "The court may, upon "the application of the mother of an "infant (who may apply without "next friend), make such order as it "may think fit regarding the custody "of such infant . . .".

Guardianship of Infants Act, 1925, s. 3, sub-s. 2: "Where the "court under the said section [s. 5 "of Act of 1886] . . . makes an order "giving the custody of the infant to "the mother, then, whether or not "the mother is then residing with the "father, the court may further order "that the father shall pay to the "mother towards the maintenance of "the infant such weekly or other "periodical sum as the court, having regard to the means of the "father, may think reasonable".

EVERSHED, M.R. It is beyond doubt as a matter of principle that English statutes will not be regarded, in the absence of language to the contrary, as asserting any jurisdiction beyond English territory. The general principle is stated in *Ex parte Blain* (9), and later in the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (10). Both were cases arising under the then existing bankruptcy legislation, and in both the question was whether certain foreign individuals were "debtors" within the meaning of the Bankruptcy Acts so as to be liable to bankruptcy proceedings. In both cases the foreign individual had been served with proceedings, and had appeared to protest. It appears that in the second case, according to the report of the proceedings in the court below, he had also challenged the allegations in the petition; but from the judgments in the House it does not appear that any point was taken that the debtor had by appearance or by taking steps in the proceedings purported to submit to the jurisdiction. This passage from the judgment of James, L.J., in the first of these two cases has been cited many times, and by the Lord Chancellor in the second of the cases (11): "It appears to me that the whole question is governed by the

(9) 12 Ch. D. 522.
(10) [1901] A. C. 102.
(11) 12 Ch. D. 526.

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"broad, general, universal principle that English legislation, "unless the contrary is expressly enacted or so plainly implied "as to make it the duty of an English court to give effect to an "English statute, is applicable only to English subjects or to "foreigners who by coming into this country, whether for a long "or a short time, have made themselves during that time subject "to English jurisdiction. Every foreigner who comes into this "country, for however limited a time, is, during his residence "here within the allegiance of the Sovereign, entitled to the "protection of the Sovereign and subject to all the laws of the "Sovereign. But, if a foreigner remains abroad, if he has never "come into this country at all, it seems to me impossible to "imagine that the English Legislature could have ever intended "to make such a man subject to particular English legislation".

Brett, L.J., and Cotton, L.J., gave judgment to the same effect, the latter saying (12): "Of course it is right that questions "of title to such property should be adjudicated upon here, and "there may well be English statutes giving our courts power to "deal with suits relating to the title to real property in England "as regards aliens, and for the purpose of serving them. But "that is a very different thing from saying that you shall deal "with a foreigner who has never been here, and has never "submitted himself to the English Act of Parliament, in the "special subject of bankruptcy to which this Act refers". I should add that, as appears from the judgments in *Ex parte Blain* (13) and from the case in the House of Lords, *Cooke* v. *Charles A. Vogeler Co.* (14), in connexion with a matter of bankruptcy there is a special reason for taking care not to assert a greater jurisdiction than the statute clearly justifies: it is that bankruptcy procedure involves, or is intended to involve, the administration of all the assets of the debtor for the benefit of his creditors. Nothing that I propose to say is intended as any qualification of the passages which I have read, or of the views expressed in those judgments, which are well established authority.

But there is another principle (which involves no such qualification), namely, that, generally speaking, an individual who ordinarily would be beyond the scope of the English legislation construed according to the first principle may, nevertheless, voluntarily submit himself to that jurisdiction and make himself amenable to the particular law. The obvious way in which that may be done by a man is the way indicated in the passages which I have read, namely, by his coming to this country and being here, albeit for quite a short time, thereby rendering himself

(12) 12 Ch. D. 532.

(13) Ibid. 522.

(14) [1901] A. C. 102.

amenable to the statute. But it seems to me that personal presence here is not, as a matter of good sense and principle, the only way whereby an individual may render himself amenable to the particular legislation. It would seem strange if a man, by coming and being physically here for a week, became amenable to the particular legislation; but that if, though he stayed outside these shores, he chose to be represented by solicitors and counsel and fought on its merits some particular piece of litigation, he should be held not to have effectually submitted himself to the jurisdiction. It does not seem to me that anything in the passages cited can be taken to have laid down that effectual submission is only to be derived from actual physical presence or residence on English territory.

On the other hand, it is undoubtedly true that a particular statute may by its character and its terms make plain that it is intended to confer only a limited and circumscribed jurisdiction, by reference either to a particular subject-matter or to the categories of individuals who may be subject to the jurisdiction.

That kind of case is best illustrated by the position of what are called inferior courts. As Asquith, L.J., observed during the course of the argument, no kind of submission by the parties to a dispute could confer on a county court jurisdiction to decide a libel action. Judges are not entitled to become arbitrators, and in the exercise of their judicial office county court judges could not by any means determine a libel action. Again, our inferior courts, county courts and justices' courts, are limited by the express language of relevant statutes as regards the persons over whom they may exercise jurisdiction. Thus, broadly speaking, a county court's jurisdiction is confined to persons who have a residence within a specified area and the same is true of justices' courts. If, therefore, the person sought to be sued in one of those inferior courts does not in fact fall within the category of persons over whom alone, by definition, that court has jurisdiction, no amount of submission on the part of an individual will operate to extend the jurisdiction which Parliament has thought fit to limit.

That particular aspect of the matter came recently under consideration by this court in *Forsyth* v. *Forsyth* (15). The question was whether a certain justices' court had had jurisdiction over a husband complained against who had at all material times been domiciled and resident in Scotland. It was said that the husband had been represented by a solicitor who, in the course of the proceeding, had cross-examined the wife, and that he must on that ground be taken to have submitted to the jurisdiction and so have given power to the justices to hear and determine the case.

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(15) [1948] P. 125.

On that point, Tucker, L.J., said (16): " Secondly, it was " contended that, even if the husband was in fact domiciled and " resident in Scotland, he had submitted to the jurisdiction of " the justices by reason of the fact that his solicitor had " appeared before the justices and cross-examined the wife, and " that, accordingly, he could not now be heard to complain of " lack of jurisdiction ". After referring to certain authorities relied on in support of that assertion the Lord Justice continued: (16) " Such cases have no application to courts of " inferior jurisdiction in this country which derive their jurisdic- " tion from statute. If such an inferior court lacks jurisdiction " parties cannot, by agreement or otherwise, confer jurisdiction " upon it ".

The main question raised in this appeal is whether the principle that where a statute confers a limited and circumscribed jurisdiction it cannot be enlarged by the parties, by agreement or otherwise, applies in the present case which, subject to what I shall say hereafter as to the form of the application, has arisen on an application to the High Court under the Guardianship of Infants Acts, 1886 and 1925.

For the purposes of this part of my judgment, I will assume that the application which came before Romer, J., was an application by the mother of the infant asking, first, for the custody of the infant under s. 5 of the Guardianship of Infants Act, 1886, and secondly, for an order against the father of the infant for maintenance under s. 3, sub-s. 2, of the Act of 1925. The father is, and has at all material times been, resident outside the English jurisdiction. He is an American citizen and has never submitted to the jurisdiction in the sense of having come here personally and lived here. In those circumstances, though the judge, as will presently appear, made an order for custody, he said, when the matter of maintenance came to be considered that, though he would have been disposed to make some order for the maintenance of the child, he felt himself bereft of the necessary jurisdiction; and he thought that the above quotation from Tucker, L.J.'s judgment was applicable to this case, although we are here concerned not with an inferior court, but with the High Court.

The question we have to consider (and I confess I have found it a difficult one) is whether that view ought to be supported. I have come to the conclusion, with all respect to the judge, that he had the jurisdiction the absence of which he so much regretted. The matter, I think, really depends, if I have correctly stated the principles, upon the construction of the Acts. If upon a fair reading of those statutes it appears that the jurisdiction to award maintenance is intended only to be exercised upon fathers who are English subjects, or English residents strictly so called, then, I conceive, it would follow (apart perhaps from some matter of estoppel) that an individual who was not an English subject or an English resident could not enlarge the Parliamentary jurisdiction; and I think that Mr. Albery, for the infant, concedes as much.

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(16) [1948] P. 132.

I therefore turn to the Acts. It is unnecessary to go through them section by section. The first thing to note about them is that, as Mr. Bonner conceded, the infant over or in respect of whom jurisdiction can properly be exercised may not be the child of English parents. Plainly the infant would have to be here if any effective order were going to be made in regard to its custody; but it may well be, and many cases must be known to all who practise in these matters, that the infant is not an English subject. From that it will follow that the fathers and mothers who are contemplated by the Act may not be English subjects; but that does not answer the question whether the fathers or mothers must be otherwise amenable to the jurisdiction. As, however, the scheme of the Act contemplates making orders in respect of the children of foreign parents in certain circumstances, there seems to be no particular reason for confining its jurisdiction to parents who have either permanently or casually been resident in England. The matter can, I think, be taken a little further, for, in s. 9 of the Act of 1886, there is this definition of "the court": "the expression 'the court' shall mean in "England the High Court of Justice or the county court of the "district in which the respondent or respondents or any of them "may reside". That, of course, reflects the limited jurisdiction by reference to areas of the county courts, but it is to be noted that the qualification of residence, expressed naturally and properly as regards the county courts, does not appear in regard to the High Court. I should therefore, prima facie, take it that this Act (and the same is true of the Act of 1925) was intended, in the absence of express provisions, to have no less and no more operation than any other Act of Parliament, namely, that it would be available in the High Court against any person who was, for any reason, amenable to the jurisdiction of that court.

On the other hand, attention was drawn to, and the judge placed some reliance on, s. 8, sub-s. 1, of the Act of 1925, which provides: "Any person for the time being under an "obligation to make payments in pursuance of any order for the "payment of money under the Guardianship of Infants Act, "1886, as amended by this Act, shall give notice of any change "of address to such person (if any) as may be specified in the "order, and any person failing without reasonable excuse to give "such a notice shall be liable on summary conviction to a fine". That, it is said, indicates that any person who is ordered to make payment—and that would, of course, plainly cover the case of a father ordered to make the payment mentioned in s. 3, sub-s. 2—has to be a person in regard to whom it would be sensible to make those provisions about notifying changes of address and imposing criminal liability in default. But s. 8, sub-s. 1, is not, be it noted, of universal application: it simply provides that any person so ordered is to give notice of any change of address to such person, *if any*, as the order may specify. If the individual were not resident in England there would be no point, prima facie, in specifying such a person or making any such requirement. In the ordinary case of an English subject or an English resident, it would no doubt be usual and proper. But it is conceded that residence for quite a short time would bring a father within the scope of the Act, and in such a case it would be no more sensible to make the necessary provision under s. 8 than it would be to make it in regard to a person who, though not resident, was acting throughout by a solicitor. I therefore think that no great point can be made of this sub-section. Reading the Act, as a whole, therefore, I am unable to conclude that the intendment of these two statutes is such that only fathers who are either subjects of this country, or personally resident permanently or for a short time in this country, are intended to be covered by the jurisdiction. I think that the statute must be treated like any other statute which contains no special provision in this regard, and therefore that the jurisdiction will be properly enlarged to the extent that if anyone chooses voluntarily to submit to the jurisdiction there is nothing in principle in the Act which prevents a court from exercising that jurisdiction. If the word "father" has to be qualified in s. 3, sub-s. 2, it seems to me that it is sufficient qualification to say that it means a father amenable by any means to the jurisdiction of the English court. Therefore, with all respect to the judge, I think that there is no such limitation to be derived from the Act as prevents a submission to the High Court's jurisdiction otherwise than by actual physical presence here.

The matter is not concluded by *Forsyth* v. *Forsyth* (17), for in my opinion the reference in Tucker, L.J.'s judgment to an "inferior court" was of the essence of his decision, which is applicable accordingly in reference only to inferior courts. I therefore think that the judge had jurisdiction provided that the husband here had submitted to the jurisdiction of the court.

(17) [1948] P. 125.

The question whether there had been such a submission may, however, be one of considerable difficulty. Where husband and wife have fallen apart, the proceedings are likely to be of a somewhat hostile character. I gather that there were here considerable delays. It is said that the husband, who throughout was represented by solicitors authorized to accept service of any proceedings, asked for an adjournment to enable him to file evidence. There is some divergence of recollection between counsel as to part of what occurred before Romer, J.

There is, too, this further difficulty: I have said that I should have to consider the form of the application in the present case, and now is the proper time to do it. Under what I conceive to be the modern practice, the summons (issued as long ago as June, 1948) was entitled first "In the matter of a settlement "made between the mother of the one part" and two persons, who I think are grandparents, of the other part. That, as is clear from the evidence, was a settlement of a small sum of money, made in order that the child should become a ward of court. The parties to the action are the infant, who is the plaintiff, and two trustees, who are the defendants, neither mother nor father being parties to the action. The next heading is "In the Matter "of an Infant", and then, finally, "In the Matter of the "Guardianship of Infants Acts, 1886 and 1925". The summons taken out in the action was not in form inter partes and it ran thus: "Let all parties concerned attend before Master . . . on "the hearing of an application on the part of the above named "infant by [the mother] . . . his next friend for an order (1) that "[the mother] may be appointed guardian of the said infant and "that custody of the said infant may be given to [the mother] "until further notice; (2) that such provision may be made for "the maintenance of the infant as to this court may seem fit". By amendment about a fortnight later the summons was directed to the father and the father's solicitors, both by name. The summons was then served upon the father, and service was accepted by the solicitors named.

Where matters of jurisdiction arise in an ordinary action by writ or by originating summons, there is an opportunity for the party seeking to dispute the jurisdiction to make a proper application to appear under protest for the purpose of raising that issue. On the form of proceeding in this case a foreign individual who is served is in rather greater difficulty. In the first place, so far as the application was for the custody of the infant, the father desired to place before the English court, for reasons which it is not necessary to pursue here, various considerations. This he could only do effectively by putting in evidence and attending by representatives for argument. On the custody issue the question of jurisdiction did not arise. It is said that the father was almost bound to take some steps in the matter if he had any kind of feeling for his own child. But under the Acts (and I shall discuss this presently a little more fully) the right of the court to make an order against the father for maintenance is dependent upon an order first being made for custody. The form of the summons (though headed "In the Matter of the Guardianship of Infants Acts") may be said to be somewhat general and vague as regards the relief sought; for it asks in para. 2 "that "such provision shall be made for the maintenance of the infant "as to this court may seem fit". It is asked on behalf of the father: assuming that that was an application for maintenance under the Guardianship of Infants Acts, what was he to do and when was he to do it? I do not think that it is for this court to suggest any answer to that question.

I am relating these facts to show that the question whether according to ordinary principles there had at this stage been a submission to the jurisdiction is a difficult one dependent upon a review of the whole of the circumstances in the case. Mr. Albery's advisers very properly have limited the material which this court has to consider to portions only of about fourteen affidavits, the exhibits to which extended, we are informed, to very many pages. But in the last paragraph of the statement exhibited to the mother's first affidavit she says: "I am willing "to act as guardian to the infant and respectfully ask the court "to appoint me his guardian or to give me custody. In addition "I ask that an order for maintenance of the infant be made "against the father for" a specified sum. It is said on the mother's behalf that on the evidence it is plain that she was asking for an order under the Act of 1925 for maintenance, and that in face of this the whole matter was highly controversial from start to finish.

On those facts is it right to draw the inference that the father submitted to the jurisdiction? On the view taken by the judge, it was unnecessary to answer that question. I wondered at first whether the expression of his regret intimated that he would have held that there had been a submission. But I do not feel able to say from a reading of the note of his judgment whether that was so or not, and I think the question primarily one which the judge must determine. It appears clear that Mr. Bonner for the husband intimated at quite an early stage that he wished to raise the jurisdiction point. It may well be there was no other convenient opportunity for him to do so. All that, however, as I think, is a matter pre-eminently for the judge, who had all the materials available to him, and who heard the argument. He is better able, in the circumstances, than this court to express a conclusion upon the matter.

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There remains, however, one final point which has been described as technical. I have said that by the terms of s. 3, sub-s. 2, of the Act of 1925, an order for maintenance against the father can be made only after an order for custody under s. 5 of the Act of 1886 has been made. That section is, so far as material, in these terms: "The court may, upon the application of the mother of any infant (who may apply without next "friend) make such order as it may think fit regarding the "custody of such infant", etc. The point made is that this was not an application by the mother, and that the order was not made under that section. The order made followed the summons, and also followed the form usual in these difficult infant cases. The titles are all reproduced in the order, though it appears that, in the course of filing the supporting affidavits, whether from economy, absent-mindedness, or other reasons, some of the titles are occasionally omitted. But when the order was drawn up the title followed the summons precisely. It recites the summons, refers to counsel and the affidavits, and then says: "It is "ordered that the custody of the infant plaintiff be committed to "the [mother] until further order", and the judge does not make any order as to costs.

Has the condition precedent to a maintenance order been established, or is Mr. Bonner right in saying that no order for custody under the statute of 1886 was made and that the court therefore cannot make, whatever the answer to the main point of jurisdiction may be, a maintenance order against the husband? The matter is troublesome, and all the more so because, I think, the procedure which has now become well established in the Chancery Division and is derived from the present rules appears somewhat to have lost sight of the original foundation for the jurisdiction. Under the Act of 1886 it was contemplated that application should be made by the mother or, if the mother was dead, by the guardian; and there was also under s. 2 a general jurisdiction, in the absence of a guardian, for the court to appoint guardians. Then power was given by rule to determine the procedure. We have seen the older precedents in Daniell's Chancery Forms (5th ed., 1901). I have also been able to refer to Daniell's Chancery Practice (8th ed.), p. 1926, where it is stated that the old rules provide that where application was made under s. 2 it would be proper to make it by the infant through a next friend. But it states, following the terms of the section, that applications under s. 5 would be made, where proper, by the mother and if the mother were dead, by the guardian, or if the application were pursuant to the last two lines of the section, by the infant, again through his next friend. There was therefore a distinction in the rules between applications under s. 2 and applications under s. 5. It is not, however, without significance that in the old forms the example given for an application under s. 5 is a summons by the mother, but the application is treated as having been headed not only in the matter of the Acts, but also in the matter of the infant by his next friend. If a mother were appointed next friend the position would be that the summons was entitled " In the matter of the " infant by the mother as next friend ", though the mother would make the application.

The modern rules which followed the passing of the Act of 1925, made it clear that the practice of the Chancery Division had become more settled. R. S. C. Ord. 55A, r. 2, is in these terms: " Any application under either the Act of 1886 or the Act " of 1925 may be disposed of in Chambers by a judge of the " Chancery Division and may be made as follows ", by summons in the action where there is a pending action, and, where there is no pending action, by originating summons. By r. 3, " A " summons under r. 2 of this Order may be taken out by the " infant (by a next friend) or by any other person interested in " the relief sought and shall be served ", etc. It is to be observed, therefore, that no longer is any distinction drawn between summonses under s. 2 and s. 5 of the Act of 1886. The rules seem to contemplate that any summons, including summonses under s. 5, may be taken out not only by the mother, but by an infant by its next friend, or by any other person interested. Fortunately we are not concerned with what the position would be if an application was taken out under s. 5 of the Act of 1886 by some person interested other than the infant itself or the infant's mother. But there seems no doubt that for procedural purposes the rules contemplate that an application in the name of the infant by its mother as next friend should be treated as an application by the mother within the terms of s. 5. I have referred to para. 9 of the mother's statement, from which it is plain that she is herself asking for the relief (a) of custody, and (b) of maintenance. When the order was made it was expressed (at any rate according to the heading) to be made under the Acts, and therefore it must have been treated, so far as custody is concerned, as an order for custody on the application of the mother, which, of course, in substance it was. It may be that at some time consideration might be given to seeing to what extent the rules are strictly in conformity with the terms of the Acts; but I have come to the conclusion that the present application ought to be treated as being an application within the terms of s. 5 by the mother, although procedurally, in accordance with the rules and modern practice, it was made by the infant acting through its mother as its next friend. I therefore do not think that the objection to the application for maintenance which has been suggested on this head can be sustained.

On the original point I will add one final consideration: if the judge had no jurisdiction, then prima facie he had no jurisdiction to order the husband in any circumstances to pay any costs. He could only do that on the terms that the husband had submitted to the jurisdiction. His order did not in fact make provision for costs, but it would seem to me a very startling thing if an individual could come, as this husband did, and take part for two years or so in a highly contentious piece of litigation which is probably very costly, and then be in a position to say that the court had no jurisdiction over him whatever, and so could not order him to give security for costs and certainly could not order him to pay them.

I think that that consideration is relevant to the matter in hand. As a matter of principle, where a man has so acted as to make it plain that he does submit and renders himself amenable, that is sufficient to confer under this Act jurisdiction over him, although he does not ever set foot on these shores. But I must not be taken to be pre-judging the question whether he has in this case submitted. I think that that is a matter, as I have said, which Romer, J., is far better able to decide, and I think, therefore, that, in allowing this appeal, we should refer the matter back, intimating our view that he has jurisdiction, if he thinks that there was a submission, and if he thinks it proper to exercise it.

ASQUITH, L.J. I agree. The proposition contended for on behalf of the father is that, where jurisdiction is conferred by a special statute on an English superior court, a foreigner resident abroad cannot submit to that jurisdiction effectively by any conduct other than coming to this country. That seems to me contrary to principle, and also to the reasoning on which the court proceeded in *Duff Development Co.* v. *Government of Kelantan* (18). It is quite true that in that case the immunity claimed was claimed by a foreign Sovereign and not merely by an ordinary foreigner resident abroad. But in my view the doctrine of submission, if it applies to the first, must logically also apply to the second; and the court, though it found on the facts that the Sovereign had not submitted, clearly held that he could have done so without coming to this country, and none the less so because the jurisdiction involved was that conferred by a special statute, namely, the Arbitration Act. Whether the conduct of the father did in this case amount to submission is a question of fact which the judge, taking a different view of the law from that

(18) [1924] A. C. 797.

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DULLES SETTLEMENT, *In re.*
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which was expressed by my Lord and which I share, found it unnecessary to decide, and it is a question which, on existing materials, we cannot decide. I agree that the case should be remitted to him for that issue to be determined.

On the other point, that maintenance cannot be claimed under s. 3, sub-s. 2, of the Act of 1925, because the condition precedent laid down by s. 5 of the Act of 1886, namely, application by the mother, has not been satisfied, I also agree with my Lord, and have nothing to add to his reasons. I agree the appeal should be allowed.

JENKINS, L.J. I also agree.

Appeal allowed.
Case remitted.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Landons.*

H. C. G.

VAISEY, J.
1950
Nov. 7.

In re SCHÄR, DECD.
MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* DAMER AND OTHERS.

[1947 S. 123]

Joint tenancy—Purported disclaimer of interest by one joint tenant—Effect.

A testator in 1931 directed by his will that his residuary estate should be divided among beneficiaries all or some of whom lived in Germany. In 1940 he provided by a codicil that if, at his death, or before his trustees had wound up his estate, legislation were in force in the United Kingdom depriving the beneficiaries of the right to receive those benefits they should go to his trustees absolutely. In 1943 he died. One of his three trustees was a bank who wished not to accept their share. The court made an order declaring that the legacies and shares of residue given by the will and codicil to persons who survived the testator and were at his death enemies within the meaning of the Trading with the Enemy Act, 1939, and orders made under it were payable to the bank and the other two trustees beneficially. The bank then executed a deed of disclaimer. The other two trustees were parties "of the other part" to the deed but did not execute it. The deed recited, among other things, that the bank did not intend and never had intended to take advantage of any interests to which they were entitled beneficially under the will and codicil, and were desirous of executing the release thereinafter contained: The clause containing the operative part of the deed stated that, in pursuance of that desire, the bank thereby disclaimed all the share and interest of and in the legacies and share of residue referred to in the order of the court.

On a summons by the bank to have determined, among other things, whether the interest declared by that order to be vested in the bank was vested in the remaining two trustees as joint tenants or otherwise:—

Held, in deciding that the effect of the deed of disclaimer was to confer on the other two trustees as joint tenants the whole of the interest declared by that order to be vested in the bank and the other two trustees:

(1) that one of several joint tenants cannot make a disclaimer, the only disclaimer which joint tenants can make being one made by all of them; *In re Wilks* [1891] 3 Ch. 59 considered; (2) that the deed in the present case operated as a release by the bank to the other two trustees as joint tenants.

ADJOURNED SUMMONS.

A testator by his will dated March 30, 1931, appointed the bank and certain other persons his executors and directed them to sell his residuary estate and invest the proceeds. He directed his executors to pay the income of the investments (" the trust " fund ") to his wife for life and, after her death, to pay certain legacies, including one to a beneficiary living in Germany. The ultimate residue he directed to be divided in certain shares among certain persons, all or some of whom lived in Germany.

By a codicil dated May 31, 1940, the testator revoked the appointment of executors other than the bank and appointed the first two defendants executors with the bank.

By cl. 6 of the codicil he provided " . . . if at the time of " my death or at any time before my trustees have wound up " my estate . . . legislation is in force in the United Kingdom " by which the said benefits " (i.e., those given to the beneficiaries under the will or any codicil thereto) " become . . . " charged . . . or the said beneficiaries are or may be deprived " of the right to receive the same at their free disposal then " I give such benefits to my trustees absolutely with the request " but without creating any trust that they will carry out the " wishes contained in my said will or any codicil thereto when " legislation permits them to do so ".

On January 19, 1942, the testator's wife died and on January 19, 1943, the testator died and on November 1, 1943, his will was proved by the bank and the first two defendants.

The bank felt some embarrassment at having thrust on them, apparently as beneficial owners, property of the testator of whose will they were one of the executors. The matter came before the court, and, on March 20, 1945, Cohen, J., declared that, on the true construction of the will and codicil, and, in particular, of cl. 6 of the codicil, and in the events which had happened, legacies and shares of residue thereby given to persons who survived the testator and were at his death enemies within the meaning of the Trading with the Enemy Act, 1939, and any orders made thereunder were payable to the bank and to the first two defendants beneficially.

That clarification of the position intensified the embarrassment of the bank, who, to relieve themselves of it, executed, on November 19, 1945, a deed of disclaimer to which the first two defendants, who were therein called " the beneficiaries ", were parties of the other part. The first recital was that the deed was to be read as supplemental to the will and codicil; the second set out the effect of the order of Cohen, J.; and the third stated: " The bank does not intend and never has intended to accept " or take advantage of any interests to which they are (sic) " entitled beneficially under the will and codicil of the testator " and is desirous of executing such release as is hereinafter " contained ". The clause containing the operative part of the deed was: " Now this deed witnesseth that in pursuance of the " said desire, the bank doth hereby disclaim all that the share " and interest of the bank of and in the legacies and share of " residue referred to in the said order ". There followed the statement that the common seal of the company was affixed thereto the day and year first above written.

By this summons, which was issued on January 14, 1947, and to which the third defendant was the Custodian of Enemy Property, the bank asked, among other things, whether, on the true construction of the will and codicil and in the events which had happened (in particular the order of Cohen, J., and the deed of disclaimer), (a) the interest declared by that order to be vested in the bank was now vested in the first two defendants as joint tenants or otherwise; (b) a one-third share of the said legacies and share of the residue of the testator or some other and what share devolved on the last defendant as the Custodian of Enemy Property.

On May 20, 1947, the summons came on for hearing before Vaisey, J. The point was raised whether the bank could give away their assets, and the summons was adjourned and retained in his Lordship's list. It now again came before the court.

Donald H. Cohen for the bank.

W. F. Waite for the first two defendants, the other trustees of the will and codicil. The questions that arise are whether the bank are entitled to execute the so-called deed of disclaimer—which they do at the expense of their shareholders—and what the effect of the deed is. If it is contended by the Custodian that it amounts to a severance of the joint tenancy, the answer is that no-one can sever a joint tenancy who has never taken any interest at all in the subject-matter of it. Where, as in the present case, there has been a gift to three persons as joint tenants, a refusal by one of them to take under the gift does not sever the joint tenancy. It operates only as a release, and its effect is simply to strike out the gift to the person disclaiming, just as if that gift had never been made: see Halsbury's Laws of England, 2nd (Hailsham) ed., vol. 34, p. 124, para. 158. Thus, the other two trustees take the whole of the residuary estate beneficially.

Denys Buckley for the Custodian of Enemy Property. The effect of executing the deed of disclaimer was to work a severance of the joint tenancy. It operated to alienate the interest which theretofore vested in the bank: see Law of Property Act, 1925, s. 205, sub-s. 1 (ii), which provides that " ' Conveyance ' " includes a . . . disclaimer . . . ". In *In re Wilks* (1), Stirling, J., said, " A joint tenancy may unquestionably be " severed . . . by a disposition made by one of the joint owners " amounting at law or in equity to an assignment of the share " of that owner . . . ". Later in his judgment he said (2) " . . . " if the act of a joint tenant amounts to a severance, it must " be such as to preclude him from claiming by survivorship any " interest in the subject-matter of the joint tenancy ". The disclaimer in the present case amounts to " a disposition made by " one of the joint owners amounting to an assignment of his " share or interest in the property ". The one-third share which has been disclaimed accordingly goes to the Custodian.

W. F. Waite in reply. *In re Wilks* (3) appears to say what are the requisites of severance of a joint tenancy; but it does not say that a legatee can sever a joint tenancy by refusing the legacy, which is what the bank have purported to do here.

VAISEY, J. [after stating the facts:] Two views can be taken of this document: first, it is said that it is a disclaimer, and, secondly, that it is a release. In the last recital the bank express the intention of executing a release, and in the operative part they purport to exercise a right, or claim a privilege, of disclaimer. I am bound to add that if it were a disclaimer into the air, so to speak—a shaking off of the embarrassing benefit which the combined effect of the will and Cohen, J.'s order had imposed upon the bank—it is rather curious that the other two trustees should have been made parties "of the other part". It certainly looks as though the intention, so far as it can be made out, was that the parties "of the other part" were intended to get something out of it, that something was to go to them, or that they were in some way to benefit by this document. If it was a pure disclaimer, I should have thought that the proper form was that of a deed poll. However that may be, it is a document inter partes; it is a disclaimer which is prefatorily called a release in the recital; and there is no indication whatever how "the beneficiaries" come in—what they are supposed to be doing and what they will get out of it.

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(1) [1891] 3 Ch. 59, 61.
(2) Ibid. 62.
(3) [1891] 3 Ch. 59.

This summons came before me so long ago as May, 1947, and stood over, I understand, because it was suggested that the bank could not have had, or at any rate, had not, under their objects the power to give away property to which they were entitled. Now, after three and a half years, the bank come back to me with further evidence which shows quite clearly that they did not much care where this property went; in fact they deliberately say that they did not care or did not know in the least what happened to it so long as they did not have to handle it. The general manager of the bank explains that he did not think it good business for the bank, so to speak, to soil their hands by accepting, even notionally, property not deliberately left to them, though I cannot quite understand the whole of the grounds of the scruples which they felt, because it may be that, on the true construction of the will as construed by Cohen, J., the bank were given this property; and why they should not have accepted it in those circumstances, I do not know.

I have to decide whether this document operates either as a severance of the joint tenancy and a putting back into the estate, as property undisposed of, of a third share in these various interests, or whether it was a release of the bank's share in those particular items of property which went in the ordinary way to the other joint tenants. Counsel have told me that there is very little authority, and I am not surprised, for this document is not one which ought to be adopted as a precedent. Probably it would not have been put in the form in which it was put had counsel been consulted at an earlier stage. The question whether there can be a disclaimer in the proper sense by one of several joint tenants has, however, received some attention. In Halsbury's Laws of England (2nd (Hailsham) ed.), vol. 34, p. 124, para. 158, it is stated: "Disclaimer may be made in "the case of a person sui juris"—in various ways. "A dis-"claimer puts a donee, as regards his liabilities, burdens, and "rights, in the same position as if no gift had been made to him, "but does not necessarily render the gift void in regard to all "persons and for all purposes, as, for example, where the donee "is a trustee".

I do not believe that disclaimer can be made by one of several joint tenants, for I think that the unity of the estate and of the interest in it enures for the benefit of each and all; and each and all have one undivided and indivisible property in the subject-matter of the gift, just as, although for other reasons, one trustee cannot disclaim. I think that the only disclaimer which can be made by joint tenants is a disclaimer which is made by them all. The case to which Mr. Buckley has referred, *In re Wilks* (3), contains a statement how joint tenancy is severed in the ordinary way; and, possibly, had there been a definite severance of the joint tenancy before the deed of so-called disclaimer was executed, the position might have been very different; but there is no evidence to that effect, and I think that in this somewhat obscure document all three parties, described in the deed as the bank and the beneficiaries, were all joint tenants together. It is a little significant that the joint beneficiaries named as "of the "other part" did not execute the deed; there was not even the usual formality and compliment of affixing a seal for them to put their fingers on. The only execution was by the bank.

I think that this document which, quite obviously, having regard to the prefatory recital, the bank thought was going to be a release, operated as a release to the other two joint tenants, and I should have thought that the bank would have been well pleased that that should be so because there are the two joint tenants bound—not legally but morally bound—to carry out certain express desires and wishes of the testator. Why the bank felt that they were in some way precluded from helping them to carry out that moral duty, I do not quite understand. But it is not for me to tell the bank how to conduct their business, and it may be that, if there had been the slightest breath of suspicion that the bank had been helping themselves to property to which they did not consider themselves entitled, that would do harm to their reputation.

I think that the effect of the deed was to vest in the other two trustees, as joint tenants, the whole of the interest which Cohen, J., declared to be vested in the bank and the other two trustees, and I shall so declare.

Declaration accordingly.

Solicitors: *Buckeridge & Braune; Solicitor, Board of Trade.*

K. R. A. H.

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(3) [1891] 3 Ch. 59.

C. A.

1950
Nov. 8, 9, 10.

Evershed, M.R., Asquith and Jenkins, L.JJ.

GREENHALGH *v.* ARDERNE CINEMAS, LD. AND OTHERS.

[1948 G. 1287]

Company law—Private company—Articles restricting transfer of shares to members—Majority resolution authorizing sales to strangers—Validity—Whether resolution passed bona fide for benefit of company.

The authorities establish that a special resolution can be impeached if it is not passed "bona fide for the benefit of the company as a whole". That phrase means that a shareholder must proceed upon what in his honest opinion is for the benefit of the company as a whole. "The company as a whole" does not, however ordinarily mean the company as a commercial entity as distinct from its corporators. It means the corporators as a general body.

A special resolution may be impeached if its effect is to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter are deprived. The persons voting for a special resolution are not required to dissociate themselves from their own prospects and consider what is for the benefit of the company as a going concern. If an outside person offers to buy all the shares, prima facie, if the corporators think it is a fair offer and vote in favour of a resolution accepting the offer, it is no ground for impeaching the resolution that in passing it they considered their own individual positions.

The first defendants were a private company with a nominal capital of 31,000*l.* divided into 21,000 preference shares of 10*s.* each and 205,000 ordinary shares of 2*s.* each. All the ordinary shares had been issued, 155,000 shares being fully paid up and 50,000 shares being paid up to the extent of twenty per cent. The plaintiff was the holder of 4,213 ordinary shares. The second defendant and his family and friends were the holders of 85,815 shares. The 50,000 partly paid up ordinary shares were held by the last two defendants as nominees of another company.

The articles of association provided by cl. 10 (*a*): "No shares "in the company shall be transferred to a person not a member of "the company so long as a member of the company may be willing "to purchase such shares at a fair value to be ascertained in "accordance with sub-clause (*b*) hereof".

By an agreement dated June 4, 1948, made between the second defendant and the third defendant (hereinafter called "the "purchaser") which recited that the second defendant owned or controlled 85,815 ordinary shares and 50,000 partly paid ordinary shares, the second defendant agreed to sell the ordinary shares to the purchaser at 6*s.* a share. On June 7, a notice was sent out calling an extraordinary meeting of the company for the purpose of passing the following resolution: "That the articles of associa-"tion of the company be altered by adding at the end of art. 10 the "following additional clause: 'Notwithstanding the foregoing pro-"'visions of this article any member may with the sanction of an "'ordinary resolution passed at any general meeting of the com-"'pany transfer his shares or any of them to any person named in "'such resolution as the proposed transferee, and the directors "'shall be bound to register any transfer which has been so "'sanctioned'".

On the footing that that resolution had been passed, it was proposed to pass an ordinary resolution sanctioning the transfer of 500 shares to the purchaser. These resolutions were duly passed by the requisite majorities at a meeting of the company held on June 30, 1948. Thereupon the plaintiff issued the writ in this action claiming, inter alia, that the two resolutions passed on June 30, 1948, were void and to restrain, in effect, transfers of shares to the defendants who were nominees of the purchaser.

The plaintiff contended that the resolutions of June 30, 1948, were invalid on the ground that the interests of the minority of the shareholders had been sacrificed to those of the majority.

Held, that, the special resolution having been bona fide passed, it was not an objection to it that, by lifting the ban in the original articles on sales to persons who were not members of the company, the right on a sale to tender for the majority holding of shares would be lost to minority shareholders, and that accordingly the special resolution could not be impeached.

Sidebottom v. *Kershaw, Leese & Co. Ld.* [1920] 1 Ch. 154; *Dafen Tinplate Co. Ld.* v. *Llanelly Steel Co. (1907), Ld.* [1920] 2 Ch. 124, and *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ld.* [1927] 2 K. B. 9 considered.

APPEAL from Roxburgh, J.

The first defendants, Arderne Cinemas, Ld. were a private company. Their issued capital consisted of preference shares (with which the action was not concerned) and 205,000 ordinary shares of 2*s*. each. Of the ordinary shares 155,000 shares had been issued and were fully paid up, the remaining 50,000 shares having been issued but were only partly paid up. Article 10 of the articles of association of the company provided:

"(a) No shares in the company shall be transferred to a "person not a member of the company so long as any member "of the company may be willing to purchase such shares at a "fair value to be ascertained in accordance with sub-cl. (*b*) "hereof.

"(b) If any member desires to sell or transfer his shares or "any of them, he shall notify his desire to the directors by "sending them a notice in writing (hereinafter called a 'transfer "'notice') to the effect that he desires to sell or transfer such "shares. The receipt by the directors of the transfer notice "shall constitute an authority to them to offer the shares for sale "at a fair value ascertained as follows, viz., the sum so estimated "by the selling member shall, if approved by the directors, be "the fair value, but in the absence of such approval in order to "prevent disputes arising, the fair value shall be the auditor's "valuation of the current worth of the company's shares to be "made by him in writing at the request of the directors. . . .

"(c) When the fair value of the said shares has been fixed "under the provisions of sub-cl. (*b*) hereof, the directors shall "cause a notice to be sent to the selling member informing him "of the current value of his shares, and shall also cause a notice "to be sent to every other member of the company stating the "number of shares for sale and the fair value of such shares "and shall therein invite each of such members to give notice "in writing within fourteen days whether he is willing to "purchase any and if so what maximum number of such shares. "At the expiration of such fourteen days the directors shall "apportion such shares amongst those members (if any, if more "than one) who shall have given notice to purchase the same, "and as far as may be *pro rata* according to the number of shares "already held by them respectively; provided that no member "shall be obliged to take more than the maximum number of "such shares which he has expressed his willingness to take in "his answer to the said notice. . . .

"(d) If the directors shall be unable within one month after "receipt of the transfer notice to find a purchaser for all or any "of the shares among the members of the company, the selling "member may sell such shares as remain unsold to any person "though not a member of the company at any price but "subject to the right of the directors (without assigning any "reason) to refuse registration of the transfer when the proposed "transferee is a person of whom they do not approve, or where "the shares comprised in the transfer are shares on which the "company has a lien."

The ordinary shares of the Arderne company were held as follows: the second defendant, J. T. L. Mallard, who was the managing director of the company, held with his relatives and friends 85,815 of the fully paid up ordinary shares. The 50,000 partly paid up shares were held partly by the tenth defendants Tegarn Cinemas, Ld. and partly by the eleventh and twelfth defendants to the action who were nominees of the Tegarn company. The plaintiff held 4,213 fully paid ordinary shares. The holders of the remaining shares did not figure in this dispute.

There had been a series of actions in relation to the affairs of the Arderne company which had left the plaintiff with a strong sense of grievance. In April, 1948, the defendant Mallard opened negotiations with the third defendant Sol Sheckman (hereinafter called "the purchaser") for the sale of a controlling interest in the company to the purchaser. By agreements of

June 4, 1948, the defendant Mallard agreed to sell or procure the sale to the purchaser of 85,815 fully paid ordinary shares at 6*s.* a share in the Arderne company. At the same time the purchaser obtained the control of the Tegarn company.

In order to give effect to these agreements an extraordinary meeting of the Arderne company was held on June 30, 1948. At that meeting the following special resolution was passed: "That "the articles of association of the company be altered by adding "at the end of art. 10 the following additional clause: 'Notwith-"'standing the foregoing provisions of this article any member "'may with the sanction af an ordinary resolution passed at any "'general meeting of the company transfer his shares or any of "'them to any person named in such resolution as the proposed "'transferee, and the directors shall be bound to register any "'transfer which has been so sanctioned'." That resolution was followed by an ordinary resolution sanctioning the transfer by the defendant Mallard of 500 shares to the purchaser. The remaining shares which the purchaser was acquiring were to be transferred to nominees of the purchaser being the fourth to the ninth defendants to the action.

Immediately after these resolutions had been passed, the plaintiff issued the writ in this action in which he claimed a declaration that the resolutions passed at the meeting of June 30, 1948, were void and of no effect, and a declaration that the transfers under the resolutions should be set aside and certain ancillary relief. The action was heard by Roxburgh, J. The plaintiff made various allegations against the defendant Mallard which involved certain questions of fact. The judge held that the defendant Mallard had not been guilty of deliberate dishonesty, and dismissed the action. The plaintiff appealed. On the appeal the various transactions which led up to the resolutions of June 30, 1948, were considered at length, but they do not call for report.

Jennings, K.C., and *Lindner* for the plaintiff. The question is whether there has been a fraud on the minority of the shareholders by the majority's taking first steps towards appropriating the assets of the company. Unless the resolution of the majority was passed bona fide for the benefit of the company, it would be an invalid resolution.

[JENKINS, L.J. Every shareholder was entitled to get 6*s.* for each share, and that suggests something quite bona fide.]

It is contended that the particular interests were not casting votes for the benefit of the company and, moreover, that all acted mala fide and in the interest of the defendant Mallard.

[JENKINS, L.J. The fraud must be one of the majority on the minority.]

It is submitted that the test is whether what has been done is for the benefit of the company. There need be no evidence of fraud. The defendants appreciated this and set up the defence that their action was for the benefit of the company. There are cases of resolutions altering the articles of particular companies, and the test is whether the articles were altered for the benefit of the company. *Sidebottom* v. *Kershaw, Leese & Co. Ld.* (1) clearly establishes that the question is whether what has been done was for the benefit of the company.

The next authorities are *Dafen Tinplate Co. Ld.* v. *Llanelly Steel Co.* (1907), *Ld.* (2) and *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead), Ld.* (3). The court has to consider whether what has been done is for the benefit of all the shareholders and therefore of the company as a whole: see Buckley's Law of Companies (12th ed.), pp. 35, 37 and 38, where it is laid down that the majority of the shareholders are not at liberty to affect the minority injuriously. The power "must be exercised bona fide "for the benefit of the company as a whole".

The evidence is only consistent with the view that the defendant Mallard and the shareholders whose votes he controlled passed the special resolution not with a view to the benefit of the company as a whole. If this is correct, the authorities establish that the special resolution cannot be valid. It unfairly discriminates between the majority and the minority shareholders, in that the majority shareholders will be able to get more for their shares for they will have an open market for them since they need not offer them to the other shareholders, whereas the minority shareholders will be only able to sell to the other shareholders. The special resolution was wider than was required: it should have been limited to authorising the sale to the purchaser and not have made a permanent alteration in the articles. The plaintiff is prejudiced by the special resolution, since it deprives him of his prospect of acquiring the shares of the majority shareholders should they in the future desire to sell. The passing of the special resolution was, in the circumstances of the case, a fraud on the minority shareholders.

Lindner followed.

Christie, K.C., and *Hector Hillaby* for the defendants other than the defendant Mallard were not called on to argue.

Pennycuick, K.C., and *Blanshard Stamp* for the defendant Mallard were not called on to argue.

EVERSHED, M.R. [after stating the facts]. The burden of the case is that the resolution was not passed bona fide and in the interests of the company as a whole, and there are, as Mr. Jennings has urged, two distinct approaches.

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(1) [1920] 1 Ch. 154.
(2) [1920] 2 Ch. 124.
(3) [1927] 2 K. B. 9.

The first line of attack is this, and it is one to which, he complains, Roxburgh, J., paid no regard: this is a special resolution, and, on authority, Mr. Jennings says, the validity of a special resolution depends upon the fact that those who passed it did so in good faith and for the benefit of the company as a whole. The cases to which Mr. Jennings referred are *Sidebottom* v. *Kershaw, Leese & Co. Ld.* (4), Peterson, J.'s decision in *Dafen Tinplate Co. Ld.* v. *Llanelly Steel Co.* (1907), *Ld.* (5), and, finally, *Shuttleworth* v. *Cox Brothers & Co.* (*Maidenhead*), *Ld.* (6). Certain principles, I think, can be safely stated as emerging from those authorities. In the first place, I think it is now plain that "bona fide for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase, "the company as a whole", does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit.

I think that the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived. When the cases are examined in which the resolution has been successfully attacked, it is on that ground. It is therefore not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from their own prospects and consider whether what is thought to be for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, prima facie, if the corporators think it a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution that they are considering their own position as individuals.

Accepting that, as I think he did, Mr. Jennings said, in effect, that there are still grounds for impeaching this resolution: first, because it goes further than was necessary to give effect to the particular sale of the shares; and, secondly, because it prejudiced

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(4) [1920] 1 Ch. 154.
(5) [1920] 2 Ch. 124.
(6) [1927] 2 K. B. 9.

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the plaintiff and minority shareholders in that it deprived them of the right which, under the subsisting articles, they would have of buying the shares of the majority if the latter desired to dispose of them.

What Mr. Jennings objects to in the resolution is that if a resolution is passed altering the articles merely for the purpose of giving effect to a particular transaction, then it is quite sufficient (and it is usually done) to limit it to that transaction. But this resolution provides that anybody who wants at any time to sell his shares can now go direct to an outsider, provided that there is an ordinary resolution of the company approving the proposed transferee. Accordingly, if it is one of the majority who is selling, he will get the necessary resolution. This change in the articles, so to speak, franks the shares for holders of majority interests but makes it more difficult for a minority shareholder, because the majority will probably look with disfavour upon his choice. But, after all, this is merely a relaxation of the very stringent restrictions on transfer in the existing article, and it is to be borne in mind that the directors, as the articles stood, could always refuse to register a transfer. A minority shareholder, therefore, who produced an outsider was always liable to be met by the directors (who presumably act according to the majority view) saying, " We are sorry, but we will not have this man in ".

Although I follow the point, and it might perhaps have been possible to do it the other way, I think that this case is very far removed from the type of case in which what is proposed, as in the *Dafen* case (7), is to give a majority the right to expropriate a minority shareholder, whether he wanted to sell or not, merely on the ground that the majority shareholders wanted the minority man's shares.

②

As to the second point, I felt at one time sympathy for the plaintiff's argument, because, after all, as the articles stood he could have said: " Before you go selling to the purchaser you " have to offer your shares to the existing shareholders, and that " will enable me, if I feel so disposed, to buy, in effect, the " whole of the shareholding of the Arderne company ". I think that the answer is that when a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form; and that, so long as the proposed alteration does not unfairly discriminate in the way which I have indicated, it is not an objection, provided that the resolution is passed bona fide, that the right to tender for the majority holding of shares would be lost by the lifting of the restriction. I do not think that it can be said that that is such a discrimination as falls within the scope of the principle which I have stated.

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(7) [1920] 2 Ch. 124.

Mr. Jennings further says that, if that is wrong, he falls back on his other point, that the defendant Mallard acted in bad faith. He concealed, it is said, various matters; he confessed to feelings of envy and hatred against the plaintiff; he desired to do something to spite him, even if he cut off his own nose in the process. Following the judge's line of reasoning, it is said that the defendant Mallard did control all these other submissive persons who supported him, so that they are equally tainted with the defendant Mallard's bad faith. I agree with Mr. Jennings that, if an ordinary shareholder chooses to give what Mr. Jennings called "carte blanche" to the promoter of a scheme and that promoter is then found to have been acting in bad faith, the persons who gave him carte blanche cannot then say that they exercised any independent judgment, and they would likewise be tainted with the evil of their leader.

Mr. Jennings had, early in his argument, formulated his grounds for bad faith against the defendant Mallard at greater length, and I need not, I think, go through the several heads.

[His lordship considered certain specific criticisms of the defendant Mallard's conduct, and continued:] Mr. Jennings says that all these various matters cast such doubt upon the transaction that the defendant Mallard must be taken to have been acting in bad faith. I think that he acted with grave indiscretion in some respects; but the judge has said that he was in no way guilty of deliberate dishonesty; and I cannot see where and how it can be suggested that he was grinding some particular axe of his own. He was getting 6*s*. a share; but he was getting no more and no less than anyone else would get who wished to sell; and I am unable and unwilling to put upon the actions of the defendant Mallard, because of his unfortunate secrecy and other conduct, so bad a complexion as to impute bad faith in the true sense of the term, of which, indeed, Roxburgh, J., acquitted him.

In my opinion, in spite of all these complexities, this was, in substance, an offer by an outside man to buy the shares of this company at 6*s*. a share from anybody who was willing to sell them. As commonly happens, the defendant Mallard, as the managing director of the company, negotiated and had to proceed on the footing that he had with him sufficient support to make the negotiation a reality. That was the substance of what was suggested. It discriminated between no types of shareholder. Any who wanted to get out at that price could get out, and any who preferred to stay in could stay in.

That being the substance of the thing, and the evidence, to my mind, clearly suggesting that 6*s*. a share (allowing for the privilege of control) was a fair price, I can see no ground for

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saying that this resolution can be impeached, and I would dismiss the appeal.

ASQUITH, L.J. I entirely agree.

JENKINS, L.J. I also agree and do not desire to add anything.

Appeal dismissed.

Solicitors: *S. A. Bailey & Co.; Billinghurst, Wood & Pope, for Keenlyside & Forster, Newcastle; Pritchard, Englefield & Co.*

B. A. B.

VAISEY, J.

1950
Oct. 12;
Nov. 23.

In re SANDBACH, DECD.

Affirmed in part and Reversed in part.
C.A. [1951] 1 All E.R. 971.

1949 S. 2362.]

Settled land—Application of capital money—Repayment of capital of loans made in respect of improvements—Repayment of capital component of tithe annuities—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 73, *sub-s.* 1 (*xiii*), (*xvi*).

The tenant for life of an estate comprising settled land had defrayed out of income instalments of repayment of capital and interest in respect of loans for improvements, which were charged on the settled property by orders made by the Ministry of Agriculture and Fisheries.

She had similarly defrayed certain tithe annuities charged on the estate in consideration of the redemption of tithe rentcharges under orders made under s. 4 of the Tithe Act, 1918.

On the hearing of a summons to have determined whether the trustees were authorized by the Settled Land Act, 1925, s. 73, sub-s. 1 (xiii) and (xvi) to recoup the tenant for life out of capital moneys in respect of the capital components of these disbursements,

Held, (1.) that "redemption" of a rentcharge, within the meaning of sub-s. 1 (xiii), indicated a compounding for future payments, and not the payment of periodical sums as they become due; and, that, accordingly, recoupment in respect of the improvement loans was not permissible:

In re Lord Sudeley's Settled Estates (1887) 37 Ch. D. 123; *In re Lord Egmont's Settled Estates* (1890) 45 Ch. D. 395; *In re Howard's Settled Estates* [1892] 2 Ch. 233, and *In re Dalison's Settled Estate* [1892] 3 Ch. 522, distinguished; these cases having been decided under s. 1 of the Settled Land Acts (Amendment) Act, 1887, in which the relevant wording was different.

(2.) That the "discharge" of an annuity, within the meaning of sub-s. 1 (xvi) signified commutation for a lump sum, and not the making of payments as they fall due; and that, accordingly, recoupment in respect of the tithe annuities was also not permissible.

ADJOURNED SUMMONS.

The testator made his will in 1923 and died in 1928. The effect of the will was to create a life tenancy in an estate in Wales in favour of the applicant, with remainder to her son, the infant respondent, as tenant in tail male. The trustees of the settlement for the purposes of the Settled Land Act, 1925, were also respondents.

The applicant's life estate began on June 25, 1928, on the termination of a preceding life estate. Subsequently to that date, the applicant had paid, or there had been paid on her behalf, or deducted from her income as tenant for life, all the instalments consisting of capital and interest in respect of certain loans made by the Lands Improvement Company to the testator or to herself, and charged on the settled property by orders of the Board or Minister of Agriculture and Fisheries. The total amount of so much of the instalments so paid as represented capital was 1,742*l.*

There had been similarly paid or deducted certain tithe annuities charged upon the estate in consideration of the redemption of tithe rentcharges under orders made under s. 4 of the Tithe Act, 1918. Of the sums so paid or deducted, the sum of 824*l.* was attributable to capital. The applicant now asked that the said sums of 1,742*l.* and 824*l.* might be recouped to her out of capital moneys subject to the settlement (1).

Jopling for the tenant for life. The principle which is applicable is stated in Gover on Capital and Incomes (3rd ed.), at p. 148: "If the life tenant pays off a charge on the settled "estate, he is presumed to have done so for his own benefit,

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(1) Settled Land Act, 1925, s. 73, sub-s. 1: "Capital money arising "under this Act . . . shall, when "received, be invested or otherwise "applied wholly in one, or partly "in one and partly in another "or others, of the following modes "(namely):— . . . (xiii) In redemp"tion of an improvement rentcharge, "that is to say, a rentcharge (tem"porary or permanent) created, "whether before or after the com"mencement of this Act in pur"suance of any Act of Parliament, "with the object of paying off any "money advanced for defraying the "expenses of an improvement of any "kind authorised by Part I. of the "Third Schedule to this Act . . . "(xvi) In the purchase of an annuity "charged under s. 4 of the Tithe "Act, 1918, on the settled land or "any part thereof, or in the discharge "of such part of any such annuity as "does not represent interest".

"and is entitled to be recouped the amount paid by him out "of the estate, in the absence of circumstances showing a contrary intention". Here, the tenant for life or the agent paid out the sums periodically in the ordinary course of estate management, and no possible contrary intention can appear.

An incumbrance on an estate is as much "redeemed" or "discharged" by periodical payments as by payment of a lump sum. [He referred to *Countess of Shrewsbury* v. *Earl of Shrewsbury* (2); *In re Lord Sudeley's Settled Estates* (3); and *In re Lord Egmont's Settled Estates* (4).]

V. M. Pennington for the trustees. It is submitted that capital money may be applied in recoupment of expenditure now being incurred, but it is doubtful if it may be applied in recouping a tenant for life for past payments made over many years. *In re Borough Court Estate* (5) shows that there are limits to this.

F. B. Marsh for the tenant in tail in remainder. *Sudeley* (3) and *Egmont* (4) depended on the language of s. 1 of the Settled Land Acts (Amendment) Act, 1887, where the words are "capital "money expended in redeeming such rentcharge, or otherwise "providing for the payment thereof". That Act was passed in consequence of the decision in *In re Knatchbull's Settled Estate* (6). Under the Settled Land Act, 1882, there was no power to redeem an improvement rentcharge out of capital: s. 1 of the Act of 1887 gave that power, but the significant words "or "otherwise providing for the payment thereof" are omitted from the Act of 1925.

The words "redemption" and "discharge" must be taken to refer to payments of a lump sum, not of instalments. In any event, the court will not recoup a tenant for life in respect of past payments made before she has claimed the right to be recouped: *In re Howard's Settled Estates* (7); *In re Dalison's Settled Estate* (8). [He also referred to *In re Marquis of Bristol's Settled Estates* (9).]

Cur. adv. vult.

November 23. VAISEY, J., in a written judgment, stated the facts and continued: As regards the former sum, the applicant's case appears to rest on s. 73, sub-s. 1 (xiii), of the Settled Land Act, 1925, and as regards the latter sum on s. 73, sub-s. 1 (xvi), of the same Act.

On the first point, the words are these: [His Lordship read sub-s. 1 (xiii) and continued:] Several cases were cited to me.

(2) (1790) 1 Ves. 227.
(3) (1887) 37 Ch. D. 123.
(4) (1890) 45 Ch. D. 395.
(5) [1932] 2 Ch. 39.
(6) (1885) 29 Ch. D. 588.
(7) [1892] 2 Ch. 233.
(8) [1892] 3 Ch. 522.
(9) [1893] 3 Ch. 161.

It was in consequence of the decision in *In re Knatchbull's Settled Estate* (10) that the Settled Land Acts (Amendment) Act, 1887, was passed, and the words which I have just quoted are said to replace s. 1 of that Act, though the wording is by no means the same. In my judgment, the difference is vital. While the earlier section refers to money expended in redeeming or "otherwise providing for the payment" of the rentcharge, the present Act refers to redemption only, and the decisions in *In re Lord Sudeley's Settled Estates* (11), *In re Lord Egmont's Settled Estates* (12), *In re Howard's Settled Estates* (13), and *In re Dalison's Settled Estate* (14), have, in my judgment, no present application.

I think that a rentcharge is not, within the meaning of the relevant words, "redeemed" by the payment of the periodical sums as they become due, though it is of course thereby "otherwise provided for". "Redemption" in the context refers, I think, to a compounding of future payments, and I think that as regards the 1,742*l*. the application fails.

On the second point, the words are these: [His Lordship read sub-s. 1 (xvi) and continued:] The words here are again different and the question is whether an annuity is "discharged" within the meaning of that word by paying it as it falls due, or only by commuting it for a lump sum, as is suggested in the note in the 12th edition of Wolstenholme and Cherry's Conveyancing Statutes, at p. 1103.

I think, on the whole, that the latter is the correct view, and that as regards the 824*l*. the application also fails. I will, however, allow the costs of all parties to this application to be taxed and raised and paid out of capital moneys.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*

F. R. D.

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(10) 29 Ch. D. 588.
(11) 37 Ch. D. 123.
(12) 45 Ch. D. 395.
(13) [1892] 2 Ch. 233.
(14) [1892] 3 Ch. 522.

C. A.

1950
Nov. 10, 13,
14, 27.

Evershed,
M.R.,
Asquith and
Jenkins, L.JJ.

BIRCH *v.* TREASURY SOLICITOR.

[1950 B. 6510]

Donatio mortis causa—Direction to one of two donees to collect bag—Gift by dying donor of contents to donees—Savings bank books and deposit account books—Documents of title to choses in action—Production of books for withdrawing money—Validity of donatio.

A donor who was near to death was held on the facts to have given to the plaintiffs in the event of her death, (a) a Post Office Savings Bank book, (b) a London Trustee Savings Bank book, (c) a Barclays Bank deposit pass book, and (d) a Westminster Bank deposit account book, with the intention that the money in the banks should belong to them. The question arose whether this operated as a donatio mortis causa; but in the case of the Post Office Savings Bank book that had been decided in the affirmative in *In re Weston* [1902] 1 Ch. 680, a case which had never since been challenged. Each of the remaining bank books contained a stipulation (but in one case by reference to rules) that it must be produced in order to withdraw money, a provision rarely infringed.

Held, therefore, that the books were indicia or evidence of title, and that the gift of them sufficed to establish a donatio mortis causa of the money in the banks: it was not necessary that each book should set out all the terms of the contract between the donor and the particular bank.

Ward v. *Turner* (1752) 2 Ves. Sen. 431 and *Moore* v. *Darton* (1851) 4 De G. & S. 517, applied.

In re Weston (supra) and *Delgoffe* v. *Fader* [1939] Ch. 922, distinguished and in part disapproved.

One person may take delivery as agent for another, and where a joint gift is intended he may take delivery for himself and as agent for the joint donee.

APPEAL from Roxburgh, J.

Mrs. E. R. Birch (hereafter called the deceased) had immediately before her death on March 29, 1948, sums standing to her credit in five different accounts, of which four were material. These were shown in (a) a Post Office Savings Bank book, (b) a London Trustee Savings Bank book, (c) a Barclays Bank deposit pass book, and (d) a Westminster Bank deposit account book. Provision was made in the books, or in one case in rules referred to in the book, that the books must be produced in order to pay in or withdraw money. In February, 1948, the deceased had been injured in an accident and was taken to St. Mary's Hospital, Highgate. The plaintiffs, Frank Birch, a nephew of the deceased's late husband, and his wife, were the best friends of the deceased, who had no blood relations. They visited the deceased on various occasions in hospital. In particular the wife went alone to visit her on March 4, 1948, and the deceased then asked the wife to go to her flat and get a black bag containing the bank books, saying, according to the wife's evidence, "I "want you to take them home and keep them and if anything "happens to me I want you and Frank to have the money in "the banks". Shortly after she said: "I think I am finished". On March 25 the deceased had a relapse and the plaintiffs were sent for. The husband, wishing to make the best of it, then said: "We have just looked in to see you"; but the deceased said: "I know I have been 'slated'" (i.e., put on the danger list). Later, after inquiring whether they had the bank books, she said: "Now don't forget, if anything happens to me, I want you to "have the money in the banks".

A full statement of the evidence is contained in the judgment of Evershed, M.R., including the fact that between March 4 and March 25 an arrangement had been made at the request of the deceased for payment of a debt that had become due.

On the deceased's death the Treasury Solicitor took out administration ad colligenda bona to her estate. The plaintiffs brought these proceedings, claiming the money in the banks as having become theirs by a donatio mortis causa.

Roxburgh, J., dismissed the action. The plaintiffs appealed.

Hawser and *M. Briegel* for the plaintiffs. There was a valid donatio mortis causa of the money in the banks by the deceased to the plaintiffs. The bank books required in each case to be produced on the occasions of any payment in or withdrawal of any sum. Provision, too, was made for payment of interest, except in the Westminster Bank deposit account book. It is possible that no interest was paid in that case although there was some evidence to the contrary. The earlier transfer by the deceased to the plaintiffs of a house in part of which she continued to live gives some indication of the excellent relationship between the deceased and the plaintiffs. The Treasury Solicitor nevertheless claims that the sums of money in question are bona vacantia. All the evidence, however, showed a clear intention by the deceased while desperately ill to let them have the money evidenced by the bank books. It is submitted that there was a clear donatio mortis causa. If documents are handed over without which money cannot be obtained, that is enough in itself to establish a donatio, and that applies to bank books. [They were stopped.]

Denys Buckley for the Treasury Solicitor. The onus is on the plaintiffs to show that the facts pleaded are established and the rule is that this should be tested strictly. It is not a mere technicality to test the value of the evidence. The first question is whether there was clear delivery of the money represented by the bank books to both plaintiffs. It is not clear, however, whether on March 4, when the wife was told to get the bank books, she was told that the money was for her only or for her and her husband; and on March 25 the deceased seems to have said that the money was for the husband only. Can it then be said that a donatio is established?

A donatio mortis causa is defined in Jarman on Wills (7th ed.), p. 49, as is also what delivery is sufficient. It is an anomalous class of gift conditional on the donor's making the gift while in extremis and dying before the gift is recalled. Further, the gift can be made through an agent. But the evidence of the wife as to the destination of the bank books makes the gift uncertain. [He referred to *Farquharson* v. *Cave* (1).] Furthermore, the delivery of the bank books does not constitute a good donatio mortis causa: *Delgoffe* v. *Fader* (2); for, to do so, the books must express "the terms on which the subject-matter of the chose "in action is held by the donor" (3).

Here, therefore, the bank books, apart from the Post Office Savings Bank book, which was recognized as the subject of a donatio in *In re Weston* (4), a decision not since challenged, are not documents sufficing to pass the money. This is because the books fail to express the essential elements of the contract between the donor and the bank. Thus no provision is made for interest in the Westminster Bank book; and the terms on which money is held under the London Trustee Savings Bank do not appear in the book but only in rules there referred to. The Barclays Bank book, also, does not state the rate of interest. Other material authorities are *Moore* v. *Darton* (5) and *In re Dillon* (6). It is true that the books provide that money cannot be paid in or withdrawn without their production, but the evidence shows that this rule is not strictly enforced.

Hawser replied.

Cur. adv. vult.

Nov. 27. EVERSHED, M.R. The judgment which I am about to read is that of the court—The question raised on this appeal is whether on the evidence there was a valid donatio mortis causa of certain bank accounts to the two plaintiffs, who are husband and wife. The trial judge has held that there was not. To answer this question involves answering at least three subordinate questions:—

(1.) Was there a sufficient "delivery" to the two plaintiffs of the subject-matter of the alleged gift to support a donatio?

(2.) Was there the requisite animus donandi having regard especially to acts done after the delivery, which are said to amount to the assertion and exercise of continued dominion by the alleged donor over the subject-matter of the alleged gift?

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(1) (1846) 2 Coll. 356.
(2) [1939] Ch. 922.
(3) Ibid. 928.
(4) [1902] 1 Ch. 680.
(5) (1851) 4 De G. & S. 517.
(6) (1890) 44 Ch. D. 76.

(3.) Assuming that there was a sufficient delivery and the requisite animus, then, seeing that the subject-matter of the gift is a number of bank balances (choses in action incapable themselves of physical delivery) and that documents relating to them were delivered, were these documents such indicia of title as are necessary to constitute a valid donatio mortis causa of choses in action?

The defendant, the Treasury Solicitor, in his capacity of administrator ad colligenda bona of the deceased, says that a negative answer should be given to all three questions save as to part of the third; and that there was accordingly no valid donatio.

The material facts may be summarized as follows:—The deceased, a frail elderly woman, who by extreme frugality had accumulated substantial savings (the bank balances involved in this case amount to about 8,000*l.*) suffered a serious accident on February 22, 1948, and was taken to St. Mary's Hospital, Highgate. She had no blood relations, but her best friends were a nephew of her late husband called Frank Birch and his wife, Gladys. They are the first and second plaintiffs respectively in this case. They together, or one or other of them separately, visited her there on various occasions between the accident and her death, which occurred shortly after March 25. As to who was present at which visit there are some discrepancies between the pleadings and the evidence, the importance of which we think the judge has overestimated. The most important at first sight is that, while para. 3 of the statement of claim appears to say that both plaintiffs were present at a visit to the deceased which can be identified as having occurred on March 4, 1948, both plaintiffs are quite positive that the first plaintiff was not present on that day.

Actually, as the judge himself acknowledged, para. 3 is ambiguous and the first plaintiff's evidence is consistent with one of its possible meanings. Apart from this, Mr. Hawser stated that he had from the first been instructed that the first plaintiff was not present at the interview on March 4, and Mr. Buckley accepted Mr. Hawser's assurance. It is quite true that where the court is dependent wholly on the evidence of interested parties it must test such evidence somewhat rigorously, but the judge, after seeing and hearing the witnesses examined and cross-examined, came to the conclusion that though the recollection of the first plaintiff, Frank Birch, was deficient, they were both completely honest.

The evidence as to the material visits and what passed at each is not very long, but as the exact words used are important some of it must be quoted verbatim. The second plaintiff, Gladys, seems to have gone every Thursday, Thursday being visiting day. The first plaintiff, Frank Birch, when he went, went on Sundays, except that he was a party on the final visit of March 25, which was a Thursday. The crucial visits were those of March 4 and 25. We will consider the evidence, in relation to these visits, first, of Gladys Birch. Gladys said (in chief) that on March 4 she visited the deceased unaccompanied by her husband and the deceased said to her: "Would I go to "Bickerton Road" (deceased's house) "and . . . I would find a "black handbag with her bank books in", adding "I want you "to take them home and keep them, and if anything happens "to me I want you and Frank to have the money at the banks". Gladys said: "Nothing is going to happen to you", but the deceased disagreed: "No . . . I think I am finished". On the next Thursday (March 11) Gladys went again, was asked if she had found the books, and said "Yes" (in the statement of claim, para. 4, this visit is mistakenly attributed to her husband). In cross-examination she said she was quite certain that she and Frank were "to have the money in the banks". On the evening of March 25 Frank and Gladys Birch were told that deceased had had a relapse and were asked to visit her at once. They thought it tactful to pretend it was a casual visit, but the deceased was not deceived and said: "I know I have been 'slated'" (i.e., put on the danger list). She then "stared at Frank Birch for "a long time" and said: "You have got my bank books, "Frank?" He said: "Oh yes, we have got them—well, as a "matter of fact, Gladys has got them". Later the deceased said: "Now don't forget: if anything happens to me I want you "to have the money in the banks". Then later, according to Gladys:—"before I left her I made her comfortable and said "'Goodbye'; and she said: 'Now don't forget: I want you to "'have that money'". In cross-examination she reaffirmed this account of this interview.

Frank Birch's evidence is shorter. He and his wife saw the deceased together on February 22, immediately after the accident. He was not present on March 4. The next time he "came into "the picture" was on the evening of March 25, the final interview, of which in his evidence in chief his account tallies exactly with his wife's, except that the final remark of the deceased, according to him, was: "I want you both" or "I want you and "Glad to have that money". Not I want "you"—a term ambiguous as to number—to have it. In cross-examination he was pressed with discrepancies between the pleadings and his and his wife's evidence, but was quite positive as to what happened on the 25th. On this occasion the deceased definitely said not "I want you both to have the books", but "I want you both "to have the money".

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This evidence establishes beyond question that certain prerequisites of a valid donatio mortis causa were fulfilled. The gift, if otherwise valid, was made in contemplation of death; and was to take effect conditionally on death occurring and in that event only. But this leaves outstanding the three issues indicated above.

1. The first issue is whether on this evidence there was a sufficient delivery to the two alleged donees. Physically, delivery on March 4 was into the hands of Gladys Birch alone; and it is objected that, where there are two donees, it must be to both. It is, however, clear that A may take delivery as agent for B; and presumably, where a joint gift is intended, A may take delivery for himself and as agent for B. But is it a proper inference from the evidence in this case that the delivery to Gladys on March 4 was, or became, actually or constructively, a delivery to both? The defendant says "No". The only delivery was to Gladys, and this was a delivery to her as agent only for the deliveror, the deceased, no doubt with a direction to deal with the object delivered, and to deal with it in a way which no doubt, if the direction were carried out, would benefit Frank as well. But that does not make it a delivery to Frank as well as to Gladys. There is no evidence, so the argument runs, that on March 4 Gladys had authority to take delivery on behalf of her husband, and nothing the deceased did could create such an authority.

On this issue, the following circumstances are relevant: (a) some years earlier, in 1940, the deceased had given and conveyed a house to the two jointly; (b) in law the delivery need not be contemporaneous with the gift: it can precede it: *Cain* v. *Moon* (7); (c) the delivery may acquire a new quality as the result of events subsequent to its physical occurrence. Thus, a delivery made in the first instance alio intuitu—e.g., for safe custody only—may acquire from subsequent events the complexion of a delivery sufficient to support a donatio mortis causa: *Cain* v. *Moon* (7).

The relevant supervening events in this case are those of the evening of March 25, when the final tripartite interview occurred. The material passages in the evidence have been quoted. It is transparently clear from this evidence that the deceased treated the two plaintiffs (as she had previously, when giving them a house) as interchangeable, or as a single entity—"one flesh". It is equally plain that the plaintiffs regarded themselves in that light. The deceased, well knowing that Gladys was the person who had actually taken delivery of the bank books on March 4, gazes fixedly, not at Gladys but at

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(7) [1896] 2 Q. B. 283.

Frank, and asks not her, but him whether he has the bank books. He says: "Yes, we have got them—well, as a matter of fact, "Glad has got them". Such language either means nothing or it means that these two amount in the eyes of the speaker to the same thing: and Gladys stands by, acquiescing without protest in this tacit identification. What passed at that interview would seem to impress on a delivery which may originally have been a delivery into the hands of Gladys only—a new character—(and we know a delivery can acquire a new character as the result of supervening events)—the character of a delivery to both. None of the parties at this interview drew any distinction between husband and wife, any more than they drew any distinction between bank books and the balances represented thereby.

Even if the matter had been otherwise—if Mr. Buckley had been right in contending that the delivery on March 4 was and remained a delivery to Gladys as agent for the deliveror only with directions to deal with the thing delivered in a certain way, yet it has been decided that in certain events delivery to X subject to a trust in favour of Y may be valid. In *Hills* v. *Hills* (8), it was held that there could be a valid donatio mortis causa though coupled with a trust. In that case Rolfe, B., said (8): "I "cannot see how the annexation of a trust to the gift can make "any difference. If it be lawful so to give the property out and "out to the party for his own use, I cannot see that it makes "any difference that with it he is to pay for a particular thing. "If a man on his death-bed gives another 1,000*l.*, is it any "addition to the evils attending this mode of bestowing property "that he attaches a condition to it—as, for instance, that he "stipulates that his brother shall receive an outfit to India? "The case of *Blount* v. *Burrow* (9), is expressly in point, and "disposes of the question; and I have no doubt that other cases "to the same effect might be found".

So here, a delivery of the bank books to Gladys on March 4, with a direction in the event of deceased's death to withdraw the balances and hand half to Frank, might well be a valid donatio, and produce the practical result for which the plaintiffs contend. But it is not necessary to decide this point. For these reasons we think that there was a delivery sufficient to comply with the requirements of a donatio.

2. The second outstanding question is whether, assuming the other conditions of a valid donatio to be satisfied, the present disposition is vitiated on the ground that the deceased, though she parted with possession, did not part with dominion over the subject-matter of the gift? For this she must do, or there is no donatio.

(8) (1841) 8 M. & W. 401, 404.

(9) (1792) 4 Bro. C. C. 72.

The argument that the deceased retained dominion is founded on an incident which occurred on the morning of March 25—before the final interview between the parties that evening. The old woman had owed a builder called Mason a sum of 98*l*. 15*s*. 10*d*. She was anxious that this debt should be paid. Gladys Birch saw her on March 11 and "later on" found this bill. She mentioned this to the deceased "subsequently" (no date can be identified, but it was before March 25): "I took her "the bill" says Gladys Birch in her evidence "and she said 'I "'would like you to pay this because I promised to pay him "'quickly and he did the work. Would you go and draw some "'money?' I said: 'Well where shall I draw the money?' "She said: 'Oh, I leave that entirely to you. You have my "'books: you can draw it where you like'". Thereupon Gladys Birch saw the manager of a branch of the Midland Bank, one Andrews, a day or two before March 25.

According to Andrews, Gladys Birch explained the situation and told him the deceased wanted arrangements made to pay this account. It was agreed that she and Andrews should go round to deceased at the hospital on the morning of the 25th and that they should get the deceased to give the bank an order to pay this sum to the builders. On the 25th the deceased put her mark on a document in the presence of Andrews and Gladys Birch. This document, which is addressed to the Upper Holloway Branch of the Midland Bank, reads: "Please pay "Mr. E. Mason . . . 98*l*. 15*s*. 10*d*. . . . to the debit of my "deposit account with you": and is witnessed by Andrews and Mrs. Birch.

This is the transaction relied on as showing that the deceased had not parted with dominion over these balances. In support of this contention counsel for the defendant cited *Reddel* v. *Dobree* (10). In that case A, in declining health, delivered to B a locked cash box, telling her to go at his death to his son for the key; that the box contained money for herself; but that he should want it every three months while he lived. He did call for it twice before he died (no doubt drawing from it) and redelivered it on each occasion to B. There it was held that the defendant had retained dominion by reserving in advance the right to deal with the box between its delivery and his death, and keeping control of the key through his son as his agent. In the present case there was no such antecedent reservation. The precatory formula used by the deceased before the final interview, "I would like you to pay this", is consistent with her having parted with dominion. At most this request and the events of the morning of the 25th might amount to a partial revocation, an effective donatio of the rest being either made or reaffirmed in the interview later that day. We are of opinion, accordingly, that this point too fails.

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(10) (1834) 10 Sim. 244.

3. If we are right in concluding that the evidence supports in other respects a valid donatio mortis causa, there remains the more difficult question whether any and, if so, which of the sums of money specified in para. 6 of the statement of claim are from their nature, and in the light of the evidence given on the defendants' behalf, capable of being the subject-matter of a donatio. Upon this point the judge was of opinion that the sum of 3,328*l.* 9*s.* 6*d.* standing to the deceased's credit in the Post Office Savings Bank was so capable. In this respect he followed the decision of Byrne, J., in *In re Weston* (11). Byrne, J.'s decision (in which he followed and applied the decision of the Court of Appeal in *In re Dillon* (12), has now stood unchallenged for close upon half a century, and Mr. Buckley, for the defendant, has addressed to us no argument against its soundness. It therefore follows that no question arises as to this sum of money, though it may be necessary to refer to the facts relevant and peculiar to a Post Office Savings Bank Deposit in discussing the problem as it affects the other deposits in this case. On the other hand, Mr. Hawser, for the plaintiffs, has abandoned any claim to the sum of 357*l.* 12*s.* 6*d.* to the deceased's credit with the Midland Bank, Ld.: and this item, therefore, disappears from the case.

There remain accordingly the three sums to the credit of the deceased, namely: (1.) 55*l.* with the London Trustee Savings Bank, (2.) 646*l.* 11*s.* 2*d.* with Barclays Bank, Ld. and, (3.) 1,353*l.* 1*s.* 8*d.* with Westminster Bank, Ld. In considering these three cases the judge applied the test stated by Luxmoore, L.J., sitting as an additional judge of the Chancery Division, in *Delgoffe* v. *Fader* (13). "The test", he said, "whether the delivery of the document constitutes a good "donatio mortis causa of a chose in action depends on the answer "to the question whether the document expresses the terms on "which the subject-matter of the chose in action is held by the "donor, or the terms under which the chose in action came into "existence".

Mr. Buckley in this court has relied upon this statement, and has contended accordingly that in the case of a chose in action actual delivery of the document constituting the evidence or indicia of title must fulfil one, if not both, of the following conditions, namely: (1.) that production and delivery of the document must be essential to the recovery of the chose in action and; (2.) it must contain all, or all the essential terms of the contract out of which the chose in action arises. In the present case the documents in question are of course the relevant bank deposit books. For reasons which we shall have to consider presently it is claimed by Mr. Buckley that in no one of the three cases (save, perhaps, for the London Trustee Savings Bank as regards the first condition) were the conditions satisfied: for, so far as concerns the first condition, it is said by Mr. Buckley that the evidence called by him proved that, whatever might have been the strict contractual terms, the practice of the joint stock banks has not been to require production of the deposit book as a condition of withdrawal; and as far as concerns the second condition, not all the terms of the relevant contracts are to be found stated, or even referred to, in any of the books.

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(11) [1902] 1 Ch. 680.
(12) 44 Ch. D. 76.
(13) [1939] Ch. 922, 928.

We have examined numerous authorities relating to this difficult subject matter. But, although it seems clearly established that there may be a valid donatio mortis causa of property other than such only as is capable of manual delivery, it must be confessed that there was, at any rate before *Delgoffe* v. *Fader* (14), no clear or precise statement of the limiting conditions applicable in such cases.

The English Law in regard to donationes mortis causa must be taken largely to rest upon the well-known judgment of Hardwicke, L.C., in *Ward* v. *Turner* (15), and as appears from Lord Hardwicke's judgment, the English law (derived at least in part from the civil law) is in many respects anomalous. It was indeed questioned at one time whether the old decisions supporting donationes mortis causa were consistent with the Wills Act, 1837, on the ground that they are in a sense testamentary in that full effect is not given to them until the donor's death. Being before that date incomplete, the gifts are then (unlike other gifts or trusts) rendered perfect and complete by the law. "A "donatio mortis causa", said Buckley, J., in *In re Beaumont* (16), "is a singular form of gift. It may be said to be of "an amphibious nature being a gift which is neither entirely "inter vivos nor testamentary. It is an act inter vivos by "which the donee is to have the absolute title to the subject of "the gift not at once but if the donor dies. If the donor dies the "title becomes absolute not under but as against his executor. "In order to make the gift valid it must be made so as to take "complete effect on the donor's death".

Because of these peculiar characteristics the courts will examine any case of alleged donatio mortis causa and reject it if in truth what is alleged as a donatio is an attempt to make a nuncupative will, or a will in other respects not complying with the forms required by the Wills Act. Such, as we read it, was the case of *Reddel* v. *Dobree* (17), where the donor stipulated that the box delivered to the claimant should be returned to him, the donor, every three months, thereby preserving to the donor an effective dominion over the contents which he could change from time to time. For the same reasons it is of the essence of a valid donatio that there should be "traditio", that is, delivery in fact of the thing given to the donee. As Lord Hardwicke observed in the course of his judgment in *Ward* v. *Turner* (18), mere symbolic delivery will not suffice. It might, therefore, be supposed that there could be a valid donatio only of such subject matters as were capable of actual manual delivery. But this is clearly not the law. Thus (as Lord Hardwicke himself noted) where the thing given is of a bulky nature, the handing to the donee of the key of the box or place where the thing is kept will be sufficient and is not to be regarded as merely symbolic. So Lord Hardwicke summed the matter up by stating that it is impossible to make a donatio mortis causa "without a transfer "or something amounting to that".

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(14) [1939] Ch. 922.
(15) (1752) 2 Ves. Sen. 431.
(16) [1902] 1 Ch. 892, 893.

The question then is, where actual transfer does not or cannot take place, what will "amount to that"? As a matter of principle the indicia of title, as distinct from mere evidence of title, the document or thing the possession or production of which entitles the possessor to the money or property purported to be given, should satisfy Lord Hardwicke's condition. On this ground, in our judgment, the validity of a donation of money standing to the donor's credit in a Post Office Savings Bank deposit, or a mortgage debt, should be sustained; and it appears to us irrelevant in such cases whether all the terms of the contract out of which a chose in action arises are stated in the document of title.

It is true that in *In re Weston* (19) Byrne, J., founded himself on the view that the document, i.e., the deposit book, "expresses the terms on which (the money) is held and shows "what the contract between the parties is", and cited *Moore* v. *Darton* (20) and *In re Dillon* (21). "An examination of the "Savings Bank Book in the present case", he said, "appears to "me to show a fulfilment of the test; and although every rule "regulating the contract is not set out in the book itself, all the "essential rules are". The judge, however, went on to state that the deposit book was not a mere receipt but that "it

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(17) 10 Sim. 244.
(18) 2 Ves. Sen. 431.
(19) [1902] 1 Ch. 680.
(20) 4 De G. & S. 517.
(21) 44 Ch. D. 76.

"must, as stated on the face of it, be produced whenever any "money is deposited or withdrawn".

In *Moore* v. *Darton* (22) the question was whether there had been a valid donation to the debtor of a debt of 500*l*. The thing handed over was in the form of a receipt signed by the debtor, as follows: "Received 22nd October, 1843, of Miss Darton, 500*l*. "to bear interest at 4 per cent. per annum but not to be with-"drawn at less than six months' notice".

In regard to that document Sir James Knight Bruce said (22): "The document here has been called a receipt, and is a receipt "in a sense, but it is not a receipt in the ordinary acceptation "of that term. . . . The debt was a debt carrying interest. A mere "debt of 500*l*. would have arisen from the loan without any "writing. But it would not have been a debt carrying interest "without a contract to that effect beyond the advance. That "particular contract, I agree, might have been entered into "without writing, but as it was created by writing, proof of the "writing, if possible, was essential to recover upon the contract. "This writing was, therefore, in a sense essential to the proof of "the contract: and it is this writing which was in substance "delivered mortis causa to the person owing the money. In my "opinion, it is consistent with what was said by Lord Hard-"wicke, Lord Rosslyn and Lord Eldon, with the civil law and "our own, to hold as I do that this was a sufficient delivery to "constitute a donatio mortis causa which, in my judgment, it "was intended to be".

The passage which we have quoted from Sir James Knight Bruce's judgment seems to us to show that the ratio decidendi was that since, in the case before him, the contract of loan was recorded in writing, proof and production of the writing was essential to the recovery of the debt: in other words, that the document was the essential indicia of title and delivery of it "amounted to transfer" of the debt. It is no doubt true that all the material terms of the contract were stated in the writing; but it was because of the above fact that the document was the essential evidence of the contract. In our judgment, it is the latter circumstance and not the incidental fact that all the terms of the contract were recorded in the writing which satisfied the test of a valid donatio.

In *In re Dillon* (23)—which appears to be the only case in this court relevant to the present question—the problem arose in regard to a banker's deposit note. The deposit note in fact stated all the terms of the contract save the rate of interest then presently payable, but it contained upon the back of it a form of cheque. As appears from the argument, the real question which

(22) 4 De G. & S. 517, 520.

(23) 44 Ch. D. 76.

was raised was whether, because of the endorsed cheque form, the result was that the document, on the face of it a deposit note, was in truth no more than a cheque payable to bearer. If it were, there would be little doubt that it could not be the subject of a valid donatio. As Buckley, J., stated in *In re Beaumont* (23): "in order that the gift may be valid it must, "I think, be shown that the donor handed over either property "or the indicia of title to property which belonged to him. His "own cheque is not property; it is only a revocable order, such "that if the banker acts on it, the donee will have the money "to which it relates".

The decision of the Court of Appeal in *In re Dillon* (24), was, however, that the presence of the cheque form did not convert what would otherwise have been a deposit note, the indicia of title to the sum deposited, into a mere bearer cheque. The purpose of the cheque form, said Cotton, L.J. (25), "was "so that when filled up and signed it may be preserved as a "receipt and not that they make it a part of the bargain that "they will not pay unless this cheque is signed and produced. ". . . I cannot think that the requiring this cheque to be signed "puts the account on any footing different from that of an "ordinary deposit account so as to prevent the fund from being "given away as a donatio mortis causa".

Then, at a later stage of his judgment (25), he uses the language upon which Mr. Buckley has mainly founded his argument: "The case of *Duffield* v. *Elwes* (26) shows that "there may be a good donatio mortis causa of an instrument "which does not pass by delivery, and that the executors of "the donor are trustees for the donee for the purpose of giving "effect to the gift. The case of *Moore* v. *Darton* (27) is very "instructive as to the class of instruments which are subjects "of donatio mortis causa. There a document was executed "when a deposit of money was made. The mere fact of the "deposit would create a debt: but the document, besides "acknowledging the receipt of the money, expressed the terms "on which it was held, and showed what the contract between "the parties was. It was held that the delivery of that document "was a good donatio mortis causa of the money deposited, and "so, in my opinion, was the delivery of the deposit note in "the present case".

In our judgment, and having regard to the circumstances of the case, Cotton, L.J., cannot be taken as laying down that in a case of alleged donatio of a chose in action such as a sum of money on deposit with a bank, the deposit note or book must

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(23) [1902] 1 Ch. 894.
(24) 44 Ch. D. 76.
(25) Ibid. 81, 82.
(26) (1827) 1 Bli. (N.S.) 497.
(27) 4 De G. & S. 517.

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contain all, or all the material terms of the contract. Neither Lindley, L.J., nor Lopes, L.J., gives any support in his judgment for that proposition. Both those judges confined themselves to disposing of the argument based on the endorsed form of cheque, and, having disposed of that argument, treated the deposit note as having been established by authority as a good subject-matter of donation.

In our judgment, accordingly, Byrne, J., in *In re Weston* (28), and Luxmoore, L.J., in *Delgoffe* v. *Fader* (29), went further than was necessary in stating that a record of all the essential terms of the contract in the document handed over was a condition or test of the validity of the donation. For reasons which we have attempted to give, we think that the real test is whether the instrument " amounts to a transfer " as being the essential indicia or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given.

We must not, however, be taken to be casting any doubt upon the correctness of the decision in *Delgoffe* v. *Fader* (29), for, as the judge observed upon the evidence before him, the deposit book there in question " was in no way essential to be " produced if the depositor had required to withdraw her money ". Further, the donor " had no current account but she in fact " operated her deposit account by making deposits and drawing " cheques on it in the same manner as she would have operated " a current account ".

We turn accordingly to the facts relating to the three deposits. Having regard to the view we have expressed it is unnecessary to consider whether in each case all the terms of the contract between depositor and bank are stated in the respective books, or whether the books record all the conditions in which the deposits were made. But we must not be taken to be expressing the view that a negative answer ought to be given to these questions. In the case of the London Trustee Savings Bank it is true that there is no statement of the rate of interest allowed —for that it is necessary to look at the elaborate book of rules duly certified in accordance with the Savings Banks Act, 1863 (26 & 27 Vict. c. 87). But on the face of the book appears a reference to the Act of 1863 and we are not satisfied that on any view a statement of the rate of interest would be necessary. As we have already pointed out, the rate current at the date of deposit was not stated in the note in *In re Dillon* (30). And it is not clear that even in the case of the Post Office account every term of the contract appears from the deposit book. There is a

(28) [1902] 1 Ch. 680.
(29) [1939] Ch. 922.
(30) 44 Ch. D. 76.

page headed "Information" which contains statements as to withdrawals and rate of interest; but also the statement that "further information is contained in a booklet obtainable at Post "Offices, etc.".

For similar reasons we do not think the absence in the Barclays Bank book of any statement of the rate of interest could on any view be material; for in the case of joint stock banks it must, we should have thought, be taken to be clearly implied that the rate was the rate of interest allowed by these banks from time to time on deposits.

The case of the Westminster Bank book is more difficult, for in that case there is no reference to interest at all. One view would be that in that case no interest was in fact payable and none was in fact credited in the book till the end of the account. But it is at least doubtful if this was the true contractual position. It is, however, unnecessary to pursue the matter further.

What, then, is the evidence in this case as to the necessity for production of the books upon any withdrawal—for this, in the view we take, is the essential matter? In each case upon the face of the deposit book such production was beyond doubt made a term or condition of the deposit. But, as we have said, Mr. Buckley has contended that, whatever the strict contractual terms, as a matter of practice, at least in the case of the two joint stock banks, such production was not required; and it is perhaps a matter of common knowledge (as we found to be the fact in *Delgoffe* v. *Fader* (31), that a so-called deposit account may by arrangement between banker and customer be operated much as a current account so that the deposit book is no more than an ordinary bank pass book.

What, then, is the evidence here? In the case of the London Trustee Savings Bank, Mr. Buckley did not, and could not, press the point far; for, according to the local actuary: "Really "we always insist on the production of the passbook except in "exceptional circumstances where hardship may be caused— "for instance with a lost passbook". The requirements of the two joint stock banks, Barclays and Westminster, are no doubt less stringent. But in our opinion the evidence in the present case cannot be said to go anything like so far as that in *Delgoffe* v. *Fader* (31). The evidence is fairly summarized in the two questions and answers appearing in the cross-examinations of the respective witnesses from those banks: (1.) Q. ". . . the "bank is kind enough to its depositors on occasions to say 'We "'will not trouble about it?'" (i.e., the rule that production is required to obtain any payment). A. "To stretch a point in

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(31) [1939] Ch. 922.

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"their favour". (2.) ". . the rule is that the book must "be produced . . . but . . . the bank is a little easy about the "rule and is prepared to relax it from time to time?" A. "I "think that is a very fair way of saying it".

In the result Mr. Buckley failed, in our judgment, to prove any such general practice as would lead to the conclusion that the contractual term as to production of the book in either case had become a dead letter: and certainly there was no evidence of any particular arrangement with the deceased. We think accordingly that in the case of both banks the condition stated on the face of the deposit books must be taken to have remained operative, i.e., that the book was and is the essential indicia of title and that delivery of the book "amounted to transfer" of the chose in action.

The result is that, in our judgment, the plaintiffs are entitled to succeed as to the deposits in all three cases, the London Savings Bank, Barclays Bank and Westminster Bank. And we think the result satisfactory, for it avoids, as it seems to us desirable to avoid, fine distinctions between moneys on deposit with the Post Office Savings Bank on the one hand and with trustee savings banks and joint stock banks on the other, where in the latter cases the deposit account is a true deposit account as distinct from an ordinary current account.

Appeal allowed.

Solicitors: *Manches & Co.; Treasury Solicitor.*

H. C. G.

In re A DEBTOR, No. 21 OF 1950, *Ex parte* THE DEBTOR *v.* BOWMAKER LD. AND ANOTHER (No. 1).

1950
Nov. 13.

Harman and
Danckwerts
JJ.

Followed. In re A DEBTOR (No. 41 of 1951)
[1952] 1 Ch. 192

Bankruptcy—Bankruptcy notice—Inaccurate copy served on debtor—Wrong county court heading—Validity—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 147, *sub-s.* 1.

By sub-s. 1 of s. 147 of the Bankruptcy Act, 1914: "No proceeding in bankruptcy shall be invalidated by any formal defect "or by any irregularity, unless the court before which an objection "is made to the proceeding is of opinion that substantial injustice "has been caused by the defect or irregularity, and that the injus-"tice cannot be remedied by any order of that court".

1950

A DEBTOR
(No. 21 OF
1950),
In re.
Ex parte
THE DEBTOR
v.
BOWMAKER
LD.

A bankruptcy notice which sets in motion the whole process leading to bankruptcy must, since the proceedings are of a penal nature, be construed strictly.

Where, therefore, two copies of a bankruptcy notice were correctly headed, but the copy served on the debtor was headed in the name of a county court from which it was not issued, though bearing the seal of the court from which it was in fact issued:—

Held, that this, being a defect which could have misled the debtor, was not curable by s. 147 of the Bankruptcy Act, 1914, and the notice was invalid; and that the debtor had therefore not been served with a true copy of the bankruptcy notice.

In re Evans (1931) 15 B. & C. R. 48, followed; *In re O. C. S.* (*A Debtor*) [1904] 2 K. B. 161; *In re a Judgment Debtor, No.* 530 *of* 1908, [1908] 2 K. B. 474 and *In re a Debtor, No.* 478 *of* 1908, [1908] 2 K. B. 684, considered.

APPEAL from the registrar of Windsor county court.

On September 30, 1948, the petitioning creditors, who were a hire-purchase financing company, obtained judgment against a debtor in the King's Bench Division for the sum of 509*l.* 1*s.* 4*d.*, being the balance owing on the purchase of a motor car. The debtor paid 100*l.*, but no more. The creditors instructed their solicitor to take bankruptcy proceedings. The creditors' solicitor instructed agents to act in the matter of issuing a bankruptcy notice. The latter thought that Redhill county court was the court from which the notice should issue; but, on finding that that court had no bankruptcy jurisdiction, they went to Windsor county court.

On May 19, 1950, a bankruptcy notice was issued by the registrar of Windsor county court for payment of 409*l.* 1*s.* 4*d.*, being the balance of the judgment debt. The registrar, in making two copies of the bankruptcy notice, did not observe that the notice handed in to him, and on which he founded the two copies, was wrongly entitled " In the Redhill County Court ". He duly entitled the two copies " In the Windsor County Court ". The notice entitled " In the Redhill County Court " was served on the debtor; and, of the other two copies, one was put on the court file and the other was annexed to the affidavit of service.

On June 12, 1950, the debtor received a letter from the creditors' solicitor saying that the proceedings in bankruptcy would not be proceeded with if payment of 622*l.* 5*s.* 9*d.*, with 3*l.* 12*s.* 6*d.*, costs of the bankruptcy to date, were received by June 26, 1950. The demand for 622*l.* 5*s.* 9*d.* was a mistake for which an explanation was given; but the demand for 3*l.* 12*s.* 6*d.* for costs was repeated in a letter of June 27, 1950, from the creditors' solicitor to the debtor's solicitors, in which the debtor was given until June 30, 1950, to pay the debt.

No payment was ever made by the debtor. On August 9, 1950, a bankruptcy petition was issued and filed on August 16, 1950. Notice of opposition was filed on September 16, 1950. At the hearing at Windsor County Court on September 27, 1950, the petition was opposed on the ground (1.) that the creditors were guilty of extortion because they had demanded 622*l.* 5*s.* 9*d.* instead of 409*l.* 1*s.* 4*d.*, and costs which were not due; and (2.) that the debtor had not been served with a true copy of the bankruptcy notice. A receiving order was made against the debtor. He now appealed, asking that the receiving order should be rescinded and the petition dismissed on the grounds above set out, except that, on the question of extortion, the debtor relied only on the demand for costs.

The court considered only the question of the bankruptcy notice to which, accordingly, the reported argument is confined.

C. H. Duveen for the debtor. The copy of the bankruptcy notice served on the debtor was not a true copy, for it was headed "Redhill County Court". That mistake is not curable by s. 147 of the Bankruptcy Act, 1914 (1). No amendment can now alter the fact that the notice served on the debtor was wrongly headed. It was an embarrassing notice.

A bankruptcy notice containing anything calculated to perplex the debtor is invalid: see *In re Howes* (2). It was held in *In re Bates* (3) that formal errors did not invalidate a bankruptcy notice, but that case was commented on unfavourably by Vaughan Williams, J., in *In re Miller* (4). A bankruptcy notice which did not follow the terms of the judgment was held to be calculated to embarrass a debtor, and was set aside in *In re a Judgment Debtor, No. 530 of* 1908 (5). Kennedy, L.J., said in that case (5) that a bankruptcy notice must be strictly construed because of the quasi-penal consequences. A bankruptcy notice claiming 1*l.* 5*s.* 6*d.* in excess of the amount due was held bad in *In re a Debtor, No. 478 of* 1908 (6). Here the debtor is wrongly told that he must pay the amount claimed, or satisfy Redhill county court that he has a counterclaim. That is sufficient to perplex him. [He referred to *In re Beach* (7) and *In re Threadkell* (8).]

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(1) Bankruptcy Act, 1914, s. 147, sub-s. 1: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court".

(2) [1892] 2 Q. B. 628, 631.

(3) (1887) 4 Morr. 192.

(4) (1893) 10 Morr. 183, 189.

(5) [1908] 2 K. B. 474, 481.

(6) [1908] 2 K. B. 684.

(7) Unreported, cited [1908] 2 K. B. 688.

(8) Unreported, cited [1908] 2 K. B. 689.

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A DEBTOR (No. 21 OF 1950), *In re.* *Ex parte* THE DEBTOR *v.* BOWMAKER LD.

This case falls within *In re Evans* (9), where the notice was considered invalid because it bore a High Court heading, but had the seal of the county court from which it was intended to be issued. *In re Evans* (9) is conclusive that this mistake is not a mere irregularity, which can be cured by s. 147. [He referred to *In re O. C. S.* (*A Debtor*) (10).]

Jupp for the creditors. Section 147 of the Act and r. 385 of the Bankruptcy Rules, 1915, are relied on. This is a formal defect or irregularity which can be remedied by s. 147, unless it has caused substantial injustice: *Ex parte Johnson* (11).

The receiving order could not have been made unless the papers were in order. The purpose of a bankruptcy notice is to tell the debtor that he is indebted, and that he must take certain steps if he wishes to escape the consequences of bankruptcy. The substantial part of the notice is in order.

In re Evans (12) does not apply here; in that case the notice was bad as the wrong procedure was used. Here the difference was merely between two county courts, not between the High Court in London and the county court in Glamorgan. Rule 137 shows that there could have been an interchange between county courts if the wrong court were used to start proceedings. Redhill county court had no bankruptcy jurisdiction. [He referred to Williams on Bankruptcy (16th ed.), p. 620.]

The perplexity in *In re Howes* (13) is understandable; in that case the debtor did not have an opportunity to pay off his debt. Similarly in *In re a Judgment Debtor* (14) the debtor did not have a chance to avoid bankruptcy. Reliance is also placed on the second finding in *In re Bates* (15); that part of the judgment was not disapproved in the later cases. The conflict here is merely between the seal of Windsor county court and the name of Redhill county court; but that was not a substantial matter: it would not have prevented the debtor from taking steps to avoid bankruptcy. In *In re Miller* (16) the mistake was as to the amount claimed, and went to the substance of the notice. Similarly in *In re a Debtor, No.* 478 *of* 1908 (17), but that case shows that a notice is not embarrassing if the debtor is able to see elsewhere on the face of the notice what is really claimed from him. However, by reason of s. 2 of the Bankruptcy Act, cases where the question concerned the wrong amount claimed in bankruptcy notices are no longer of importance.

It is also submitted, but not as an alternative submission, that the defect in this notice is only in the title part, and therefore

(9) (1931) 15 B. & C. R. 48.
(10) [1904] 2 K. B. 161, 162.
(11) (1883) 25 Ch. D. 112.
(12) 15 B. & C. R. 48.
(13) [1892] 2 Q. B. 628.
(14) [1908] 2 K. B. 474.
(15) 4 Morr. 192.
(16) 10 Morr. 183.
(17) [1908] 2 K. B. 684, 691.

a defect which the court has discretion to cure: see r. 10 of the Bankruptcy Rules. The bankruptcy notice itself has no defect: the questions which matter to the debtor are correctly indicated. The defect here is merely formal: *Ex parte Johnson* (18); *In re Bates* (19).

Duveen, in reply. The fact that the notice has the seal of the correct court does not affect the mistake: the debtor might just as well have looked at the heading. It does not matter that he was not misled; the point is that he might have been misled.

Harman, J., [after stating the facts] : I propose to discuss the contention which stands in the forefront of this case, namely, that the petition cannot be a good ground for a receiving order, because it is founded on an invalid bankruptcy notice, namely, one which is not a true copy of the notice upon the file. There is no doubt that it is not a true copy. It is headed " In the " Redhill County Court ", whereas in fact it should be headed " In the Windsor County Court " in order to be a true copy.

It is said—and this is the real crux of this part of the case—that that is covered by s. 147 of the Bankruptcy Act, 1914, and that the discrepancy is one which the court should overlook because it was a mere irregularity.

[His lordship read s. 147 of the Bankruptcy Act, 1914, and continued:] It was suggested at one time that the defect or irregularity could be remedied by an amendment of the bankruptcy notice; but, in my judgment, that point does not arise, because no amendment can cure the fact that the notice which was served on the debtor, and which is the foundation of the petition, was not a true copy. It is no good altering anything now: you cannot make the alteration date back for the court to assume that the notice which had this slip in it did not have it. It is therefore not a question of amending or remedying the so-called injustice, but merely whether this is a formal defect, or an irregularity which we ought to brush aside on the footing that no substantial injustice has been done.

First, I do not think that this can be called a formal defect: it is more than that. It has a very puzzling result on the face of it because, at the top, " Redhill " is mentioned, and a few lines further down there is the county court stamp on which " Windsor " is mentioned. It seems to me, therefore, that this defect is not a mere formality.

On the other hand, I seek in vain for any evidence that an injustice has been done. Speaking for myself, if I were unconstrained by authority, I should be inclined to hold that this was an irregularity which could be overlooked by reason of s. 147.

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(18) 25 Ch. D. 112.

(19) 4 Morr. 192.

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The matter is by no means free from authority, and Mr. Duveen has pointed out that there are many cases on this question going back some time. A bankruptcy notice, being the document which sets in motion the whole process leading to bankruptcy (which is in the nature of a criminal matter), must be very strictly and narrowly construed on the footing that it is a penal matter; and it is much easier to cure a defect in a petition, apparently, than in a bankruptcy notice.

Vaughan Williams, L.J., a great authority on bankruptcy, said this in *In re O.C.S. (A Debtor)* (20): "In *In re Collier* (21), "a rule was laid down by the Divisional Court, and I think that "rule has ever since been acted on. In that case Cave, J., "said (22): 'Due service of a bankruptcy notice is necessary in "'order to constitute an act of bankruptcy, and it is more im"'portant that the rules and regulations should be properly "'complied with than in the case of a petition for adjudication. "'When the act of bankruptcy has been committed then the "'petition is a less formal matter and one as to which it is not "'necessary to take exactly the same view. Very soon after the "'Act of 1883 came into operation several cases were brought "'before the courts with reference to a bankruptcy notice, and "'on more than one occasion the members of the Court of "'Appeal expressed the opinion that, since the commission of "'an act of bankruptcy was a serious matter and involved "'consequences of what has been called a penal nature it was "'important to see that the necessary preliminaries were com"'plied with'. In that decision I concurred. I have ever since "declined to allow an amendment of a bankruptcy notice, except "in the case of a merely formal defect". Those are weighty words: it does not seem to me that this is a merely formal defect.

The words in s. 147 have been part of our bankruptcy law for a very long time: they go back as far as the Bankruptcy Act, 1869 (see s. 82). There are a number of cases in which the facts are more or less similar to the facts here.

Two cases, *In re Beach* (23) and *In re Threadkell* (24), were cited to us in which the vice in the bankruptcy notice was that the amount of the debt was not exactly stated. It was held that that was fatal. It was pointed out to us that that is why, in the Bankruptcy Act of 1914, that kind of defect was covered by a proviso.

In *In re a Judgment Debtor, No.* 530 *of* 1908 (25), it was held that a bankruptcy notice was calculated to embarrass the debtor because it did not follow the terms of the judgment in this sense that, although the judgment was a debt due to two persons trading as a firm, the notice did not treat them as if they were individuals entitled to the debt jointly and severally.

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(20) [1904] 2 K. B. 161. 162.

(21) (1891) 8 Morr. 80.

(22) 8 Morr. 83, 84.

(23) Unreported, cited [1908] 2 K. B. 688.

(24) Unreported, cited [1908] 2 K. B. 689

(25) [1908] 2 K. B. 474.

The Master of the Rolls said this (26): "I approach this "question impressed with the idea that a bankruptcy notice, "which is the foundation of a bankruptcy, attended as a bank-"ruptcy is with penal consequences, is a matter in which great "strictness is required and, so far as I am aware, always has "been required since the Bankruptcy Act of 1883. I need not "quote authorities on that point, because that is really admitted "by both sides". He continued (26): "Here I think the notice "was very much more calculated to puzzle and perplex the "debtor, because the debtor was told that he must pay two "people when he was under no obligation to pay more than "one". He thought that was substantial. Buckley, L.J., dissented. Kennedy, L.J., agreed with the Master of the Rolls, and said this (27): "In the first place one has not to determine 'the validity or invalidity of the notice by considering whether "the debtor to whom the notice is given has in fact been mis-"led. It is sufficient that there is good ground for saying that "the debtor might be misled. That is, I think, settled by "authority. Secondly, in judging of the probability of the "debtor being misled, one is bound not to deal too liberally with "the requisites of the notice because of the quasi penal conse-"quences which a bankruptcy involves. My own view is that in "considering this particular notice one may take into account the "position of a debtor who is not necessarily learned in the law".

He came to this conclusion at the end of his judgment (28): "Here is a possibly misleading notice, which was not in accord-"ance with the terms of the judgment. I think we ought to "follow the practice of the Court in such cases and hold this "notice to be invalid, although the objection to the validity may "be in a sense a technical one, and although there is no evidence "that the debtor was in fact actually misled". That was a strong case.

To the same effect is *In re a Debtor*, 478 *of* 1908 (29), where it was a question of amount. The law would not be the same now on that point, but only because of the alteration by s. 2, sub-s. (ii) of the Bankruptcy Act, 1914, which provides that a notice "shall not be invalidated by reason only that the sum "specified in the notice as the amount due exceeds the amount "actually due", unless certain conditions are fulfilled. Nevertheless, the observations of the Court of Appeal in this case are

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(26) [1908] 2 K. B. 476, 478.

(27) Ibid. 481.

(28) Ibid. 483.

(29) [1908] 2 K. B. 684.

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valuable, although the particular subject-matter is no longer the law. It was argued there that the court ought to apply the principle de minimis non curat lex. An amount of 1*l.* 5*s.* 6*d.* was in question, but the court nevertheless held that a mistake, which was made in calculating the interest, invalidated the notice. Lord Cozens-Hardy, M.R., said that he did not think that even 1*l.* 5*s.* 6*d.* was a mere formal defect which had no substance. Farwell, L.J., agreed in that opinion. Kennedy, L.J., also pointed out that in the case of *Ex parte Johnson* (30), which I think was relied on by the registrar below, there was a mere clerical mistake where 24*l.* was written for 74*l.*, and he said this (31): " That was a mere clerical error. It was a defect in " form and not in substance, and a defect which could not mis- " lead or embarrass the debtor, because he could see on the face " of the document what was the nature of the claim and what " was the amount which was really claimed from him ".

I am to ask myself, therefore, not whether this is a mistake which has misled the debtor, but whether it could mislead him.

The bankruptcy notice is in the common form, and it tells the debtor that he must pay a certain sum to Bowmaker Ld., or their solicitors, or that he must secure or compound for the said sum to their satisfaction, or to the satisfaction of their said agent, or to the satisfaction of this court, or that he must satisfy this court that he had a counterclaim, set-off or cross-demand against them. The debtor has three days in which to do that, He is told " this court ". When he looks at the notice, he may take his choice, whether it is the Redhill court or the Windsor court. Suppose that he chose the wrong court and went to Redhill at the end of the third day with, say, an affidavit to prove that he had a good set-off. He might find that he had gone to the wrong place and could not get to Windsor that day, so that when he arrived at Windsor, he would be told that he was too late because the three days had expired. It cannot be said that the debtor is not embarrassed by this notice. According to the authorities, therefore, I feel myself constrained to hold that this is not an irregularity which we can overlook.

A similar case, *In re Evans, Davies* v. *Evans* (32), was decided by a Divisional Court consisting of Luxmoore and Farwell, JJ. The mistake there was rather like the mistake in the present case, except that the heading was that of the High Court, but it had the seal of the county court on it and it was intended to be issued out in the Glamorganshire county court. That made it quite beyond praying for. Luxmoore, J., said this (33): " The notice directs the debtor to pay to the creditor or his

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(30) 25 Ch. D. 112.

(31) [1908] 2 K. B. 691.

(32) 15 B. & C. R. 48.

(33) Ibid. 58, 59.

"agent or to secure or compound to the satisfaction of this "Court, i.e., the High Court. The original bankruptcy notice "is a High Court form and not a county court form at all. The "deponent to the affidavit of service deposes to the fact that he "had served the debtor with a copy of the above-mentioned "bankruptcy notice duly sealed with the seal of the court and "the copy which is exhibited to the affidavit is not a true copy "of the bankruptcy notice at all". The reason was that the copy exhibited had a county court seal. Then: "The appeal "allowed with costs, receiving order rescinded . . .".

Even if I did not feel constrained by the earlier cases, I should feel constrained by that one to say that, in my judgment, for that reason this receiving order was bad and must be rescinded.

That makes it unnecessary for me to canvass the other point whether there has been extortion. The notice being bad, the petition which is founded upon it fails in limine and ought to be dismissed and the receiving order should be rescinded. That is the judgment which in my opinion should be given.

DANCKWERTS, J. I agree.

Solicitors: *Isadore Goldman & Son; Peacock & Goddard for W. Parkinson Curtis, Bournemouth.*

I. G. R. M.

VAISEY, J.
1950
Nov. 13, 14, 15;
Dec. 20.

In re D'AVIGDOR-GOLDSMID.
D'AVIGDOR-GOLDSMID *v.* INLAND REVENUE COMMISSIONERS.

[1949 D. 1606]

Revenue—Estate duty—Property passing on death—Policy of life insurance—Claim for estate duty on value of policy—Whether an interest provided by deceased—Whether any beneficial interest arose on death of deceased—Scottish decision on similar point—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1, (*c*). (*d*).

"Donee"—Meaning of—Customs and Inland Revenue Act, 1889 (52 *Vict. c.* 7), *s.* 11, *sub-s.* 1.

Under a marriage settlement made in 1907, the husband settled, among other things, a life insurance policy taken out by him in

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D'AVIGDOR-GOLDSMID, *In re.* D'AVIGDOR-GOLDSMID *v.* INLAND REVENUE COMMISSIONERS.

1904 for 30,000*l.* In 1930 a resettlement was made by the settlor and his eldest son of property including the policy. On November 10, 1934, a deed of appointment under the resettlement was made by the settlor and his eldest son in relation to the policy and certain freehold property. Under that deed the trustees were directed to hold the policy and the property in trust for the eldest son absolutely, and the settlor was freed from covenants in the resettlement to pay the premiums on the policy. On April 14, 1940, the settlor died. When the policy matured the eldest son received 48,765*l.*, being the original 30,000*l.* and bonuses. The Estate Duty Office claimed duty on the policy moneys, as being due under s. 2, sub-s. 1 (*d*), or, alternatively, (*c*) of the Finance Act, 1894.

Held, (1), that neither was the policy provided by the deceased nor did any beneficial interest arise on his death, for the eldest son acquired the policy absolutely on November 10, 1934, the date of the deed of appointment; and (2), that the only relevant donee was the eldest son, the ultimate taker, for whose benefit no premiums were paid. Accordingly, no duty became payable on the death of the settlor.

Lord Advocate v. *Hamilton* 1942 S. C. 426, followed.

Observations on the duty of a court of first instance in England to follow decisions of the Court of Session.

In re Hartland, [1911] 1 Ch. 459; *Brooks* v. *Inland Revenue Commissioners,* [1913] 3 K. B. 398, followed.

ADJOURNED SUMMONS.

Sir Osmond Elim D'Avigdor-Goldsmid (hereinafter called "the deceased") took out a life policy, dated May 3, 1904, for 30,000*l.*, with profits under the annual premium of 695*l.* The first annual premium was payable on January 20, 1905, and premiums were payable on each succeeding anniversary of that date during the life of the deceased. On the issue of the policy a first premium of 510*l.* 6*s.* 0*d.* was paid in respect of the initial period of "cover", namely, 268 days from April 27, 1904, to January 20, 1905. The deceased was married on October 23, 1907, and his eldest son, the plaintiff, was born on June 10, 1909.

On his marriage the deceased made a settlement dated October 22, 1907, of certain freehold estates and investments, and the policy. The interests which the deceased took under the settlement were, first, a protected life interest in the settled freeholds, out of which, after his death, a jointure rentcharge was limited to his wife with power for him to apportion it among the various settled properties and, subject as aforesaid, as to the estates specified in the first and second parts of the first schedule to the settlement, there was a limitation to the first and other sons of the marriage in tail male. The policy with all bonuses and additions was assigned to the trustees on trust to receive the moneys to become payable thereunder at maturity and to invest the same in the purchase of freehold hereditaments to be settled on and subject to the uses, trusts, powers and provisions therein declared and contained concerning the before-mentioned freeholds or such of them as should be subsisting or capable of taking effect and in the meantime to invest or apply it in any other mode in which capital moneys under the Settled Land Acts, 1882 to 1890, were authorized to be invested or applied. The deceased covenanted to pay the premiums on the policy, and he was given an option (which he never exercised) to apply bonuses in reduction of premiums.

A private Act of Parliament entitled the Goldsmid Estate Act, 1928 (18 & 19 Geo. 5, c. 1), was passed on August 3, 1928, and by s. 3, sub-s. 1, of that Act the deceased was empowered by deed effectually to assure his life interest in all or any parts of the settled property to the person who at the date of the assurance was next entitled in remainder or reversion expectant on his death to the property to which the assurance related; and in particular it was provided that that section should extend to a disentailing deed affecting the said property or any part thereof whereby the property was assured to a grantee on trusts conferring a general power of appointment having priority over the life interest, and it was provided by s. 3, sub-s. 2, of the Act that any assurance thereby authorized should operate as if the settlement had not contained any provision to determine the deceased's life interest and as if, in place thereof, an absolute life interest had been limited to him, and any such assurance of part of the settled property should not operate to effect a determination of the said life interest as respects any other part of the settled property.

By a deed of appointment dated June 10, 1930, the deceased, under a power of appointment conferred on him by the settlement over certain properties and funds thereby settled for the benefit of his younger children, appointed that the same should be held in trust for the plaintiff in tail male, subject to the prior limitations and powers in the appointment referred to; and by cl. 1 of a disentailing deed of the same date the plaintiff, with the consent of the deceased as protector of the settlement, assured, and the deceased in exercise of the powers conferred on him by the Act as to his life interest in the property (but not so as to transfer any legal estate) assured, released and confirmed to the trustees all the hereditaments of which the plaintiff was then tenant in tail under the settlement or the said appointment, to hold the same in fee simple or absolutely freed from the life estate or interest of the deceased and from the plaintiff's interests in tail male and all subsequent estates or interests on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint and in default of and until and subject to any such appointment on the precedent subsisting trusts and so as to restore the same, and by cl. 2 of the disentailing deed a similar assurance was made of inter alia the said life policy on and subject to similar trusts and powers.

After the two last-mentioned deeds, a resettlement was also, on June 10, 1930, made by the deceased and the plaintiff under their joint powers of appointment of property including the policy.

By cl. 3 of the resettlement some of the family real estate was settled on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint, provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly and in default of and until and subject to any appointment on trusts under which during the life of the plaintiff there was a discretionary trust of which the plaintiff was the principal object. By cl. 4 of the resettlement other parts of the family real estate were settled on trusts under which the deceased and the plaintiff had a joint power of appointment corresponding to the power conferred on them by cl. 3 of the deed and, subject thereto and to certain charges, the deceased took a determinable protected life interest in restoration of his interest in those parts of the real estate under the settlement with remainder on the trusts and subject to the powers and provisions affecting the estates comprised in cl. 3 of the resettlement.

By cl. 10, sub-cl. 1, of the resettlement the deceased, so long as the policy should remain subject to the trusts thereof, covenanted with the trustees that he would duly pay all money payable and do all things necessary for keeping it on foot.

By cl. 22 of the resettlement, in exercise of the said power conferred by the disentailing deed, the deceased and the plaintiff appointed inter alia the policy to be held on trust to get in all moneys to become payable thereunder and to stand possessed of the net money received on the trusts and subject to the powers and provisions on and subject to which capital money arising under the Settled Land Act, 1925, from the estates settled by cl. 4 of the resettlement or investments representing the same would be held, and as to the said money and investments mentioned in the said second schedule on the trusts and subject to the powers and provisions subject to which capital money arising under the said Act from the estate settled by cl. 3 of the resettlement would be held.

Before the appointment hereinafter referred to, the freehold property known as No. 27, Wood Street in the City of London was acquired out of capital moneys representing part of the estates settled by cl. 4 of the resettlement.

By a deed of appointment dated November 10, 1934, under the hands and seals of the deceased and the plaintiff they, in exercise of their said joint powers of appointment conferred by the resettlement, appointed that, first, the policy and, secondly, the premises No. 27, Wood Street, should be thenceforth held by the trustees and the deceased respectively in trust for the plaintiff absolutely and in fee simple for the plaintiff's own use and benefit discharged from the trusts, powers and provisions declared by the resettlement, and the plaintiff thereby released and discharged the deceased from all his covenants contained in the resettlement for the payment of premiums on and otherwise relating to the policy and that a term of ninety-nine years limited by the resettlement should, as regards the premises affected by such appointment, cease and be extinguished.

J. Millard Tucker, K.C., Cyril King, K.C., and Wilfrid M. Hunt for the plaintiff. The claim of the Commissioners of Inland Revenue is based on s. 2, sub-s. 1 (*d*), of the Finance Act, 1894 (1), for duty on the whole of the policy moneys; and, alternatively, under s. 2, sub-s. 1 (*c*), for duty on a proportion of them.

It is logical to take s. 2, sub-s. 1 (*d*), first. It has been held that, where a life policy taken out by the deceased person on his own life is settled by him or given away by him during his life, it would be an "other interest" within s. 2, sub-s. 1 (*d*), which he has "provided": see *Attorney-General* v. *Dobree* (2); *Attorney-General* v. *Robinson* (3); *Attorney-General* v. *Murray* (4).

With reference to the marginal note to s. 2, sub-s. 1, of the Act of 1894—" What property is deemed to pass "—the property which is deemed to pass is the interest which is provided by the deceased; the measure of the interest, however, is not the value of the property but—see the concluding words of s. 1, sub-s. 1 (*d*) —the beneficial interest therein, which arises or accrues by survivorship or otherwise on the death of the deceased. This is the crux of the case. First, it is necessary to take the property which is deemed to pass and then to measure the liability by the extent of the beneficial interest: see *Westminster Bank Ld.* v. *Attorney-General* (5).

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(1) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death "of the deceased shall be deemed to "include the property following, that "is to say: (c) Property which "would be required on the death of "the deceased to be included in an "account under s. 38 of the Customs "and Inland Revenue Act, 1881, as "amended by s. 11 of the Customs "and Inland Revenue Act, 1889, if "those sections were herein enacted "and extended to real property as "well as personal property, and the "words 'voluntary' and 'voluntarily' and a reference to a "'volunteer' were omitted therefrom; and (d) Any annuity or other "interest purchased or provided by "the deceased, either by himself "alone or in concert or by arrangement with any other person, to the "extent of the beneficial interest "accruing or arising by survivorship "or otherwise on the death of the "deceased".

(2) [1900] 1 Q. B. 442.

(3) [1901] 2 I. R. 67.

(4) [1904] 1 K. B. 165.

The vital questions in this part of the Crown's claim are what was the interest provided by the deceased and whether that interest was the policy or the policy money. If it was the policy, then the plaintiff owned it absolutely before the death of the deceased and, therefore, no beneficial interest in the policy could have arisen by reason of the death of the deceased. If it was the policy money, the contention of the Crown would be that the other interest provided is the actual money payable on the death of the deceased. Those are the opposing views. If it is the contention of the Crown that the policy money and not the policy passed, then it would be contended on behalf of the plaintiff that duty would not be payable by virtue of s. 3, sub-s. 1, of the Act of 1894.

If the alternative claim for a proportion of the duty is made under s. 2, sub-s. 1 (*c*), of the Act of 1894, no duty is payable, as the case falls within the principles applied in *Lord Advocate* v. *Fleming* (6); *Lord Advocate* v. *Inzievar Estates* (7) and *Parr* v. *Attorney-General* (8).

Lord Advocate v. *Hamilton* (9)—a case in the Scottish Court of Session—covers the present case, and should be followed by a court of first instance in this country: see *In re Hartland* (10) and *Brooks* v. *Inland Revenue Commissioners* (11). [They also referred to *Attorney-General* v. *Meech* (12).]

Upjohn, K.C., and J. H. Stamp for the defendants. The premiums have in fact been paid by the plaintiff from 1934 to 1940, but, having regard to s. 30 of the Finance Act, 1939, the premiums paid by the plaintiff must be deemed to have been paid by the deceased, because the deceased also alienated to the plaintiff, in 1934, some other property, which covered the premiums.

The court has to see what was the beneficial interest arising on the death of the deceased. The interest, which thus passed, was the right to sue for and collect the policy money. On the death of the deceased, completely new rights arose. That proposition has been stated in one or two cases as being no more than the statement that the policy matures on death. Then for the first time wholly new rights spring into action, the most important being that then for the first time any rights to sue the insurance company arise. A " beneficial interest arising on

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(5) [1939] Ch. 610. 617.
(6) [1897] A. C. 145.
(7) [1938] A. C. 402.
(8) [1926] A. C. 239.
(9) 1942 S. C. 426.
(10) [1911] 1 Ch. 459.
(11) [1913] 3 K. B. 398.
(12) (1931) 15 A. T. C. 619.

"the death of the deceased" under s. 1, sub-s. 2 (*d*), of the Act of 1894, is something wholly new. [They referred to *In re Albert Life Assurance Co.* (13); *In re Anchor Assurance Co.* (14) and *Fryer* v. *Morland* (15).]

The beneficial interest which arises is something which is within the interest purchased. The "interest arising", being the right to sue on the death, is plainly an interest arising within the policy. The decision in *Attorney-General* v. *Dobree* (16), is relied on. All that has to be found is an interest provided by the deceased. *Attorney-General* v. *Robinson* (17), exactly covers the present case. [They referred to *Inland Revenue Commissioners* v. *Scott's Trustees* (18).]

Lord Advocate v. *Hamilton* (19), is inconsistent with *Attorney-General* v. *Robinson* (20) and *Inland Revenue Commissioners* v. *Scott's Trustees* (21). [They also referred to *Attorney-General* v. *Murray* (22).]

Notwithstanding the observations in *In re Hartland* (23) and *Brooks* v. *Inland Revenue Commissioners* (24), the court would not be justified in following *Lord Advocate* v. *Hamilton* (25). There being other authorities which support the Crown's contention, the matter is open before this court. If the Court of Session case stood alone, the Crown might not pursue the argument, but might, if necessary, wish to go to the Court of Appeal.

[*Tucker, K.C.* The point is completely open and *Lord Advocate* v. *Hamilton* (25) is the first case which decides it.]

A beneficial interest arose on the death of the deceased because no interest arose before that date and, at the death, a right to sue arose by reason of the death.

With regard to the question arising on s. 2, sub-s. 1 (*c*), if the claim for duty fails under sub-s. 1 (*d*), in any event the Crown would be entitled to duty on a proportion of the policy moneys, which would have to be ascertained. In 1904 the policy was taken out. In 1907 it was settled. Before 1907 any question relating to premiums is excluded. The effect of the settlement was that certain lands were settled on protective trusts for the settlor for life with remainder to his sons in tail male.

The policy was to be held until it matured; the policy moneys were then to be invested in properties which were to be held on similar trusts. Thus the settlor passed the whole of his beneficial interest in the policy and never could, down to the date of his death, have any interest under the policy. Therefore, from 1907 onwards, the settlor never had any power to give away or dispose of the policy. It was part of the entailed interest. [They referred to *Lord Advocate* v. *Fleming* (26) and *Lord Advocate* v. *Inzievar Estates* (27).]

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(13) (1870) L. R. 9 Eq. 703.
(14) (1870) L. R. 5 Ch. 632.
(15) (1876) 3 Ch. D. 675.
(16) [1900] 1 Q. B. 442.
(17) [1901] 2 I. R. 67.
(18) 1918 S. C. 720.
(19) 1942 S. C. 426.
(20) [1901] 2 I. R. 67.
(21) 1918 S. C. 720.
(22) [1904] 1 K. B. 165.
(23) [1911] 1 Ch. 459.
(24) [1913] 3 K. B. 398.
(25) 1942 S. C. 426

At no time, therefore, since 1907, could the deceased be said to have kept up the policy for his own benefit. He parted with the property in 1907. After that date he only had an interest in reversion. [They referred to *In re Jones* (28) and *In re Park* (29).]

Tucker, K.C., in reply. *Lord Advocate* v. *Hamilton* (30) is a conclusive authority in favour of the plaintiff's contentions. It is in conflict only with *Attorney-General* v. *Dobree* (31).

Cur. adv. vult.

Dec. 20, 1950. VAISEY, J., read the following judgment:—The question which arises on the present summons is whether, on the true construction of the Finance Act, 1894, and amending Acts and in the events which have happened, estate duty became payable as claimed by the Commissioners of Inland Revenue on the death, on April 14, 1940, of Sir Osmond Elim D'Avigdor-Goldsmid (whom I will call "the deceased") in respect of a policy of assurance on his life, dated May 3, 1904, or of the sum of 48,765*l.*, which became payable under the policy on maturity.

[His Lordship stated the facts and continued:] The effect of the deed of appointment of 1934 was that the plaintiff became absolute beneficial owner of the policy and of the premises, No. 27, Wood Street. The legal estate in those premises was vested in him after that appointment. He could at any time afterwards have surrendered or sold the policy, but he continued to pay the premiums and when it matured on the death of the deceased, on April 14, 1940, he received 48,765*l.*, being the original sum of 30,000*l.* plus bonuses.

The Estate Duty Office put forward a claim to duty on the policy moneys, and a summons was taken out by the plaintiff to have determined whether estate duty became payable (as claimed by the defendants, the Commissioners of Inland Revenue) on the death of the deceased in respect of the policy or the sum of 48,765*l.*, which became payable thereunder.

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(26) [1897] A. C. 145.
(27) [1938] A. C. 402.
(28) [1945] Ch. 105.
(29) [1932] 1 Ch. 580.
(30) 1942 S. C. 426.
(31) [1900] 1 Q. B. 442.

Thirty-seven premiums were paid in respect of the policy from its issue until maturity, and it would appear to follow (a) that the deceased had paid for his own benefit four premiums, that is to say, the first premium of 510*l.* 6*s.*, and three premiums of 695*l.* each payable in 1905, 1906, and 1907; (b) that the deceased had paid for the benefit of the persons interested under the marriage settlement twenty-three further premiums payable in the years 1908 to 1930 inclusive; (c) that the deceased had paid for the benefit of the persons interested under the resettlement four premiums payable in the years 1931 to 1934 inclusive; and (d) that the plaintiff for his own benefit has paid six premiums payable in the years 1935 to 1940 inclusive, he having since November 10, 1934, been the absolute owner of the policy and exclusively entitled to the benefit thereof. On April 14, 1940, when the policy matured, he alone could have given the insurance company a good discharge for the policy moneys. It is to be noted that more than five years had elapsed between November 10, 1934, and April 14, 1940.

The claim to the duty rests either on s. 2, sub-s. 1 (*c*), or on s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, as to two of the items of property which are deemed to be included in property passing on a death, although they do not in fact so pass. I will deal with the alternatives separately, taking head (c) first. [His Lordship read sub-s. 1 (*c*) and continued:] The relevant part of s. 38 of the Act of 1881, with the modifications indicated, reads thus: sub-s. 1 (*b*): " Any property which " a person dying . . . having been absolutely entitled thereto, " has . . . caused or may . . . cause to be transferred to or " vested in himself and any other person jointly whether by " disposition or otherwise, so that the beneficial interest therein " or in some part thereof passes or accrues by survivorship on his " death to such other person "; and s. 11 of the Act of 1889 is in these terms (so far as material): " The charge under the said " section "—that is, s. 38 of the Act of 1881—" shall extend to " money received under a policy of assurance effected by any " person dying on or after June 1, 1889, on his life, where the " policy is wholly kept up by him for the benefit of a donee, " whether nominee or assignee or a part of such money in pro- " portion to the premiums paid by him, where the policy is " partially kept up by him for such benefit ".

The Crown's claim under head (c) is for duty on a proportion of the policy moneys, and a question may arise as to what the proportion is. It is clear that in 1930 the original settlement was destroyed and a new settlement came into operation under which a class of beneficiaries different from the class interested under the original settlement came into existence, and it also is clear that after November 10, 1934, the plaintiff became sole owner of the policy and it certainly seems a strange result if duty should become payable by reason of the death of the deceased more than five years afterwards.

The authorities which were cited to me are numerous and difficult to reconcile. But it seems to me that on this part of the case I ought to follow the decision of the House of Lords in *Lord Advocate* v. *Fleming* (32). The facts there are simple and, I should have thought, on all fours with the facts in the present case. My attention was called to the passage in Lord Herschell's speech, where he points out that it is an abuse of language to suggest that the policy had ever been wholly or even partially kept up for the benefit of the daughter to whom it was assigned merely because of the premiums having been paid before the assignment when the daughter was in no sense a " donee ". There is also the earlier passage, in the Lord Chancellor's speech, where he points out the fallacy in the suggestion that the moment a policy of insurance is taken out the person who takes out the policy keeps it up not only for his own benefit but for the benefit of some person becoming a donee at a future time.

So far as the claim under head (c) is concerned, I think that the Crown have not established their case. I have been somewhat puzzled by the decision in *Lord Advocate* v. *Inzievar Estates* (33), but there it was pointed out by Lord Maugham, L.C., that, where the donee had paid all the premiums subsequent to the assignment, no duty would be payable. But where, as in that case, the assignor had paid some of the premiums subsequent to the assignment, a proportionate claim to the duty could be established. On the whole I think that that case, no less than the earlier one, supports the conclusion which I have reached that no duty is payable under head (c).

I have come to the conclusion that the donee referred to in s. 11 of the Act of 1889 is the ultimate donee; that the reference to donee is not properly applicable to a series of donees; and that the word only properly signifies the final beneficiary and owner of the policy in question.

I have considered *Parr* v. *Attorney-General* (34), which was, of course, a decision on a different point, but which seems to establish the proposition that, where a settlement is put an end to, as by an absolute assignment, the old estates cease to exist. For any purpose they are indeed merely past history. It seems to me that the Crown's case is that one must look at the whole life of the policy from start to finish, and that is a proposition which I cannot accept.

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(32) [1897] A. C. 145, 153, 154.

(33) [1938] A. C. 402, 408.

(34) [1926] A. C. 239.

I do not think that the deceased can be considered for the present purpose as having kept up the policy for the benefit of the plaintiff as donee. He could never, before 1934, have been understood to be doing so, except prophetically. The only person who kept up the policy for the benefit of the plaintiff was the plaintiff himself. I reject the argument that the fact that the plaintiff was one of a number of beneficiaries under the previous settlements has any bearing on the present question.

I do not think that the policy was kept up by the deceased for the benefit of the plaintiff. It is not denied that it was kept up by the deceased until November 10, 1934, but it was not kept up, in my judgment, for the plaintiff's benefit. I have come to the conclusion that neither on the whole nor on 4/10ths (or 2/5ths) or 27/33rds of the policy moneys is any duty leviable, that is to say, under head (c).

I turn to head (d), which is as follows: "Any annuity or "other interest purchased or provided by the deceased, either "by himself alone or in concert or by arrangement with any "other person, to the extent of the beneficial interest accruing "or arising by survivorship or otherwise on the death of the deceased". Under head (*d*), it seems to me, where a life policy is sold or given away by the life assured to another person, there can be no other interest in it or in the moneys assured thereby. That in my view is so at any rate in a case in which the life assured has ceased altogether to be concerned with the policy, e.g., by having covenanted to pay the premiums: see *Attorney-General* v. *Murray* (35).

I was invited to consider whether the property assigned was the policy of insurance or the moneys payable under it. I am of opinion that it was the policy, that is to say, the contract or the benefit of the contract with the insurance company. On this footing the plaintiff was the sole and absolute owner of the assigned property at the death of the deceased, and having been so for more than five years from the date of the assignment no duty could attach to it, or to any of its fruits, on the death of the deceased. Admittedly, I think, the plaintiff might have surrendered or sold the policy or the benefit of the policy before its maturity, in which case so far as I can see no duty could possibly have attached to the proceeds. I think that no beneficial interest accrued or arose on the death. The point whether it was the policy or the policy moneys which were provided by the deceased was apparently left open in *Tennant* v. *Lord Advocate* (36); but see the observations of Lord Russell of Killowen. If the view which I have expressed is right, the claim under (d)

(35) [1904] 1 K. B. 165.

(36) [1939] A. C. 207, 212, 213.

cannot, I think, be sustained. The nature of a policy of assurance is thus expressed by James, V.-C., in *In re Albert Life Assurance Co.* (37): "The contract on the part of the company "was, that if he should, on or before a certain day in every "year, pay a certain sum, their assets should be liable to pay "his representatives a certain sum on his death. He was under "no contract with the company; it was simply this, that he had "to perform a condition the performance of which entitled him "to certain benefits". That seems to me to be accurate, with appropriate additions of references to the assured's assigns.

I was urged to consider *Lord Advocate* v. *Hamilton's Trustees* (38) as concluding the matter so far as I am concerned in the plaintiff's favour. I accept that view, and hold that the claim under head (d) is precluded by that authority. *In re Hartland* (39) and *Brooks* v. *Inland Revenue Commissioners* (40) are to the effect that it is my duty in a court of first instance in England to follow a unanimous decision of the Court of Session on a statute equally applicable to both countries. I propose to follow *Lord Advocate* v. *Hamilton's Trustees* (41) and to treat it as concluding the issue in this action, so far as the Crown rests the claim under head (d). It is not necessary, I think, for me to enter at length into the facts on which the case to which I have referred arose. Lord Wark in his judgment (42), after observing that the claim in that case was made under head (d) and not under head (c), observed that, while it was not disputed that head (d) might render subject to duty insurance policies and policy moneys which escape under head (c), and that the words "other interests" in (c) are sufficiently wide to include the right to a policy or policy moneys, he found it difficult to understand how it could catch the very case with which head (c) deals, namely, the case of an out-and-out transfer of a policy by way of gift, and make the interest in such a policy liable to duty whether the policy be kept up by a donor for the benefit of the donee or not. He added that if that were a sound view it seemed to him that head (c) was otiose. He expressed the view that the Crown's claim failed, because it was not shown that any beneficial interest accrued or arose on the death of the deceased, and he pointed out that the whole interest in the policies and the policy moneys had passed to the beneficiaries twenty-four years before the deceased's death. Their interest then was fully vested, and was neither altered nor increased by the death of the assured. The nature of the interest was the same although the value of it was increasing during the lifetime of the assured, and reached its maximum at his death.

(37) L. R. 9 Eq. 703. 705.

(38) 1942 S. C. 426.

(39) [1911] 1 Ch. 459.

(40) [1913] 3 K. B. 398.

(41) 1942 S. C. 426.

(42) Ibid. 439.

An earlier passage in the same judgment puts the case in a manner which seems to me most convincing. Lord Wark said (43): " Coming to consider the language of s. 2, sub-s. 1 (*d*), " it is apparent that, in order to succeed, the Crown must establish two things: (first) that the property sought to be charged " has been provided or purchased by the deceased, either by " himself alone or in concert or by arrangement with any other " person; and (second) that to some extent there has been a " beneficial interest arising or accruing by survivorship or other" wise on the death of the deceased. If either of these is not " established, the claim fails. And it is well to keep in view the " elementary principle of construction of taxing statutes that it " is for the Crown to show that the subject is within the ambit " of the statute and not for the subject to show that he is outside " it. Having regard to what I have said as to s. 2, sub-s. 1 (*c*), " I think there is soundness in the argument for the respondents " that, where you are dealing with policy moneys, it is not " sufficient to bring them within the expression ' purchased or " ' provided by the deceased ' that the policy was originally taken " out by him, or even that certain premiums were paid by him " upon it, if it has been assigned to a donee and the assured has " thereafter paid no further premiums. And, in my opinion, " this is true, even when the gift is made through the medium " of a trust, so long as it is not one of the purposes of the trust " to make payment of the premiums out of funds provided by " the truster. The argument for the Crown amounted to this, " that the deceased had in effect provided the premiums after " the date of the declaration of trust by creating a trust and " empowering the trustees to borrow upon the trust property, " which was of sufficient value to afford security for the further " premiums required. Alternatively, it was said that the trustees " were his mandataries to pay the premiums. I do not think " this argument is sound in either alternative. The trustees were " trustees, not for the deceased, but for the beneficiaries. They " were answerable to them alone, and, when they borrowed, " it was in their interest and on their behalf. They were not " directed to borrow, but only empowered to do so. They might " have surrendered the policies, or some of them, at any time. " Accordingly, the further premiums required were paid truly by " the beneficiaries entirely, and not by the deceased. The case " of *Scott's Trustees* (44), on which the Crown relied, has thus " no application. Moreover, in *Scott* (44) there was no vested " right in the beneficiaries until the death of the assured ".

The latter part of this passage seems to me to dispose of any claim that might have been based on s. 30, sub-s. 1, of the

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(43) 1942 S. C. 440.

(44) 1918 S. C. 720.

Finance Act, 1939, in reference to the Wood Street property as affecting the policy and policy moneys in question. It may well be that *Lord Advocate* v. *Hamilton's Trustees* (45) is inconsistent with *Attorney-General* v. *Dobree* (46); *Attorney-General* v. *Robinson* (47) and *Inland Revenue* v. *Scott's Trustees* (48), but I think, as I have said, that I am bound to follow it.

The authorities are, in my view, difficult to reconcile. I am aware that a taxing statute must be taken as meaning exactly what it says, irrespective of any capricious or surprising consequences that may flow from such a construction of it. But, in truth, it surprises me that so simple and so ordinary a situation as is found in the present case should fall to be dealt with in the manner which the Crown suggests. The property which the plaintiff acquired on November 10, 1934, namely, the policy, was essentially the same in character as any other property which is capable of absolute and unfettered ownership. The plaintiff could have sold it, mortgaged it, given it away, destroyed it, settled it, or (it being a policy on his father's life) he could have surrendered it at the moment when his father was at the point of death. In the case of none of these possible dealings on the plaintiff's part could the present claims have been established so far as I see. I will declare that no estate duty became payable on the deceased's death on the insurance policy or on the value of it or on any part of such value or on the sum of 48,765*l.* which became payable thereunder or on any part of such sum. The defendants must pay the plaintiff's costs.

Solicitors: *Frere, Cholmeley & Nicholsons; Solicitor of Inland Revenue.*

J. L. D.

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(45) 1942 S. C. 426.
(46) [1900] 1 Q. B. 442.
(47) [1901] 2 I. R. 67.
(48) 1918 S. C. 720.

LLOYD-JACOB, J.

1950
Nov. 16, 17;
Dec. 13.

HINCKLEY URBAN DISTRICT COUNCIL *v.* WEST MIDLANDS GAS BOARD.

Affirmed.
[1951] 1 Ch. 577

[1950 H. 952]

Gas—Undertaking of local authority—Vesting of undertaking in area board—Profit balance accrued but not ascertained or allocated by local authority at vesting date—Whether repayable to local authority—Gas Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *ss.* 19, 56.

For a number of years before May 1, 1949 (the vesting date under the Gas Act, 1948), the plaintiffs, a local authority, carried on a gas undertaking under powers and obligations contained in their local Act, as amended by two statutory orders. In accordance with the financial provisions of that Act, the plaintiffs were authorized to apply the revenue of the undertaking, after making proper provision for maintenance, the discharge of loans, improvements, and a reserve fund and carry-forward of limited amounts, to the relief of the general rate fund or to the reduction of the price of gas. The general rate fund was liable, subject to certain conditions, to make up deficiencies in the revenue of the gas undertaking.

By virtue of ss. 17 and 18 of the Gas Act, 1948, the plaintiffs' gas undertaking and their property, rights, obligations and liabilities vested in the defendants, as the appropriate area board, on the vesting date. At that date there had accrued an unascertainable balance of profit in respect of the working of the undertaking for the thirteen months ending April 30, 1949. This balance, amounting to 30,178*l.*, was ascertained in accounts adopted by the plaintiffs in October, 1949. Before the vesting date, the plaintiffs had made no decision appropriating the balance for any of the purposes within the financial provisions of their local Act.

The plaintiffs brought an action against the defendants to recover the balance stated above, contending that, on the vesting date, the financial provisions of the local Act remained in force, with the name of the defendants substituted for that of the plaintiffs, so that the profit balance in the hands of the defendants must be applied to the relief of the rates, that being the only method of application possible after the vesting date; alternatively, that the provision in the local Act authorizing the appropriation of a profit balance to the relief of the rates constituted a "special provision for the protection of a person or class of "persons" within the meaning of the proviso to s. 56, sub-s. 2, of the Act of 1948, the plaintiffs' ratepayers being such a class.

Held, (1.) that as no appropriation, as required by s. 19 of the Act of 1948, had been made by the plaintiffs of the profit balance before the vesting date, that section did not avail the plaintiffs; (2.) that, as to s. 56, sub-s. 2, the financial provisions of the local Act were inconsistent generally with the Act of 1948, so that the local Act would cease to have effect unless saved by the proviso;

and (3.) that the words "special provisions for the protection of "any person or class of persons" in the proviso had reference to the relief of a person or class from liability or default, and not to the administration in the prescribed manner of the funds of the undertaking for the benefit of gas users or ratepayers.

Accordingly, the undertaking vested in the defendants free from any obligation as to the specific disposal of any part of it, and the action failed.

ACTION.

The plaintiffs, Hinckley Urban District Council, claimed to recover from the defendants, West Midlands Gas Board, the sum of 30,178*l.*, representing the profit derived from the operation of the gas undertaking carried on by the plaintiffs during the last accounting period up to May 1, 1949, on which date the undertaking vested in the defendants under ss. 17 and 18 of the Gas Act, 1948.

The following statement of facts is taken substantially from the judgment of Lloyd-Jacob, J.:—

The accounting period extended from April 1, 1948, until April 30, 1949, and included, in addition to the normal yearly period, an additional month. The accounts for this period, in the form of an annual account and a separate account for the month of April, 1949, were prepared for and adopted by the plaintiffs in October, 1949, subject to audit, and the amount now claimed was agreed to represent the unappropriated profit properly included in those accounts.

The basis on which those accounts were prepared differed in only one particular from the basis previously obtaining, in that a figure for "unbilled" gas was included. In the normal operation of the undertaking, the reading of meters and the collection of coins from pre-payment meters was not timed to coincide precisely with the plaintiffs' financial year or its regular divisions, with the consequence that at any particular accounting date the cost of producing and distributing such outstanding "unbilled" or "unread" or "unmetered" gas would not be balanced by appropriate receipts.

With the gradual growth of the undertaking over the years, the value of gas "unbilled" at the close of each financial year had increased so as to form a substantial hidden reserve, amounting by May, 1948, to some 12,000*l.*; but the inclusion in the balance sheet of a properly estimated value for such gas would, his Lordship found, have been justified in any period, and was essential in a final period of working; and that was in accord with the suggestions offered by the defendants to local authorities such as the plaintiffs when the defendants were anticipating take-over.

The rights and obligations of the plaintiffs in respect of their gas undertaking derived from the Hinckley Local Board Gas Act, 1880 (43 & 44 Vict. c. clvii), as amended by the Hinckley Gas Orders of 1922 (St. R. & O., 1922, No. 608), and 1928 (St. R. & O., 1928, No. 512).

For the purposes of these proceedings, the only material statutory provisions were s. 43 of the Act of 1880 (as amended by the Order of 1922) and s. 25 of the Order of 1928, which replaced s. 44 of the Act of 1880 (1). For convenience of reference, the expressions s. 43 and s. 44 are hereinafter used, but the reference must be understood to relate to the provisions in respect of (a) accounts and application of receipts, and

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(1) Hinckley Local Board Gas Act, 1880, s. 43; "From and after the "transfer the local board shall keep "accounts in respect of their receipts "and expenditure on capital account "under this Act and accounts in "respect of their receipts and "expenditure on revenue account "under this Act and accounts in "other, and from all their other "accounts, and shall, save as "hereinafter otherwise expressly "provided, apply all moneys from "time to time received by them in "respect of the undertaking (except "borrowed money, and except money "produced by the sale of superfluous "lands), as follows; (that is to say); "(i) In payment of the working "and establishment expenses, and "cost of the maintenance of their "gasworks and the undertaking; (ii) "In payment of their costs, charges, "and expenses of and incidental to "the collecting and recovery of gas "rents and rates, and of the borrow- "ing of money under this Act; [Then "followed sundry provisions for the "discharge or redemption of loans "and debentures charged on the gas "undertaking.] (viii) In setting "apart if the council think fit a "yearly sum not exceeding ten "pounds per centum of the said "moneys from time to time received "by them as aforesaid for the pur- "pose of forming a reserve fund to "provide for any extraordinary "expenditure in connexion with the "gas undertaking; (ix) In improving "and extending the gasworks and "mains, and in payment of any "charges and expenses for the time "being paid out of the general dis- "trict rate in respect thereof;

"And they may if they think fit "carry forward to the credit of the "revenue account of their gas under- "taking for the next succeeding year "for the purpose of providing a work- "ing balance any sum not exceeding "five thousand pounds and subject "thereto shall either carry to the "[general rate] fund any surplus or "balance remaining in any year or "apply the same in reduction of the "price charged by them for the "supply of gas".

Section 44: "Any deficiency in the "revenues and receipts of the coun- "cil on account of the undertaking "to make any of the payments or "provide any of the funds to which "the moneys received by them in "respect of the undertaking are "applicable under the provisions of "s. 43 (accounts and application of "receipts) of the Act of 1880 as "amended by s. 32 (Reserve fund) of "the Order of 1922 shall be from "time to time made good out of the "general rate in such manner as the "council may from time to time "determine:

"Provided that the general rate "shall not without the consent of "the Minister of Health be applic- "able to meet any such deficiency "unless all persons supplied with gas "by the council have been charged "for the same the maximum prices "authorised by s. 15 of this Order "throughout the period during which "such deficiency shall have arisen".

(b) deficiency in receipts, respectively, which were operative during the twenty years preceding the take-over by the defendants.

Section 44 was material only as indicating that there was a contingent liability in certain circumstances upon the general ratepayers to make good losses incurred in the working of the gas undertaking. No such circumstances ever arose, the credit balance carried forward in the preceding year for all the seven instances of a loss in working being found sufficient to meet the deficiency.

Accordingly, s. 43 specified the purposes to which the receipts from the gas undertaking were to be applied, and it provided that, if there remained a surplus or balance in the opinion of the plaintiffs not required to be retained as a working balance, the plaintiffs had an option either to apply the amount to price reduction or to transfer it for rate aid. Over the sixty odd years of working, approximately 10,000*l*. had been transferred to the general rate fund.

Before the vesting date, the plaintiffs had not considered the question of disposing of the surplus, if any, for the period from April 1, 1948, to April 30, 1949. In the events which had happened, the plaintiffs, as from May 1, 1949, had had neither occasion nor opportunity to consider the application of the surplus of the last working period of the gas undertaking to any purpose other than for rate aid; and if so applied, it would have represented approximately 3*s*. 4*d*. in the pound on the rateable value of property in the area.

Capewell, K.C., and *F. N. Keen* for the plaintiffs. After the vesting date the plaintiffs, who had lost possession and control of the gas undertaking, could, by the terms of the local Act, apply the balance only to the relief of the general rates; the other purposes which that Act authorized were no longer open to them. If they had been able to ascertain the surplus before April 30, 1949 (which was impossible), they could have applied it to rate relief.

Sections 17 and 18 of the Gas Act, 1948, vested the assets and liabilities of the undertaking in the defendants, subject to other provisions of that Act concerning repeals, consequential provisions, and the saving of certain powers. On the vesting date, the plaintiffs' rights and liabilities passed to the defendants, who are bound to apply the profit balance in the way the plaintiffs must have done; they must return it to the plaintiffs for this purpose [s. 53, sub-s. 4; s. 56, sub-s. 2, and s. 76 of the Act of 1948 were referred to].

The plaintiffs' Statutory Orders of 1922 and 1928 are not affected by the repeal provision of s. 76, as they come within

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the saving words of that section. If it should be considered that ss. 43 and 44 of the local Act are not otherwise saved by s. 56, sub-s. 2, of the Act of 1948, then the proviso must take effect, as the plaintiffs' ratepayers are a class of persons for whom the local Act has made special provision. If there are two possible constructions of the Act of 1948, then that construction which does not effect an injustice should be preferred. Throughout the years the ratepayers have been under a potential liability to make up deficiencies, and it would be an injustice if the surplus revenue now ascertained were not applied for their benefit.

Heald, K.C., and *J. P. Ashworth* for the defendants. [They referred to ss. 1, 7, 17, 18, 28, 29, 33, 34, 37, 41, 49 and 53 of the Act of 1948.]

The question of injustice, as affecting the construction of a statute, must be approached with caution: the overcharging of gas consumers, which has occurred in this case, is not requited by making a present of a large sum to ratepayers.

The only claim which the plaintiffs could have is under s. 29 of the Act of 1948, which sets up a general fund of 2,500,000*l.*, but the action is not so framed. Section 37 restricts the right of the plaintiffs, as from February, 1948, to deal with their trading surplus, and the authority of the Minister of Health would have been necessary before making an allocation. The whole financial scheme of the Act of 1948 is inconsistent with the provisions of the local Act, which accordingly lapses. Under s. 17 of the Act of 1948, the defendants hold the assets of the gas undertaking for the purposes of the Act subject to the direction of the Minister: these purposes do not contemplate separate accounting for particular undertakers. It is inconsistent with the scheme of the Act that after the vesting date any sum should be paid by the defendants to the plaintiffs except by way of loan, interest or share of compensation under ss. 28 and 29. If, as from the vesting date, the plaintiffs' local Act is not entirely repealed, then (a) s. 43 of the local Act is repealed as being generally inconsistent with the Act of 1948, or (b) the protective provisions of the proviso are not applicable to the general ratepayers, as claimed by the plaintiffs.

Ashworth following. The effect of ss. 56 and 76 of the Act of 1948 is that if the local Order or Act is not inconsistent with the Act of 1948, or redundant, it will continue in force, with the substitution of the defendants for the plaintiffs, and will not be repealed by reason of the repeal of the Gas Regulation Act, 1920. But, if the local Act is to be saved, it must be applicable in full: the plaintiffs cannot pick out sentences here and there and contend that they only are not repealed.

Section 43 of the local Act is quite inconsistent with the scheme of the Act of 1948, which contains no provision for repayment of the balance now claimed. The option to apply the surplus profits in support of the rates cannot survive alone.

Section 37 of the Act of 1948 shows that there was no debt accrued due to the plaintiffs which could have been enforced immediately before the vesting date, so they cannot now claim that the defendants have inherited an obligation to do what they themselves could not have done.

The proviso to s. 56, sub-s. 2, cannot be construed as referring to the plaintiffs' ratepayers generally: it refers to "protective clauses" of a well-known type, of which there are instances in the local Act.

Capewell, K.C,, replied.

Cur. adv. vult.

December 13. LLOYD-JACOB, J., reading his judgment, stated the facts substantially as above set out, and continued:—By this action the plaintiffs seek to recover the admitted surplus from the defendants (to whom the assets of the gas undertaking have been transferred), and they express the intention, if successful, to carry the amount to the credit of their general rate fund.

It becomes necessary, therefore, to examine the terms of the Gas Act, 1948, to ascertain to what extent, if at all, the plaintiffs retain any right to, or to the disposition of, any funds forming part of the assets of the undertaking after the date when the provisions of that Act became effective.

The general purposes of this Act included the transfer to area gas boards of property, rights, obligations and liabilities of gas undertakers and other persons: see Part II, ss. 15 to 40 inclusive; and it is not in dispute that on May 1, 1949, pursuant to the provisions of ss. 17 and 18 of the Act and the Order made thereunder, the property, rights, obligations and liabilities of the plaintiffs wholly or mainly relating to their gas undertaking became vested in the defendant board.

Immediately before that vesting there was included within the property a sum, not then ascertained, of the surplus of unappropriated profit from the operations of the gas undertaking since its previous accounting date, which sum was later ascertained to be the amount herein claimed. Two questions therefore arise: (1.) did this property vest subject to any obligation as to its disposal? (2.) If yes, does such obligation require the remission of the amount claimed to the plaintiffs?

As to the first of these, apart from the general obligations resting upon the area boards contained in Part I of the Act, which can for present purposes be disregarded, there are two sections which are directly relevant, ss. 19 and 56 (2). [His Lordship read s. 19, and continued:] The appropriation of surplus profit of the gas undertaking to the relief of rates would, in my judgment, be an arrangement for the making of financial adjustments as between the accounts of the gas undertaking or the local authority and another account of the local authority,

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(2) Gas Act, 1948, s. 19: "(1) "Where a local authority have before "the vesting date made arrangements "for the making of financial adjustments, as between the accounts of "the gas undertaking of the local "authority and any other account of "the local authority, in respect of any "transaction or matter affecting "both their functions as a gas undertaker and other functions of the "authority, and in pursuance of "those arrangements any amounts "would, but for this Act, have fallen "on or after the vesting date properly to be debited or credited in "the accounts of the gas undertaking of the local authority and "credited, or, as the case may be, "debited, in some other account of "the local authority, the area board "in whom property, rights, liabilities and obligations of the local "authority vest by virtue of this Act "shall, subject as hereinafter provided, pay those amounts to the "local authority or be entitled to "receive those amounts from the "authority, as the case may be, at "the times at which, but for this "Act, those amounts would have "fallen to be debited or credited in "the accounts of the gas undertaking of the local authority: . . .".

Sub-section 2: "The said area "board and the local authority may "agree or the Minister of Health "may, on the application of either "party in default of such agreement, "determine that, having regard to "the circumstances in which any "such arrangements were made and "the circumstances arising under "this Act, the last preceding subsection shall not apply to those "arrangements or shall apply thereto "with such modifications as to the "payments to be made by the board "or the local authority as may be "so agreed or determined, and the "said subsection shall have effect "subject to any such agreement or "determination.

"Any other question arising under "the last preceding subsection as to "the payments to be made thereunder shall, in default of agreement, be determined by the Minister of Health".

Sub-section 3: "Any payment "made by the said area board or "the local authority under the preceding provisions of this section "which would, but for this Act, "have been debited or credited as a "capital payment shall be deemed "to be a capital payment, and any "other such payment shall be "deemed to be an annual payment".

Section 56, sub-s. 2: "All local "enactments in force at the vesting "date and applicable to any statutory undertakers, . . . shall as from "the vesting date have effect—

"(*a*) as if for references to the "undertaker there were substituted "references to the area board in "whom property, rights, liabilities "and obligations of the undertaker "vest by virtue of this Act;

"(*b*) As if for any references (however worded and whether expressed "or implied) to the gas undertaking "or any part thereof or to the limits "of supply of the undertaker or any "part thereof there were substituted "a reference to so much of the "business carried on by the area "board as corresponds to that "undertaking or part thereof or, as "the case may be, a reference to the "area comprised in the said limits of "supply immediately before the "vesting date or part thereof; and "shall also have effect, as from such "date as may be prescribed, which "may be prior to the making of the "regulations but not to the vesting and it would be in respect of a matter affecting their functions both as a gas undertaker and as a local authority.

If therefore such an appropriation had been determined on before the vesting date, but no actual adjustment made before the transfer of the assets of the gas undertaking, this section would apply, and the assets would be charged with the obligation to implement the adjustment subject to agreement, or in default thereof, to determination by the Minister. As no such appropriation had in fact been made the subject of arrangements before the vesting date, it does not avail the plaintiffs.

Section 56 by its first sub-section imposes upon area boards certain obligations in connexion with gas supply. [His Lordship read sub-s. 2 and continued:] The Hinckley Act was in force at the vesting date, and was applicable, so that as from the vesting date sub-s. 2 (*a*) would cause the substitution of the defendants for the plaintiffs in the operation of that Act, subject to the effect of the proviso to the sub-section. Section 43 of the Hinckley Act provides for the regulation of charges made by the undertaker (and even if it did not specifically so provide, it would in my judgment be proper to hold that the scheme for distribution of profits contained in the section was inconsistent with the Gas Act, 1948), so that unless it is saved by the exception for protective clauses, s. 43, notionally amended by the substitution of the name of the defendants for that of the plaintiffs, would cease to have effect as from the vesting date.

Is it so saved? The reference to "special provisions for the "protection of any person or class of persons" is not in my view apt to describe the regular, prescribed manner in which the funds of the undertaking are to be administered, however much such administration may provide benefits to the ratepayers or gas users as a class. It must rather be read as intended to preserve the operation of a statutory provision which relieves a person or class of persons from liability or default. It follows, therefore, that as from the vesting date s. 43 of the Hinckley Act ceased to have effect, and that there rests upon the defendants no obligation or liability to deal with any assets taken over by them from the plaintiffs in accordance with its provisions.

"date, with such other adaptations "and modifications (if any) as may "be prescribed, being adaptations "and modifications required in consequence of the provisions of this "Act:

"Provided that any such local enactment which provides for the "regulation of charges made by the "undertaker and any other such "local enactment which is inconsistent with or rendered redundant by "the provisions of this Act shall "cease to have effect, as from the "vesting date, so, however, that this "proviso shall not be taken as affecting any local enactment which "contains special provisions for the "protection of any person or class "of persons and is not rendered "redundant by the provisions of this "Act".

Some indirect support for this conclusion is, in my judgment, to be derived from ss. 19 and 37 of the Gas Act, 1948. Section 19 has already been referred to, and s. 37, in effect, qualifies the statutory right of the local authority, between February 10, 1948, and the vesting date, to apply its trading surpluses.

It would be strange to find that an Act which limited the freedom of a local authority in the exercise of their statutory duty pending take-over, and made special provisions for implementing the decisions of a local authority not fulfilled at the date of take-over, should preserve the freedom of the local authority to make any effective decision after the date of take-over in relation to property which had been vested.

The answer, therefore, to the first question must accordingly be that the whole property in the gas undertaking of the plaintiffs vested in the defendants subject to the general obligations under s. 56, sub-s. 1, of the Act of 1948 (which are common to all area boards), but not subject to any obligation as to the specific disposal of any part of it.

The second question therefore does not arise, and it becomes unnecessary to decide whether, had the provisions of s. 43 of the Hinckley Act remained operative, but exercisable by the defendants, the plaintiffs could have required that exercise to be in favour of a grant to the general rate fund.

On the hypothesis that these provisions continue, the whole rights of allocation among the various objects set out in the section would prima facie continue, and the restriction to the residuary purpose which would now characterize the exercise of the power by the plaintiffs would not, it would appear, be necessarily imposed by circumstance upon the defendants. Nor am I concerned to decide how, should the position be other than as I have stated it, the crediting of the amount claimed to the general rate fund could have been secured by an order of this court.

There are not, as I understand the matter, any questions of fact in dispute. It is sufficient to say that the plaintiffs have not satisfied me that any sum is due to them, and accordingly I dismiss this action.

Judgment for the defendants.

Solicitors: *Lees & Co. for J. G. S. Tompkins, Hinckley; Sherwood & Co. for A. C. Croasdell, Birmingham.*

F. R. D.

DANCKWERTS, J.

1950
Nov. 29.

In re YOUNG, DECD.
YOUNG *v.* YOUNG AND OTHERS.

[1950 Y. 496.]

Trust—Secret trusts imposed on beneficiary under will—Communicated during lifetime of testator—Admissibility of parol evidence—Future benefits—Validity.

Will—Attestation—Will witnessed by beneficiary under secret trust—Validity—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 15.

A testator by his will provided: "This is the last will and "testament of Roger Pilkington Young [the testator] and is to the "effect that he leaves all his worldly goods and chattels both real "and personal unto his wife for her lifetime only. . . . ". He appointed his wife and a solicitor to be his personal representatives, and continued, "it being a condition of this will that after the "testator's death . . . [his wife] makes a new will leaving Roger "Pilkington Young's estate for the purposes she knows he desires "it to be used for—for the permanent aid of distressed gentlefolk "and similar purposes such will to be administered by . . . [his "solicitors] . . . leaving such small legacies as she knows I wish to "be paid . . .". One of the witnesses of the will was an employee of the testator. The testator died on December 20, 1943. His widow proved his will on October 23, 1944. The second executor survived the testator, but died before the grant of probate was obtained.

The testator's widow stated in an affidavit that, before executing his will, her husband had discussed with her the devolution of his estate after his death, and that she knew of his wishes, namely, that the employee referred to, who had served the testator for many years as a chauffeur, should receive a legacy of 2,000*l.*, and that the testator's land agent and personal friend should receive a legacy of 1,000*l.* Subject to the above gifts he wished his estate to be used to found and endow a home for distressed gentlefolk. His widow deposed to her willingness to give effect to those wishes so far as they were legally possible.

On a summons asking whether the testator's wishes communicated to his wife during his lifetime constituted valid trusts which were effective to bind the estate, and whether the chauffeur, as an attesting witness, was entitled to receive a legacy of 2,000*l.* out of the estate of the testator:—

Held, that the words in the will "it being a condition of "this will" were imperative and created trusts in proof of which parol evidence was admissible; that the widow's parol evidence of the testator's wishes established secret trusts which were binding on the estate; that the trusts became effective on the death of the testator notwithstanding that they related to future interests; that, although the testator's wishes were communicated to one executor only, that would have been sufficient to bind both executors had they both proved the will, that the estate duly passed to the widow as an executor, and it could accordingly not be objected that there was no estate in her to which any trusts could be tacked; that the testator's direction that the widow should make a will disposing of the property as she knew he wished merely meant that, trusts having been created, she was to declare them by will, in the sense of putting them on record, and so did not involve that he was requiring her to dispose by her will of property in which she had no beneficial interest subsisting after her death. *In re Gardner*, [1920] 2 Ch. 523, and *Blackwell* v. *Blackwell*, [1929] A. C. 318, applied; *In re Hetley*, [1902] 2 Ch. 866, distinguished.

Held, further, that attestation of the will by the chauffeur did not prevent him from receiving the legacy of 2,000*l*., because his interest did not arise by virtue of the will, but by virtue of the trusts imposed on the widow.

O'Brien v. *Condon*, [1905] 1 I. R. 51, followed; *In re Fleetwood* (1880), 15 Ch. D. 594, not followed.

ADJOURNED SUMMONS.

The testator, Roger Pilkington Young, by his will dated April 25, 1942, provided: "This is the last will and testament "of Roger Pilkington Young and is to the effect that he leaves "all his worldly goods and chattels both real and personal unto "his wife Eveleen Mary Young for her lifetime only . . .". He appointed his wife and a solicitor, John Teddie Marriott, to be his personal representatives, and continued: "it being a condi-"tion of this will that after the testator's death the said Eveleen "Mary Young makes a new will leaving Roger Pilkington "Young's estate for the purposes she knows he desires it to be "used for—for the permanent aid of distressed gentlefolk and "similar purposes such will to be administered by Messrs. "Marriott & Co. . . . leaving such small legacies as she knows "I wish to be paid and Messrs. Marriott & Co. to be allowed to "charge reasonable fees for the work they do". One of the witnesses of the will was Thomas Cobb, an employee of the testator.

The testator died on December 20, 1943. His wife proved the will on October 23, 1944. The second executor survived the testator, but died shortly afterwards before a grant of probate was obtained.

The testator made his will without legal assistance, leaving an estate of over 94,000*l*. which he possessed at the date of the will. His widow stated in an affidavit that before executing his will her husband had discussed with her the devolution of his estate after his death, and that she knew of his wishes, namely, that the defendant Thomas Cobb, employed by the testator for many years as a chauffeur and general factotum, should receive a legacy of 2,000*l*.. and that Gerald Summerfield, the testator's land agent and personal friend, should receive a legacy of 1,000*l*.

Subject to the above gifts he wished his estate to be used to found and endow a home for distressed gentlefolk. His widow deposed to her willingness to give effect to those wishes so far as they were legally possible.

On a summons taken out to have determined various points of construction under the will, the questions material to this report were whether the instructions communicated by the testator to his wife constituted trusts which were effective to bind the estate, and whether, having regard to s. 15 of the Wills Act, 1837 (1), the attesting witness Thomas Cobb was entitled to receive a legacy of 2,000*l.* out of the estate of the testator.

The case is reported on those two questions only.

Jennings, K.C., and *B. S. Tatham* for the executrix, the testator's widow. The question is whether the direction in the will is a power or a trust. On the one hand it might be said that the whole estate is given to the widow, and that a trust is grafted on to it; on the other hand, it might be said that she had only a life tenancy; but in either event the legacy would go to the distressed gentlefolk. It is submitted that the direction is a trust imposed on the widow, and not a power, for the words "it "being a condition of this will" are imperative. If it is a power, it is a power in the nature of a trust. [He referred to Farwell on Powers (3rd ed.), ch. 12.] The position was summed up by Jenkins, L.J., in *In re Coxen* (2). [He also referred to *In re Parnell* (3).]

In re Hetley (4) is distinguishable. In that case there was nothing but a power.

The court may find that the direction constitutes an executory gift on the death of the widow. An example of an absolute gift subject to an executory gift is to be found in *Comiskey* v. *Bowring-Hanbury* (5).

Christie, K.C., and *J. A. Plowman* for the next-of-kin. If parol evidence were admitted, this would be a device to get round the Wills Act.

There is no trust capable of taking effect during the life of the testator's widow, but it is suggested that there is a trust which takes effect after her death. She, however, cannot be a trustee after her death, and therefore any such trust would be ineffective. Moreover no absolute estate is given to the widow to which any trusts could be attached after her death. The widow has only a power of disposing of the property during her lifetime, and parol evidence is not admissible to prove how the testator wished any such power to be exercised. It is not proper to admit parol evidence in proof of matters outside the will: see *In re Hetley* (6).

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(1) Wills Act, 1837, s. 15: "... 'if any person shall attest the execu- 'tion of any will to whom ... any '... legacy ... shall be thereby 'given ... such ... legacy ... "shall, so far only as concerns such "person attesting the execution of "such will ... be utterly null and "void ...".

(2) [1948] Ch. 747, 751.

(3) [1944] Ch. 107.

(4) [1902] 2 Ch. 866.

(5) [1905] A. C. 84.

It is indicated in the testator's will that the wife should make a will; but that is merely a wish, which is not binding on her.

There is a second point: the chauffeur, Thomas Cobb, attested the will. Therefore it would be contrary to s. 15 of the Wills Act, 1837, for him to take any benefit under it. Accordingly the legacy of 2,000*l.* to the chauffeur fails in any event, even if the existence of the secret trust is proved: see *In re Fleetwood* (7). It is submitted that the court should follow that case, which has stood since 1880.

M. J. Albery for the defendants Thomas Cobb and Gerald Summerfield, called upon only on the question of the validity of the legacy to Thomas Cobb. In *In re Fleetwood* (8) the matter was not argued, and certain authorities were not cited; and it is submitted that that decision is wrong. The question turns on the construction of s. 15 of the Wills Act, 1837, and in particular of the word " thereby " in line 6 of the section. The interest of Thomas Cobb does not arise under the will, but by virtue of the trusts imposed on the widow outside the will. The signature of the witness is only evidence of the contents of the will, and not of the trusts which are proved by other evidence. There is therefore no logical reason for rejecting evidence of those trusts in favour of the witness.

In *O'Brien* v. *Condon* (9) Sir Andrew Porter, M.R., said that he thought that *In re Fleetwood* (10) was inconsistent with the principles ruling this matter and contrary to common sense, and he refused to follow it. It is submitted that *In re Fleetwood* (10) is also inconsistent with the decision of the House of Lords in *Cullen* v. *Attorney-General for Ireland* (11), and with the statements of the law on this topic by Viscount Sumner and Lord Warrington of Clyffe in *Blackwell* v. *Blackwell* (12). *O'Brien* v. *Condon* (13) should be followed in preference to *In re Fleetwood* (14). [He also referred to *In re Gardner* (15).]

Denys Buckley for the Attorney-General.

(6) [1902] 2 Ch. 866.
(7) (1880) 15 Ch. D. 594.
(8) 15 Ch. D. 594.
(9) [1905] 1 I. R. 51.
(10) 15 Ch. D. 594.
(11) (1866) L. R. 1 H. L. 190.
(12) [1929] A. C. 318, 339, 340, 342.
(13) [1905] 1 I. R. 51.
(14) 15 Ch. D. 594.
(15) [1923] 2 Ch. 230.

DANCKWERTS, J., following *Perrin* v. *Morgan* (16), held that the widow was entitled to a life interest in the whole of the testator's property, both real and personal. He also held that the "gift for the permanent aid of distressed gentlefolk and "similar purposes . . ." was a valid charitable gift. On the two questions for which the case is reported he gave judgment as follows:—There is no doubt what the testator's intentions really were. The question is whether he adopted methods to which effect can legally be given. Although there is reference to some will-making power given to the testator's widow, the court may find that there is an executory gift on the death of the widow for the benefit of certain beneficiaries, whom the testator intended to benefit: see, for example, *Comiskey* v. *Bowring-Hanbury* (17). The circumstances of that case were somewhat different from those of this case.

It is objected that nothing is given to the widow after her death, that there is therefore no estate with which she could deal, and that she has merely a power of disposing of property. In such circumstances, it is contended, it is not possible to refer to parol evidence to ascertain something outside the will, as is shown by *In re Hetley* (18). But that case is distinguishable from the present. In that case, in effect, there was nothing but a power. There is something more definite than any power to be found in this will: everything in it is imperative. Once it is found that the directions in a will are imperative, then they relate to trusts rather than to the creation of a power. The words in the present will, "it being a condition of this will" that something shall be done, point to an imperative trust.

It is then said that there is no estate in the widow upon which any trusts provable by parol evidence can be tacked. That is not the case. It is to be observed that the testator appointed the widow and the solicitor, John Teddie Marriott, the executors of his will, and upon the testator's death, therefore, the estate by law vested in those executors although John Teddie Marriott died before they were able to perfect their title by the grant of probate.

It was also said that the trusts in question, being obviously intended to take effect after the widow's death, must be ineffective because she could not be a trustee for any purpose after she was dead. At first sight that seems a reasonable statement, but when it is examined it is, in my view, found to be based upon a fallacy. The widow is, and, if he had survived, the co-executor would have been, a trustee for purposes which were to take effect upon the testator's death as soon as the will came into effect.

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(16) [1943] A. C. 399.
(17) [1905] A. C. 84.
(18) [1902] 2 Ch. 866.

True the purposes related to future interests and future purposes, but they would have been none the less trustees for those purposes.

A good example of a secret trust being founded in that way is in *In re Gardner* (19). There the testatrix by her will, made in 1909, bequeathed all her real and personal estate to her husband for his use and benefit during his life "knowing that he will "carry out my wishes". Four days after the date of her will she signed an unattested memorandum expressing her wish that "the money I leave to my husband" should, on his death, be equally divided among certain named beneficiaries. She died in 1919 and her husband died four days later. After the wife's death a memorandum was found in his safe and there was parol evidence that shortly after the execution of the will the testatrix had said, in his presence, that her property after his death was to be divided equally between the named beneficiaries and that he had assented to that. Those were held to be effective trusts binding upon his estate.

There the trusts in question were only operative after the husband was dead, and they were operative in respect of an estate which devolved upon him not by reason of the dispositions contained in the will, for she gave him only a life interest: they were interests which vested in him by operation of law. Accordingly there is no difficulty in regard to the fact that these trusts are to operate after the death of the widow.

The conclusion to which I have come is that these trusts are secret trusts which are established by parol evidence given by the widow in her affidavit, and that they are effective in respect of this estate. It is to be observed that they were communicated to the wife in the testator's lifetime before the date of the will, and that they were only communicated to her, and not, apparently, to her co-executor. Upon the authorities, that would have been sufficient to bind her co-executor equally with her, if he had survived long enough to obtain the grant of probate, so that he would have been concerned with the operation of the will and the trusts as well as the widow. In *Blackwell* v. *Blackwell* (20) the principle is thus expressed by Lord Warrington: "Further in *Moss* v. *Cooper* (21), Wood V.-C. "said: 'If, on the faith of a promise by A., a gift is made in "'favour of A. and B., the promise is fastened on to the gift to "'both, for B. cannot profit by A.'s fraud'". Prima facie, it seems to me that there are here secret trusts to which effect should be given.

Another objection which is taken, however, is that, as the widow took no beneficial interest after her death, she was incapable of making a will as required by the testator: she could not make a will for the testator, and she could not leave the property herself because she had no beneficial interest in it. I do not think that that is the intention of the testator. What he did was to create a trust through the estate, which by law vested in the executors for the benefit of the beneficiaries, the names of whom he had communicated to his wife in his lifetime. When he said "It being a condition of this will" that his wife should make a new will disposing of the property as she knew he desired, what he had in mind was that, trusts having been created, she was to declare them by her will in the sense that she put them on record. I can see nothing ineffective in that, which seems to me to be the result of the directions given by the testator, though it may be that he has not expressed his intentions in a very intelligible manner. One has to examine the will to give effect to the substance of the matter.

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(19) [1920] 2 Ch. 523.

(20) [1929] A. C. 318. 341

(21) (1861) 1 J. & H. 352, 367.

There is one other point, which is rather interesting, concerning the validity of one of these legacies. The widow has testified that the testator's intention, as communicated to her, was that the man who had been employed by the testator for many years as chauffeur and general factotum should receive a legacy of 2,000*l.* The chauffeur was one of the two attesting witnesses to the will, and if he takes the legacy under the terms of the will the result of s. 15 of the Wills Act, 1837, is to make his legacy ineffective. The question is whether he takes the legacy under the will. Mr. Christie, on behalf of the next-of-kin, referred to *In re Fleetwood* (22), a case of a secret trust, decided by Hall, V.-C., where it was held that, as a woman intended to be a beneficiary was one of the attesting witnesses to the fourth codicil, the trust for her failed as to her beneficial interest, as it would have done, Hall, V.-C., said, had it been declared in the codicil. It appears that the point was not argued in that particular case, which was concerned with a number of other points; and it seems to me that that particular decision is contrary to principle. The whole theory of the formation of a secret trust is that the Wills Act has nothing to do with the matter because the forms required by the Wills Act are entirely disregarded, since the persons do not take by virtue of the gift in the will, but by virtue of the secret trusts imposed upon the beneficiary, who does in fact take under the will.

In the Irish case of *O'Brien* v. *Condon* (23) Sir Andrew Porter, M.R., had to consider the matter with the decision of *In re Fleetwood* (24) before him. He pointed out in a judgment which seems to me to be entirely in accordance with principle and common sense that *In re Fleetwood* (24) was inconsistent with the principle of the matter, and inconsistent with certain other cases, one of which was a decision of the House of Lords on an Irish appeal, namely, *Cullen* v. *Attorney-General for Ireland* (25). Sir Andrew Porter, M.R., pointed out in *O'Brien* v. *Condon* (26) that the point was not argued before Hall, V.-C., in *In re Fleetwood* (27), and accordingly he decided to differ from the decision in *In re Fleetwood* (27), and to apply what seems to me to be the proper statement of the principle. I agree with the decision in *O'Brien* v. *Condon* (28), and I think it right to follow it in the circumstances of this case, because the particular point was not argued before Hall, V.-C., and I think that his judgment on it was given per incuriam.

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(22) 15 Ch. D. 594.

(23) [1905] 1 I. R. 51.

(24) 15 Ch. D. 594.

It seems to me that according to *Cullen* v. *Attorney-General for Ireland* (29), and the later decision of *In re Gardner* (30), every consideration connected with this principle requires me to reach the conclusion that a beneficiary under a secret trust does not take under the will, and that he is not, therefore, affected by s. 15 of the Wills Act, 1837.

Accordingly, the legacy intended for Thomas Cobb, though given in an indirect manner, is effective and he has not forfeited it. That being so, the whole of the estate is effectively disposed of, and there is no question of any intestacy.

Solicitors: *Foyer, White & Prescott, for Dunning, Rundle & Stamp, Honiton; Corner & Co.; Treasury Solicitor.*

I. G. R. M.

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(24) 15 Ch. D. 594.
(25) L. R. 1 H. L. 190.
(26) [1905] 1 I. R. 51, 59.
(27) 15 Ch. D. 594.
(28) [1905] 1 I. R. 51.
(29) L. R. 1 H. L. 190.
(30) [1923] 2 Ch. 230.

Affirmed. C.A. [1951] 2 All E.R. 353.

ROMER, J.
1950
Nov. 29;
Dec. 13.

In re BRASSEY'S DEED OF APPOINTMENT.
COUTTS & CO. *v.* INLAND REVENUE COMMISSIONERS.

[1950 B. 3322]

Revenue—Estate duty—Settlement—Policies on the settlor's life purchased by settlement trustees—Payment of premiums out of trust income—Death of settlor—Cesser of interest—Accrual of benefits to tenant for life and remaindermen—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7.

By a disentailing deed made between a father, his son, and certain trustees, the son's entailed interest in certain settled funds was barred, and the funds were limited upon such trusts as the father and son should jointly appoint, with a limitation over in default of appointment.

The father and son thereupon executed a deed of appointment and re-settlement of the funds, which were further charged with a jointure in favour of the father's wife, to take effect upon his death.

The deed of appointment provided that the trustees should purchase from the father certain policies on his life, and should out of the trust income pay the premiums necessary for keeping them on foot. Subject to this, and to other outgoings not material, the trustees were to hold the balance of the income upon protective trusts for the benefit of the son for life. The deed contained a number of further provisions under which the son was given powers of appointment in favour of his children, remoter issue, or any wife who might survive him.

The father died in 1946, and his life policies then fell in. The son, though married, had no children and had not exercised any of the powers of appointment given to him, and the interest in remainder in the settled funds was vested in three daughters of the father.

On the death of the father, estate duty was claimed in respect of the slice of the trust funds of which the income was required to pay the premiums on the father's life policies, the Crown contending that it constituted property in which persons had an "interest "ceasing on the death of the deceased", and that "benefits accrued "by the cesser of such interest", within the meaning of s. 2, sub-s. 1 (*b*) of the Finance Act, 1894.

On the hearing of a summons to determine whether estate duty was so leviable:—

Held, (i) that the remaindermen had a right, ceasing on the death of the father, to compel the trustees to apply a sufficient part of the income of the fund to keep on foot the policies which would, on the father's death, result in an increase of the trust capital; (ii) that this right constituted an "interest" in the trust fund within the meaning of the sub-section; (iii) that the fact that the remaindermen's right to the possession and enjoyment of the trust property was in the future did not alter the fact that the remaindermen had an immediate right as in (i) above, similar to the right to enforce accumulation as in *Westminster Bank Ld.* v. *Attorney-General* [1939] Ch. 610; (iv) that the falling in of the policies, the cessation of the payment of the premiums, and the coming into effect of the jointure provisions constituted "benefits" to the son, remaindermen and widow. *Held* also (following *Attorney-General* v. *Barclays Bank Ld.* (1943) 59 T. L. R. 52) that in applying s. 7, sub-s. 7, the ratio is to be based on the gross amount of the income required for producing the amount of the premiums. The claim of the Crown was, accordingly, well founded.

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment: The summons raised the question whether estate duty became payable on the death of Captain Robert Bingham Brassey by reason of the fact that certain trust income had to be applied in paying the premiums on certain policies of assurance on his life.

By a disentailing deed dated August 6, 1935, made between Captain Brassey, his son Hugo, and certain trustees, the entailed interest of Hugo in the funds then subject to the trusts of a previous resettlement was barred and those funds were limited upon such trusts and subject to such powers and provisions as Captain Brassey and Hugo Brassey should jointly appoint, with a limitation over in default of and subject to any such appointment.

Under a deed of appointment made in 1927 between Captain Brassey and Constance Marion Brassey, his wife, and a deed of appropriation dated August 7, 1935, the wife became entitled on his death to a jointure rentcharge of 3,000*l.* (or, in the event of her remarriage, 1,500*l.*) per annum payable during the residue of her life and charged upon the investments specified in the first schedule to the deed next mentioned.

On August 8, 1935, a deed of appointment and resettlement (hereinafter called "the 1935 resettlement") was entered into by Captain Brassey of the first part, Hugo Brassey of the second part and Coutts & Company and Sir Henry Brassey as trustees of the third part. The effect of the resettlement of 1935 was thus summarized in an affidavit sworn in support of the summons: In exercise of a power conferred on them by the disentailing deed therein mentioned, Captain Brassey and Hugo Brassey irrevocably appointed that the investments specified in the first and second parts of the first schedule thereto (subject to the jointure and portions therein mentioned) and the cash specified in the third part of the schedule should be held by the plaintiffs and Sir Henry Brassey as the then trustees, upon such trusts and subject to such powers and provisions as Captain Brassey and Hugo should at any time or times thereafter by any deed or deeds revocable or irrevocable appoint and in default of and subject to any such appointment upon the trusts and subject to the powers and provisions thereinafter declared and contained concerning the same, that was to say:

(i) The trustees should pay and apply the cash in manner following, namely:—(a) . . . (b) . . . (c) The trustees should purchase from Captain Brassey for the sum of 11,000*l.* or such larger sum as should represent the surrender value at the date of the purchase the policies on Captain Brassey's life specified in the first and second parts of the third schedule thereto. [By paras. (d), (e) and (f) the trustees were to apply other cash sums for purposes including the acquisition of other policies on the life of Captain Brassey and of Hugo.]; (g) The trustees should hold any balance as capital moneys under the 1935 resettlement.

(ii) . . . (iii) (a) The trustees should stand possessed of the investments thereby appointed (hereinafter called "the appointed "investments") upon trust to permit the same to remain as actually invested so long as the trustees should think fit or might at any time or times sell the same or any part thereof and should invest the moneys produced thereby and the moneys which might be received by the trustees in respect of the policies specified in the third schedule thereto and the policies to be effected in pursuance of sub-cl. (i) (d) and (f) of this clause and any other capital moneys which might be received by the trustees in respect of the funds thereby appointed in the names of the trustees in or upon any investments thereby authorized with power to vary or transpose any investments for or into others of any nature thereby authorized. (b) The trustees should out of the income of the appointed investments and any moneys received by them as aforesaid and the investments for the time being representing the same respectively (thereinafter called "the "trust fund") . . . pay the premiums and other moneys necessary for keeping on foot . . . the policies on Captain Brassey's life specified in the first part of the third schedule thereto . . . and should hold the balance of the same income upon protective trusts for the benefit of Hugo Brassey during his life. (c) After the death of Hugo the trustees should stand possessed of the capital and future income of the trust fund in trust for all or such one or more of the children or remoter issue of Hugo, such children or issue to take vested interests not later than 21 years from the death of Hugo at such age or time or respective ages if more than one in such shares and with such trusts as Hugo should by deed or deeds revocable or irrevocable appoint, and in default of and subject to any such appointment: (d) In trust for all or any the children or child of Hugo who being male should attain the age of 21 years or being female should attain that age or marry and if more than one in equal shares . . . (f) If there should be no child of Hugo who being male should attain the age of 21 years or being female should attain that age or marry then subject to the trusts powers and provisions thereinbefore declared and contained and to the powers by law vested in the trustees and to every or any exercise of such powers the trustees should stand possessed of the trust fund for such person or persons and for such purposes as Hugo should by will or codicil appoint.

(iv) Hugo might by any deed or deeds revocable or irrevocable executed before and in contemplation of any marriage or by will or codicil appoint that the income of the whole or any part of the trust fund should from and after his death be paid to any wife who might survive him during her life or any less period in such manner and subject to such conditions and restrictions as Hugo might think fit.

(v) . . . (vi) In so far as the income derived from the investments appropriated in respect of the jointure therein mentioned should prove insufficient such jointure should stand charged on the corpus of such investments.

The first and second parts of the first schedule to the resettlement contained particulars of the investments thereby settled (having a nominal value of over 100,000*l.*), and the third part of the schedule specified the sum of 196,696*l.* 2*s.* 5*d.* cash. The second schedule contained details of two policies on the life of Hugo. The first part of the third schedule contained details of policies on Captain Brassey's life for an aggregate sum of 40,000*l.* at an aggregate yearly premium of 1,976*l.* 13*s.* 4*d.*; and the second part of the schedule contained details of other policies on Captain Brassey's life not material to the present question.

Captain Brassey died on November 14, 1946. From the date of the resettlement of 1935 until the date of his death the annual premiums on the policies on Captain Brassey's life specified in the first part of the third schedule were paid by the trustees out of the income of the trust fund, and the balance of such income (subject since Captain Brassey's death to Mrs Brassey's jointure) had been paid to Hugo Brassey.

Hugo Brassey had been married twice but had had no issue by either marriage, and had not exercised the power of appointment in favour of a surviving wife conferred on him by the resettlement of 1935. In default of issue of Hugo who attained a vested interest under the resettlement of 1935 and of his exercising the testamentary power of appointment thereby conferred on him, the property comprised in the resettlement would devolve upon three daughters of Captain Brassey as the residuary legatees under his will.

On Captain Brassey's death, the Estate Duty Office claimed duty in respect of the slice of the trust funds required by the income thereof to pay the premiums on the policies of assurance specified in the first part of the third schedule to the re-settlement of 1935. That claim now came before Romer, J., for decision. It was founded on s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, which provides, so far as material, that property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest (1).

(1) Finance Act, 1894, s. 2, sub-s. 1. Property passing on the death of the deceased shall be deemed to include the property following, that is to say : . . . (*b*) Property in which the deceased or any other person had

Heyworth Talbot, K.C., and *Cozens-Hardy Horne* for the plaintiffs. It appears from the correspondence that the Crown contends that Hugo and the remaindermen constitute a group, or constructive person, who had an interest ceasing on Captain Brassey's death. The answer to that is that this group held the entirety of the beneficial interest both before and after the death: there was no change in their interest and no cesser of any interest.

Taking the beneficiaries separately, Hugo continued to have what he had before, a protected life interest in income. The remaindermen continued to have, as before, an interest in the trust fund in remainder. This interest was the same before and after the death. Their interest not only did not cease: it did not diminish in value. The only difference that can be discovered is that during Captain Brassey's lifetime the fund was growing in value, while on his death it ceased to grow, when the policies fell in. It is further submitted that the language of s. 7, sub-s. 7, shows that s. 2, sub-s. 1 (*b*), can only apply to an interest in possession, and not in remainder.

There is no direct authority on the point at issue, but it has been suggested that *Scott* v. *Inland Revenue Commissioners* (2) and *Attorney-General* v. *Barclays Bank Ld.* (3) are of assistance. The first case was concerned with a totally different question —whether property passed under s. 1; while the second merely decides what is the proper method of valuation of the slice of the trust fund if estate duty is held to be payable; that question is not open to argument in this court.

Horne following. What is charged by the sub-section is the "property"; i.e., the capital and not the income, as is clear from the language of s. 7, sub-s. 7. The property in question here was the policies, which had a practically identical value immediately before and at the death of the deceased, so that the benefit, if any, is merely nominal.

Upjohn, K.C., and *J. H. Stamp* for the Crown. The remaindermen had an interest in the application of part of the income of the appointed investments, so that they had an interest in the investments themselves. That interest, which ceased on the death of Captain Brassey, was the right to insist that part of the income was applied to keeping up the policies.

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an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; . . . .

Section 7, sub-s. 7: The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—(*a*) if the interest extended to the whole income of the property, be the principal value of that property; and (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which that interest extended.

(2) [1937] A. C. 174.

(3) (1943) 59 T. L. R. 52.

As for the question of benefit: on the death of Captain Brassey benefits accrued to the widow, who became entitled to the payment of her jointure, and to Hugo, whose income was increased by the sums previously required to meet the premiums.

There is a close analogy between the right to have the premiums paid, and the right to insist on accumulations being made: see *Westminster Bank Ld.* v. *Attorney-General* (4). [*In re Hodson's Settlement* (5) was also referred to.]

Stamp following. The persons to whom the policy moneys will eventually come have an interest in the payment of the premiums; and as the premiums are paid out of the trust fund, this gives them an interest in that fund which ceased on the death of the deceased and is quite separate from their future reversionary interest in the corpus. The whole fund is charged with the premiums, and is deemed to pass to the extent provided by s. 7, sub-s. 7.

Heyworth Talbot, K.C., in reply. Much emphasis has been laid on the analogy between the present case and a case where accumulations are directed, but it has been said that the subject is not taxed by analogy, but by statute. The foundation of a claim to tax must be the statutory language, and analogies do not assist in construing it.

Cur. adv. vult.

December 13. ROMER, J., reading his judgment, stated the facts, substantially as above set out, and continued: Mr. Talbot and Mr. Cozens-Hardy Horne for the plaintiffs argued that, on the death of Captain Brassey, there was no cesser of anybody's interest by reason merely of the fact that no further premiums fell to be paid in respect of the policies in question; and that in the absence of any such cesser the provisions of s. 2, sub-s. 1 (*b*), of the Act have no application. So far as Hugo Brassey was concerned, they say that his interest in the trust fund remained as it was before, namely, a protected life interest. So also the interest of the remaindermen continued to be what it had been before Captain Brassey's death, namely, a right in reversion to the corpus of the fund. It was further contended that s. 2, sub-s. (1) (*b*) is not concerned with interests in remainder, but is aimed at the cesser of interests in possession; that this view receives support from the language of s. 7, sub-s. 7; and that, so far as the remaindermen are concerned, they had no interest in possession before Captain Brassey's death; nor have they any such interest now.

It is, of course, quite true that the remaindermen neither had nor have any right to call upon the trustees to transfer to them any part of the capital of the fund. That right was and is in suspense, and if it constituted the only relevant interest of the remaindermen in the fund during Captain Brassey's lifetime, it could not be said that it ceased, either in whole or in part, on Captain Brassey's death. On analysis, however, I do not think it accurate to say that that was the only right which the remaindermen possessed, for they were at all material times entitled as cestuis que trust to insist that the trustees should, during Captain Brassey's lifetime, apply a sufficient part of the income of the fund to payment of the premiums on the policies in question. In other words, they could compel the trustees temporarily to divert a proportion of the income away from the life tenant and apply it in the manner which I have stated. This application of income would, of course, enure to their benefit in that it would result in an increase of the trust capital to which they would eventually succeed.

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(4) [1939] Ch. 610.

(5) [1939] Ch. 343.

Accordingly, if the trustees, in disregard of their trust obligations, had paid the whole of the trust income to Hugo Brassey, there can be no doubt but that the court would, at the instance of the remaindermen, have intervened and compelled them to devote sufficient of the income to the maintenance of the policies. From this it follows, in my judgment, that the remaindermen had pro tanto an "interest" in the trust income and a corresponding "interest" in the property, i.e., the trust fund, of which that income was the fruit. I am unable to avoid the conclusion that this was an interest in property within the purview of s. 2, sub-s. 1 (*b*), or that that interest ceased on the death of Captain Brassey; and in my view the fact that the right was vested in them in their capacity of reversioners is of no real materiality. It was contended on behalf of the plaintiffs that it is not permissible to split up the rights of the remaindermen and, by doing so, to identify some immediate interest and isolate it from their title to possession of the property, which was reversionary and nothing else. I cannot, however, accept this contention. The fact that the remaindermen's right to the possession and the enjoyment of the property was and is future does not and cannot alter the further fact that a right to insist on income being applied to premiums (like a right to enforce accumulation, as to which see *Westminster Bank Ld.* v. *Attorney-General* (6)), is a valuable ancillary right which confers an immediate interest in the property from which the income is derived.

I accordingly hold that the remaindermen had an interest in the trust fund which ceased on Captain Brassey's death and that duty therefore became then exigible if a benefit accrued or arose by the cesser of such interest. As to this, it seems to me that benefits accrued or arose in various ways. The policy moneys fell in, to the advantage both of the remaindermen and of Hugo; Hugo's income was no longer diminished by the payment of premiums, and Captain Brassey's widow became entitled to receive her jointure. It therefore appears to me that in this respect also the case falls within s. 2, sub-s. 1 (*b*), of the Act and that duty is payable on the footing prescribed by s. 7, sub-s. 7, that is to say, on the capital value of the slice of the trust funds which was required by the income thereof to pay the premiums on the policies in question; and, if this is so, it was conceded by Mr. Talbot that, having regard to the decision of Wrottesley, J., in *Attorney-General* v. *Barclays Bank Ld.* (7), he must accept in this court that that slice has to be ascertained by comparing the gross income required to produce, after deduction of tax, the net amount of the premiums with the gross income of the trust funds.

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(6) [1939] Ch. 610.

I will accordingly make a declaration appropriate to give effect to the conclusions which I have expressed, that is to say, that "estate duty became payable on the death of the above-"mentioned Robert Bingham Brassey under s. 2, sub-s. 1 (*b*) "of the Finance Act, 1894, on the capital value of the slice of "the trust funds comprised in the said deed of appointment and "resettlement which was required by the income thereof to pay "the premiums on the policies of assurance on the life of the "said Robert Bingham Brassey referred to in the first part of "the third schedule to the said deed".

Declaration accordingly.

Solicitors: *Norton, Rose, Greenwell & Co.; Solicitor of Inland Revenue.*

F. R. D.

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(7) (1943) 59 T. L. R. 52.

DANCKWERTS, J.

1950
Dec. 12, 13.

In re SMITH, DECD.
EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Estate duty—Settlement—Securities free of tax in beneficial ownership of persons not domiciled or ordinarily resident in United Kingdom—Tenant for life resident in United Kingdom—Remaindermen resident abroad—Whether estate duty leviable on death of tenant for life—Finance (No. 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 47—*Finance (No.* 2) *Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1.

By s. 47 of the Finance (No. 2) Act, 1915, and s. 22, sub-s. 1, of the Finance (No. 2) Act, 1931, the Treasury were authorized to issue securities "with a condition that neither the capital nor "the interest thereof shall be liable to any taxation, present or "future, so long as it is shown . . . that the securities are in the "beneficial ownership of persons who are neither domiciled nor "ordinarily resident in the United Kingdom . . . ".

Under settlements effected by, and under the will of, a testator who died in 1915, certain trust funds, which included securities to which the above provisions were applicable, were settled for life on a beneficiary resident in the United Kingdom, and in remainder on persons not so resident or domiciled. On the death of the tenant for life in 1946, estate duty was claimed in respect of the securities in question. On the hearing of a summons to determine whether estate duty was payable:—

Held, that estate duty was not payable, for, as the passing of the property in the securities and the chargeability to duty were the consequence of the death of the life tenant, there must be a slight period of time between the cause and the effect, with the result that, when the securities became chargeable, they were vested beneficially in the remaindermen resident abroad. The "official view" of the Estate Duty Office, as stated in the textbooks, that the material domicile or residence is that of the deceased tenant for life, disapproved.

Observations of Palles, C.B., in *In re Augusta Magan* [1922] 2 I. R. 208 n., 210, applied.

ADJOURNED SUMMONS.

Robert Barr Smith, who died in 1915, constituted certain trusts, under settlements effected during his lifetime and under the provisions of his will, in favour of Mrs. Mabel Fairfax Braund for life, with remainder to certain beneficiaries not domiciled or ordinarily resident in the United Kingdom.

The trust funds comprised holdings of 4 per cent. Funding Loan, 1960–90, to which s. 47 of the Finance (No. 2) Act, 1915 (1), applied and 3½ per cent. War Loan, 1952, to which s. 22, sub-s. 1, of the Finance (No. 2) Act, 1931 (2), applied. The prospectus, which was taken as typical, of the 5 per cent. War Loan, 1929–47, from which the holdings of the 3½ per cent. loan had been converted, contained the following statement: " Stocks " and bonds of these loans, and the dividends payable from time " to time in respect thereof, will be exempt from all British taxa" tion, present or future, if it is shown in the manner directed " by the Treasury that they are in the beneficial ownership of a " person who is neither domiciled nor ordinarily resident in the " United Kingdom ".

On the death of the tenant for life, who was resident in the United Kingdom, in 1946, a claim was made for the payment of estate duty. The claim was resisted by the trustees, who took out this summons to have the question of liability decided.

Milner Holland, K.C., and *J. A. Wolfe* for the plaintiffs. The official view of the Estate Duty Office is that the material domicile or residence is that of the life tenant. This view is set out in the textbooks on death duties: see Green (2nd ed.), at p. 632; Hanson (9th ed.), at p. 304, and Dymond (10th ed.), at p. 200.

The plaintiffs contend that this view is wrong, and that the question of beneficial ownership must be determined after the death of the tenant for life. A cause must precede its effect by some period of time, however small. Here, the death of the tenant for life is the cause; the effects are that the property passes, and that the question of liability to death duties arises.

This question was considered in *In re Augusta Magan* (3), though the relevant question of law was different, and it was held that property passes immediately after the death of a life tenant: see the observations of Palles, C.B. (4).

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(1) Finance (No. 2) Act, 1915, s. 47: " The Treasury may, if they " think fit, during the continuance of " the present war and a period of " twelve months thereafter, issue any " securities which they have power " to issue for the purpose of raising " any money or any loan with a " condition that neither the capital " nor the interest thereof shall be " liable to any taxation, present or " future, so long as it is shown in " manner directed by the Treasury " that the securities are in the bene" ficial ownership of persons who " are neither domiciled nor ordinarily " resident in the United Kingdom, " and securities issued with such a " condition shall be exempt accord" ingly ".

(2) Finance (No. 2) Act, 1931, s. 22, sub-s. 1: " Any securities " issued by the Treasury under any " Act may be issued with the condi" tion that—(*a*) so long as the " securities are in the beneficial " ownership of persons who are not " ordinarily resident in the United " Kingdom, the interest thereon shall " be exempt from income tax; and " (*b*) so long as the securities are in " the beneficial ownership of persons " who are neither domiciled nor " ordinarily resident in the United " Kingdom, neither the capital " thereof nor the interest thereon " shall be liable to any taxation " present or future ".

(3) [1922] 2 I. R. 208, n.

This argument must be taken as applicable to a set of circumstances such as the present, in which a gift automatically passes into the beneficial ownership of another on death. The plaintiffs make no contentions on questions regarding the beneficial ownership in gifts passing under a will on the death of the testator. It is shown by cases such as *Sudeley* (*Lord*) v. *Attorney-General* (5) that, while residuary estate is being administered, no residuary legatee can claim any particular asset of the estate. The result of that may be that on the death of a testator there is no one who can claim beneficial ownership in his estate.

However that may be, there is no such difficulty in this case, when the passing of the beneficial ownership is automatic, and it would be wrong to allow the curious effects which might arise under *Lord Sudeley's* case (5) to result in a distorted construction of the Acts in a plain case such as the present.

In re Demarest's Settlement Trusts (6) shows that a gift inter vivos made by an English settlor to a person resident abroad is not chargeable.

Wolfe following. The court is asked to decide a point of principle: whether, when tax-free securities pass from one beneficial ownership to another on death, the domicile or residence of the deceased is to be considered, or those of the new beneficiaries. If the answer is clear on the words of the statutes, the court should not be influenced by the consideration that difficult or anomalous consequences may arise under wills or intestacies.

The effect of the sections of the Acts in question is, that persons who for the time being are beneficially entitled are exempt from taxation: to hold otherwise would be to run counter to the whole principle involved, that is, that persons abroad are exempted from taxation.

Upjohn, K.C., and *J. H. Stamp* for the defendants. These are exemption sections, so it is for the subject to bring himself within their ambit. The wording of the sections, particularly the expression "so long as", is primarily directed to income tax, which recurs regularly over a period. To apply it to estate duty, which arises only once, one must ascertain that at some moment of time someone is a beneficial owner. To determine what is the proper moment of time one must see what the nature of estate duty is. It is essentially a tax on the passing of property, which takes place without regard to the nature of the interest which arises on the death; which interest is quite irrelevant. [*Cowley* (*Earl*) v. *Inland Revenue Commissioners* (7), *Attorney-*

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(4) Ibid. 210.

(5) [1897] A. C. 11.

(6) [1940] Ch. 661.

(7) [1899] A. C. 198, 210.

General v. *Milne* (8), and *Christie* v. *Lord Advocate* (9) referred to.]

The real truth is that, with all respect to the observations in *In re Augusta Magan* (10), the death, the passing of property, and the attraction of estate duty are simultaneous: the moment that tax becomes leviable cannot be separated from the moment of death. The fact is that at the moment when liability to estate duty arises there is no beneficial owner.

The plaintiffs' construction of the Acts gives rise to a number of serious difficulties, and it is proper to take into account the reason for the enactment of the sections in question (see *Hughes* v. *Bank of New Zealand* (11)), which was to attract investment in tax-free loans from persons abroad. The sections should be given a construction consistent with this policy, so that the promise is fulfilled to foreign investors that they and their estates are freed from liability. It is to the interests ceasing, not to the interests arising, that the sections refer.

It would be a breach of faith with the foreign investor if estate duty were claimed on a bequest by him of these loans to a British resident. *Corbett* v. *Inland Revenue Commissioners* (12) shows that a residuary bequest of this kind would attract estate duty if the plaintiffs' contentions are correct.

Corbett's case (12) and *Lord Sudeley's* case (13) show that. in the case of a testator who is absolutely entitled, a residuary bequest confers no entitlement on the legatees to any particular asset during the course of administration; they cannot claim to be beneficially entitled on the death of the testator. Even a specific legatee cannot claim his gift until there is an assent by the executors, and cannot claim it at all if the estate is insolvent. In truth, on death, the beneficial interest in a testator's residue belongs to no one: legatees have only a claim against the estate. On the plaintiffs' construction of the Acts, the beneficiaries under the will of a foreign investor will take subject to estate duty, a clear breach of faith with the investor.

In re Augusta Magan (14) dealt with the question of aggregation, and the observations in it were directed to a different point. It is submitted, however, that the moments of death, chargeability and passing cannot be separated, and that if there is a division of time the charge arises before the beneficial interest.

Stamp following. It was the clear intention of the legislature that these securities should be capable of being held free from all taxation whatsoever. A foreigner must be considered to have understood that neither he nor his estate would be liable to

(8) [1914] A. C. 765, 779.
(9) [1936] A. C. 569, 574.
(10) [1922] 2 I. R. 208, n.
(11) [1937] 1 K. B. 419, 430.
(12) [1938] 1 K. B. 567.
(13) [1897] A. C. 11.
(14) [1922] 2 I. R. 208, n.

taxation: this clear intention of the statute should not be defeated by a piece of metaphysics.

Wolfe in reply. It is true that estate duty attaches without regard to the destination of property, but at the date of the Acts in question legacy duty and succession duty were in force, which did have regard to destination. Arguments directed to the question of keeping faith with the foreign investor are inadmissible, unless the words of the Acts are ambiguous. If and when this question has to be considered in relation to property passing directly under a will, it may well be that the principles set out in *Corbett's* (12) and *Lord Sudeley's* (13) cases will not be strictly applied: the court may well hold that for this purpose it must find a beneficial ownership somewhere.

DANCKWERTS, J. [after stating the facts]: It is to be observed that, in the prospectus, for the statutory words "so "long as", the Treasury have substituted the words "if it is "shown". Whether that makes any real difference I do not know; at any rate, I think that the terms of the statute may be more accurately expressed as regards income tax, which is referable to a continuing period rather than to a particular event. It is, at any rate, clear that this is an exempting provision, and that in order to claim exemption the persons claiming such exemption must show that they are within the terms of that provision.

The view taken officially by the Inland Revenue Commissioners is thus stated in Green's Death Duties (2nd ed.), at p. 632: "Exemption, *so long as* the property is in a particular "ownership, is more appropriate to income tax than to death "duties, which relate to a change of ownership. The official "view is that regard must be had, on the death of an absolute "owner or a life tenant, only to his domicile, etc., and not to "the domicile, etc., of the living beneficiaries".

That, it appears, is a convenient way of dealing with the matter, because it is easy to ascertain the domicile and residence of the deceased person—the commissioners are concerned with that for other purposes—and it is further argued that that view is obviously correct having regard to the intention of the statute, which, it is said, is to induce persons not resident in the United Kingdom to invest their money in these particular securities for the benefit of this country. I am entitled, it appears, to consider the intention of the statute, and in that connexion I am referred to the observations of Lord Wright, M.R., in *Hughes* v. *Bank of New Zealand* (15); but the difficulty is to be sure what the intention in certain respects of the legislature really was in passing these particular provisions.

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(12) [1938] 1 K. B. 567.

(13) [1897] A. C. 11.

(15) [1937] 1 K. B. 419, 430.

The official view is contested by the plaintiffs in the present case. Estate duties, of course, arise upon the death of the life tenant: at that moment and not before; and it is said, on behalf of the plaintiffs, that death is the cause, and that the result of estate duty being leviable must follow the cause. On the other hand, it is argued for the commissioners that the events are simultaneous—the death, the passing, and the liability to duty; and that they all occur at the moment of time when the life tenant dies.

It seems fairly clear that it is not until the life tenant is dead that there can be any passing or any liability to duty. It is not the life but the death of the life tenant which attracts the duty; and so long as the life tenant is still alive, even though he or she be in extremis, no claim for duty can possibly be made. It is only when the person in question has expired, after the last breath has left the body, that the property passes and the liability to estate duty arises.

Although from one point of view one may regard those events as occurring simultaneously, it seems to me that in fact from a common-sense point of view one must treat them as being in some sort of sequence; and, on any view, the ownership of the life tenant cannot be the test, because, as I have said, when the event occurs the life tenant has died. But the question is what happens then.

It was suggested by Mr. Upjohn that there might be no person beneficially owning the property at the moment when death duties arose, because of the simultaneous occurrence of death, passing, and liability to duty. I do not think that that is really the correct way to look at the matter. It seems to me that the death is the cause, as Mr. Milner Holland suggested, and that then that cause gives rise to a passing and a liability to duty. Therefore, though conceivably there is a simultaneous occurrence from one point of view, there is some slight, almost imperceptible, period of time before the liability to estate duty arises.

In that view I receive some support from a decision of Palles, C.B, in an Irish case, *In re Augusta Magan* (16). The question in that case was not the same as that here: it arose on s. 12, sub-s. 2, of the Finance Act, 1894, which concerned the question of duty upon settled property. The question was whether the property was to be considered as settled at the moment of a life tenant's death, the position being that theoretically she might have children during her life, and that on

(16) [1922] 2 I. R. 208, n.

her failure to have issue she became absolutely entitled to the property concerned. Therefore it was correct to say that during her lifetime the property was settled, but that after her death, when the event had been decided whether she could have children or not, the property was unsettled; and the question was whether, for the purpose of the estate duty arising upon the passing, on her death, the property was settled or not.

Palles, C.B., said (17): "As long as Miss Magan was alive, "notwithstanding her age, and the fact that she had never been "married, the law contemplated the possibility of her having "issue. Her issue, had there been such, would have taken under "the will of her mother, Mrs. Elizabeth Georgiana Magan, and "therefore during the life of Miss Augusta Magan, and up to the "moment of her death, the property in my view was 'settled' "within the meaning of the Finance Act. But at the moment "of her death the possibility of there being issue ceased. At "and from that moment no person could take under the mother's "will save Miss Magan herself; and therefore I hold that, upon "and from the moment of her death, the property ceased to "answer the description of being 'settled'. Thus arises a "question of some nicety: was the property 'settled' when it "passed from Miss Magan at the moment of her death? I am "of opinion that it was not. The two events—death and the "passing of property—took place, in point of time, at the "moment: but in nature one preceded the other. The passing "of the property was the effect of the death; the death was the "event upon which it passed, and in nature the event must "precede the effect which is to ensue upon it. This is so, not "only metaphysically, but it is a recognized principle of our "law". Then he refers to the cases which are collected in Viner's Abridgment. It seems to me that that is the sensible view, if I may say so with respect, and one which I ought to apply in the present case.

Certain difficulties are, however, said to arise from such a view, which must compel me to consider that the intention of the statute is defeated unless I give effect to the view, put forward on behalf of the Crown, that the life tenant's interest in the property is the one which has to be considered. It is said that unless regard be had to the domicile of the tenant for life, the intention of the section must necessarily be defeated. The sections provide that capital as well as interest is not taxable. As is said in Green's Death Duties, it is much easier to apply these provisions to income tax than to estate duty. Indeed, I think it was said at one stage that estate duty was the only tax upon capital which could have been in the consideration of the legislature when the section was passed. That, of course, is not quite accurate, because at the date when each of these sections were passed there was another death duty, legacy duty, which would be very material with regard to capital or securities of this kind. Further, though so far there had not been at that date any tax of the kind, the sections refer to taxation both present and future, and it was always a possibility that there might be a capital levy of some kind imposed by the legislature to which the sections could refer.

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(17) [1922] 2 I. R. 208 n., 210.

It is said by Mr. Upjohn that estate duty is a tax in respect of which the nature of the person succeeding is irrelevant; that the beneficial interests are therefore not material because the event which attracts the duty is the passing of property from one person to another. That is obviously true; but in this case that argument does not seem to me to carry very great weight; because, first, there is (or was) legacy duty in which the relationship of the deceased to the person to succeed is a material point; and secondly we are faced here with two sections which in their terms are concerned with the beneficial ownership of persons. Therefore, whatever may be the general nature of estate duty, the court and the inland revenue authorities are compelled to consider the beneficial interest of the persons concerned.

A further argument put forward was based on the difficulties which arise in the case of a testator who is absolutely entitled, and who disposes of his property by will. That is different from this case, where the settlor had disposed of his property inter vivos. In the present case, upon the death of the tenant for life, there was no difficulty about probate or administration of an estate, and the property simply passed from one beneficiary to another set of beneficiaries. It is pointed out that, where property is disposed of by will, if these investments fell into the residuary estate and were not disposed of specifically, there is no person who could claim a beneficial interest in the property in question. It has been held, of course, for certain purposes, at any rate in such cases as *Sudeley (Lord)* v. *Attorney-General* (18) and *Corbett* v. *Inland Revenue Commissioners* (19), that while the residuary estate is being administered, the persons who will eventually, if the estate is solvent, obtain the property upon the completion of administration cannot claim that any particular asset of the estate is theirs; they cannot claim that the income of any particular asset is theirs, or indeed that the capital of any particular asset belongs to them; and therefore, it is said, upon the death of the testator, at the moment when the liability to estate duty accrues, there is no person who could claim the benefit of these sections, because there is no person who is

(18) [1897] A. C. 11.

(19) [1938] 1 K. B. 567, 576.

beneficial owner of the securities in question. Those difficulties of course require consideration and there is no doubt an awkward situation in the case of a residuary estate which includes securities of this kind, when the residue is eventually given to non-residents. But it may be that, when that question has to be considered, the courts will have regard to the substance of the matter, and will not think for this purpose that it is necessary to adhere to the strict rule laid down in such cases as *Sudeley (Lord)* v. *Attorney-General* (20).

It is also said that there are difficulties in the case of a specific gift, because even specifically bequeathed property is liable to be taken for payment of debts; that the beneficiary has no absolute right to the specifically bequeathed property at the date of the testator's death; and, further, that an assent is necessary, though in the case of an assent to a specific legacy the rule is that the assent dates back to the moment of death. The difficulties do not seem to me to be so great in the case of a specific legacy, because it seems that the beneficiary to whom the property is specifically bequeathed has the real ownership in the asset in question, subject to the risk that it may be required —and therefore may be taken from him—for the purpose of paying the creditors of the estate. But that, again, is a case which I have not to consider here. It was argued very strongly that these difficulties do show that the legislature must have had in mind the particular case of an absolute owner of the securities, who would be hindered, therefore, in procuring the advantages of the sections for the persons who succeed him upon his death.

It seems to me that these arguments are not conclusive. The fact that there are difficulties with regard to other cases, which are not the case which I have to consider, does not necessarily dispose of the matter, if I conceive that the case which I have to consider does fit the words of the section, and it seems to me that in the present case the passing of the securities in question to beneficiaries who are resident outside the United Kingdom falls within the terms of the exempting sections, and that therefore estate duty is not payable. I therefore come to the conclusion that the claim of the plaintiffs succeeds.

Counsel referred also to *In re Demarest's Settlement Trusts* (21), which appears to be the only decision on the sections in question; but actually it is not of assistance to me in deciding the present case. In that case a gift had been made within three years before the date of the testator's death and was therefore normally subject to estate duty on the death of the deceased. The question was whether the donee, being resident in the United

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(20) [1897] A. C. 11.

(21) [1940] Ch. 661.

DANCKWERTS, J

1950

SMITH, DECD., *In re.* EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LD. *v.* INLAND REVENUE COMMISSIONERS.

Kingdom, could claim the benefit of the exemptions, merely because the donor was resident or domiciled outside the United Kingdom. It seems to me plain that the answer must have been that which the court gave, that he was not exempted, because both before and after the death of the deceased the securities in question were owned by a person who was resident in the United Kingdom. That seems to be a very clear case, and its only usefulness for the purpose of the present case is, that it shows that the sections may be concerned with persons other than the original investor in matters relating to estate duty; but otherwise it is of no assistance, because obviously it did not matter whether one had regard to the owner before the moment of death or immediately after death: it was the same person in each case, and therefore the difficulties which I have had to consider did not arise there.

There will accordingly be a declaration that, on the death of the tenant for life, no estate duty became payable on such amounts of these stocks as under the provisions of the settlements or the will or any of them passed to persons not then domiciled or ordinarily resident in the United Kingdom.

Declaration accordingly.

Solicitors: *Freshfields; Solicitor of Inland Revenue.*

F. R. D.

In re SMALLWOOD, DECD.
SMALLWOOD *v.* MARTINS BANK LD.

[1949 S. 768.]

ROXBURGH, J.

1951
Jan. 17.

Family Provision—Evidence of testator's reasons—Whether limited to reasons expressed by testator in connexion with his will—Whether limited to statements in writing—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-s.* 7.

The Inheritance (Family Provision) Act, 1938, provides by s. 1, sub-s. 7: "The court shall also, on any such application, have "regard to the testator's reasons, so far as ascertainable, for making "the dispositions made by his will, or for not making any pro- "vision or any further provision, as the case may be, for a "dependant, and the court may accept such evidence of those reasons "as it considers sufficient, including any statement in writing signed "by the testator and dated . . .".

The "evidence" which is receivable under that sub-section is not confined to reasons given by the testator for making the testamentary dispositions which he made: it extends to facts from which the court can infer what his reasons were.

Further, such "evidence" is not limited to written statements of the testator, but extends to oral statements made by him.

In re Vrint, [1940] Ch. 920, applied on both points.

ADJOURNED SUMMONS.

The widow of a testator took out a summons under the Inheritance (Family Provision) Act, 1938, asking for further provision, the defendants being the executors and the children of the testator by a former marriage. At the hearing objection was taken to the admissibility of an affidavit by one of the defendants, which set out a number of oral complaints made by the testator against the plaintiff, on the grounds (1.) that it was not evidence of the testator's reasons for making the dispositions which he made, and (2.) that it was not a statement in writing. The facts are set out in the judgment which Roxburgh, J., gave separately on the point on which the case is reported.

Ungoed-Thomas, K.C., and *W. G. H. Cooke* for the plaintiff.
O. Lodge for the executors.
Jennings, K.C., and *B. S. Tatham* for other defendants.
M. J. Albery for other defendants.

ROXBURGH, J. A statement by one of the testator's sons, parts of which are said to be inadmissible in evidence, contains the following paragraph: "The testator on many occasions told "me that the plaintiff was drinking too much and that he had "found bottles of whisky and gin hidden in her wardrobe. . . . "These matters much distressed the testator. In 1929 the "plaintiff left the testator for a short time, and in 1930 they "entered into a deed of separation, but they were reconciled in "the following year. The testator also told me that in 1933 the "plaintiff had an affair with [a person named] and that he had "forgiven her. From 1931 onwards the relations between the "plaintiff and the testator steadily deteriorated. The plaintiff's "main interest was indulging in a social life and in endeavouring "to obtain an entry into a higher social circle, and these matters "did not interest the testator. The testator told me frequently "that the plaintiff was continually nagging and quarrelling with "him, that she was frequently the worse for drink, and that in "1947 she had seriously assaulted him. During the war the "testator travelled to London nearly every week and came and "saw me. On these occasions he complained to me most bitterly "of the plaintiff's conduct. The testator was also in the habit "of spending week-ends either with me or my sisters in order to "escape from the plaintiff, and I know that he dreaded going "back to her. In 1947 the testator's health was bad and he was "so unhappy with the plaintiff that he felt it was essential that "there should be a separation".

In fact a deed of separation was made on October 22, 1947. The testator made the will in question on April 3, 1948, and died on October 9, 1948. Some portions of this paragraph are obviously inadmissible on any view, but I have read it all because I think it necessary to treat the paragraph as a whole. Some portions of it would plainly not be admissible unless they be so under s. 1, sub-s. 7, of the Act.

Mr. Ungoed-Thomas raises two grounds of objection: first, he says that this paragraph is not a statement of the testator's reasons, and that therefore it does not come within the sub-section. Alternatively, he says that it is not within the ambit of the sub-section because it is not a statement in writing by the testator. I must confess that at first sight I should have thought that the first point was good. I should have thought that this sub-section was directed to statements by the testator of his reasons, and did not extend to statements by the testator of facts which the court may hold to have constituted his reasons. But I find it quite impossible to reconcile that prima facie view with the decision in *In re Vrint* (1), which has stood unchallenged since 1940. In that case the plaintiff widow had taken proceedings for maintenance against the testator in the magistrates' court, and an order had been made in 1935. In contemplation of the hearing, his solicitor had prepared in the ordinary course of business, on his oral instructions, a proof of the evidence which he was ready to give. It had been dictated by the solicitor to a typist, by whom it was transcribed, and had then been sent to the testator, who had returned it without correction, but unsigned and without any covering letter. Counsel for the defendant tendered it in evidence to "enable the court to ascertain "what were the testator's reasons for the provisions he had made "in his will". I think that that must be an accurate statement of what counsel was trying to do. It is almost unthinkable that that proof contained any statement in terms about the testator's testamentary intentions, and, if it had contained any such statement, I feel sure that it would have been mentioned either in the report or in the judgment. It seems to me quite certain that it must have contained statements about the widow from which the court might have no difficulty in inferring what were the testator's reasons for making no provision for her; and I think that it is clear that counsel tendered it in evidence, not to show what reasons the testator gave, but to enable the court to ascertain what were the testator's reasons.

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(1) [1940] Ch. 920.

I think that that follows, too, from the way in which Bennett, J., stated the problem (2). He said: "The question "is whether the court is entitled to look at the proof to see "whether it can ascertain from that what were the testator's "reasons for the dispositions which he made in his will". It is to be noted that he does not say "in order to find a state-"ment of the testator's reasons". Having thus posed the problem, Bennett, J., held that the document was admissible. Therefore I feel no doubt that I ought to follow Bennett, J., in what is on any view a difficult point; and I feel that I ought to hold that the section is not confined to evidence of the reasons given by the testator for making the dispositions made by the will, or for not making any further provision, as the case may be, but extends to evidence of facts from which the court can infer the reasons of the testator for making the dispositions made by his will, or for not making any provision, or any further provision, as the case may be.

Mr. Ungoed-Thomas's second point is founded on a passage in *In re Pugh* (3), where Morton, J., said: "I am prepared to "assume in favour of the widow, without so deciding, that oral "statements alleged to have been made by the testator to the "widow in his lifetime come within the terms of the sub-section, "although the inclusion of the words 'including any statement "'in writing signed by the testator and dated' may possibly "throw some doubt on that point". I must now decide what Morton, J., was able to assume without deciding. He does throw some possible doubt on the point, but he certainly does not say that he thinks it is an assumption that ought not to be made.

I cannot myself see on this point any real distinction between the present case and *In re Vrint* (4), because, though in that case the statement was in writing, it was not written or signed by the testator: the testator gave oral instructions to the solicitor, the solicitor dictated a statement to the typist, who transcribed it, and it was then sent to the testator, who returned it.

I see no substantial difference between such a document and a statement by the testator direct to another person. The only difference is that in one case the statement had been recalled to the mind of the testator, and in the other case, no doubt, it was not. Accordingly, I do not think that the point is open in view of *In re Vrint* (4); but, if it is open, I must hold, though with hesitation, that the oral statement is admissible. The words

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(2) [1940] Ch. 922.

(3) [1943] Ch. 387, 394.

(4) [1940] Ch. 920.

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1951

SMALLWOOD, DECD., *In re.* SMALLWOOD *v.* MARTINS BANK LD.

of the sub-section, "such evidence as it considers sufficient", are as wide as anything could be, and though it is rather surprising that the further words, "including any statement in "writing signed by the testator and dated", were added, the word is "including", and it cannot, I think, possibly be that the generality of the words "such evidence of those reasons as "it considers sufficient" has to be curtailed because they are said to include something.

Therefore in my judgment this second point fails also, and the evidence is admissible.

Evidence admitted. ✓

Solicitors: *Gibson & Weldon for Berry & Berry, Tunbridge Wells; Jordan & Lavington.*

F. R. D.

In re WOKINGHAM FIRE BRIGADE TRUSTS.
MARTIN *v.* HAWKINS.

[1950 W. 1196.]

DANCKWERTS, J.

1951 *Feb.* 1.

Charity—Charitable trust—Voluntary fire brigade—Assets purchased by National Fire Service—Disposal of proceeds of sale.

The assets of a voluntary fire brigade were purchased by the National Fire Service in 1942, and a summons was taken out to have determined how the proceeds of sale should be disposed of. The brigade had been maintained by donations, subscriptions and fees for attending fires; and, from 1940 to 1942, the rural district council had made an annual payment to the brigade in consideration of their undertaking to provide services over a specified area.

Held, (1.) that the provision of a public fire brigade for the benefit of the district was a charitable purpose, and the funds of the brigade were held on charitable trusts; and (2.) that, as the trusts had been in operation for many years, and as the purpose for which the funds had been collected was no longer practicable, they should be applied cy-près by means of a scheme.

ADJOURNED SUMMONS.

The voluntary fire brigade at Wokingham was set up at the Rose Hotel, Wokingham, at a public meeting held on November 9, 1876. From its inception until 1940, it was maintained by private donations and subscriptions, fees for attending fires

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[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

and the proceeds of an annual ball. In addition, from 1940 to 1942, the Wokingham Rural District Council paid 250*l.* a year, the brigade undertaking to provide services over a specified area. That agreement was made between Wokingham Rural District Council and "trustees" appointed by those who were then members of the brigade. Those trustees in 1940 executed a declaration of trust in which they purported to declare the trusts on which the property of the brigade was supposed to be held.

In 1942, the National Fire Service purchased the whole of the brigade's equipment, including two fire engines, for 1,645*l.*, and the brigade ceased to operate.

The plaintiffs, the self-styled "trustees" appointed in 1940, took out this summons to have determined whether, in the events which had happened, the assets of the brigade ought to be distributed between themselves and the other persons who were members of the brigade when it ceased to operate (including the personal representatives of two persons who had died since 1942) or should be returned to the subscribers, or, being held on charitable trusts, ought to be applied cy-près by way of a scheme, or passed to the Crown as bona vacantia.

The funds consisted of 187*l.* 19*s.* 1*d.* at Barclays Bank, 1,000 3 per cent. Savings Bonds, and 1,000 3 per cent. Defence Bonds. 1,075*l.* of the funds were the proceeds of the fire engines, one of which, a Dennis engine valued at 325*l.*, was bought in 1926 mainly with funds raised by a public appeal, which read as follows: "Our first motor engine which was purchased mainly by "public subscription in 1914 to replace the old horse-drawn "steam engine has given many years of good service, but its "frequent need of repairs during the last two years is reliable "evidence of it having seen its best days. The enormous "increase in the number of houses in the large area under our "care and the consequent greater risk of fires makes it essential "for us to keep our machines and equipment in first class "condition, and for this purpose we are endeavouring to raise "the sum of 1,000*l.* to purchase a new motor engine with its "necessary fitments. We are a voluntary brigade and all "moneys received for use of our engines at fires is kept quite "apart from the account of annual subscriptions and general "expenses, and from this about 200*l.* can be taken for the new "engine. We feel sure that property owners and householders "appreciate the difference in cost to them of a voluntary brigade "and one provided by a public body, and will respond to our "appeal generously".

J. Monckton for the plaintiffs.

Elverston for the members of the brigade, and the personal representatives of those who died after 1942. The funds were not held on trust but are the property of the members of the brigade and should be distributed between them. The work of the brigade was no doubt useful to the community, but that is not sufficient to make the funds subject to a charitable trust: see *In re Clarke* (1). On the evidence of the constitution and history of the brigade it is submitted that the brigade was not a charity.

J. L. Arnold for the subscribers. [He adopted the argument that the funds were not held on a charitable trust.] The funds of the brigade were used for purposes not ancillary to those of the brigade. That indicates that they were not held on trust, for it is reasonable to suppose that the members had a public conscience and would not have used the funds in breach of the trust if there was one. If, however, there was a trust, it was within the discretion of the particular members and was not a charitable trust. The entity to which the funds were subscribed has now ceased to exist, and there is a resulting trust to the subscribers.

Denys Buckley for the Attorney-General. The funds were subject to a charitable trust and, in the events which have happened, should be applied cy-près by means of a scheme. The activities of the brigade were prima facie activities of a public nature for the relief of distress, and the brigade was maintained principally by public contributions. Though fees were charged, they were used for the purposes of the brigade, and the brigade was not a commercial venture.

Newsom for the Solicitor-General. [He adopted all the apposite parts of the preceding arguments.] As the funds were not held on charitable trusts, and as there was no resulting trust in favour of the subscribers, the funds pass to the Crown as bona vacantia.

DANCKWERTS, J., after referring to the assets which had been purchased by the National Fire Service and to the history of the brigade up to 1940, continued: In 1940, Wokingham Rural District Council wished to enter into an agreement with the Wokingham Fire Brigade to provide fire brigade services in certain parishes, and apparently they felt difficulty in deciding with whom to negotiate as representing the brigade. The fourteen members of the fire brigade at that time took it upon themselves to appoint trustees by resolution and, on January 27, 1940, those trustees executed a declaration of trust in which they purported to declare a trust on which the property and funds of which they had taken charge were supposed to be held. If a certain conclusion is reached in regard to this case, that method of appointing trustees has no validity and the trustees had no authority to declare any trusts in respect of these funds. It seems to me that I cannot treat that document as having weight or importance.

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(1) [1901] 2 Ch. 110.

On December 3, 1940, an agreement was entered into between those so-called trustees and Wokingham Rural District Council by which the council undertook to pay 250*l.* a year to the brigade and the brigade undertook to provide services in the parishes mentioned in the document. Those sums were duly paid.

In 1942, the National Fire Service having been established, the whole of the equipment of the fire brigade was purchased for the sum of 1,645*l.* and the fire brigade became defunct. In October, 1942, accordingly, the assets of the fire brigade were sold, and as an operative body, it ceased to exist. The question now is how to deal with those assets.

I have before me a number of claimants. The plaintiffs are the surviving trustees of the declaration executed on January 27, 1940. The first ten defendants, the surviving members of the fire brigade, and the eleventh and twelfth who are the personal representatives of the members who have died since the brigade was disbanded in 1942, claim that the assets of the brigade were the private property of the members just as the property of a members' club is owned by the members for the time being, and, therefore, can be sold, the proceeds being divided among the existing members at that time by an agreement among themselves. That negatives the existence of any trust over the assets at all.

On the other hand, it is alleged on behalf of the subscribers that the property was given on a rather peculiar set of trusts, a trust to use the subscriptions of money given for the purposes of a fire brigade, or possibly, if the money was not wanted for that purpose, for the individual members' benefit; and, failing the devotion of the money in that way, upon a resulting trust for the subscribers on the footing that they did not intend to part out-and-out with all the interest in the funds which they had subscribed.

The Attorney-General claims that the fund is subject to charitable trusts of a public nature, and that there should be a cy-près application; and, finally, the Solicitor-General claims the assets as bona vacantia.

In order to discover whether there are trusts and what those trusts are, the court is, I think, entitled to look at the history of the matter. [His Lordship referred to the appeal set out above and continued:] Mr. Arnold, on behalf of the subscribers, has emphasized the appeal to self interest which appears in the last paragraph of that appeal. That does not seem to me

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1951

WOKINGHAM FIRE BRIGADE TRUSTS, *In re.* MARTIN *v.* HAWKINS.

to be conclusive: many people subscribe to charitable purposes partly because they are induced by some motive in their own interest, and the fact that there is an appeal to their interest does not rule out the possibility that there may be a charitable trust.

The appeal indicates the basis on which the fire brigade was carried on, and the fact that it was formed at a public meeting in 1876 points the same way. This was a body of a non-profit making character. It was formed to meet a public need for a means of fighting fires in the Wokingham district. That seems to be a public purpose. The brigade was not formed for the benefit of the members, but for the benefit of the public, and its purpose was to prevent damage and loss of life in that community. It seems to me that the provision of a public fire brigade of this kind is as much a public charitable purpose as the provision of a lifeboat, which has been held in a number of cases to be a public charitable purpose.

It seems to me, therefore, that the assets and funds were subject to public charitable trusts. Those trusts have obviously been in operation for a number of years and that rules out any other application of the fund.

I think that the subscribers intended to part with all interest in the subscriptions when they made them for the benefit of this public purpose. I do not believe that at that time they had any intention as to the future disposal of the money; and I do not think that that was taken into account. The only thing which I think they took into account was the provision of the fire brigade, or the equipment for the fire brigade; and, that being so, the funds were subscribed out-and-out for a charitable purpose. Though that purpose is no longer practicable by reason of the sale of the assets to a different body charged with the duties, the charitable trusts do not fail. It is not necessary to consider whether there was any general charitable intention, and the trusts should be modified by means of a cy-près application.

The declaration is that the funds were held on charitable trusts for the benefit of Wokingham and adjoining districts and should now by order be applied cy-près by means of a scheme.

Order accordingly.

Solicitors: *Soames, Edwards & Jones, for Cooke, Cooper & Barry, Wokingham; Treasury Solicitor.*

HARMAN, J.

1951
Feb. 2.

In re THE STATUTORY TRUSTS DECLARED BY S. 105 OF THE LAW OF PROPERTY ACT, 1925, AFFECTING THE PROCEEDS OF SALE OF NO. 20 WOODLEY AVENUE, FINCHLEY.

C. & M. MATTHEWS LD. *v.* MARSDEN BUILDING SOCIETY.

[1950 C. 4155.]

Mortgage—Moneylender—Sale by first mortgagee—Claim to surplus proceeds of sale by second mortgagee—Second mortgagee a moneylender—Payments to second mortgagee more than twelve months in arrear—Whether claim based on statutory trust maintainable—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 105—*Moneylenders Act*, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 13.

In 1933 a borrower mortgaged a freehold house to the defendants, a building society, to secure a sum of 725*l.*, repayable by monthly instalments. In January, 1940, he borrowed a sum of 40*l.* from the plaintiffs, who were registered moneylenders, on a promissory note, and gave also as security a legal charge on the house. This sum was also repayable by instalments.

In September, 1940, the borrower died, at which date he owed some 600*l.* to the defendants and some 32*l.* to the plaintiffs. No further payments were made in discharge of either debt, and no representation was taken out in respect of the borrower's estate. At the end of 1949 the defendants, acting under their statutory powers, sold the house. After satisfying their principal debt, interest, and costs, they held some 412*l.* as surplus proceeds of sale.

Section 105 of the Law of Property Act, 1925, provides that the proceeds of sale by a mortgagee, after meeting the expenses of sale, and the principal, interest and costs of the mortgagee " shall be paid " to the person entitled to the mortgaged property, or authorized to " give receipts for the proceeds of the sale thereof ".

Section 13 of the Moneylenders Act, 1927, provides that no proceedings by a moneylender for the recovery of a loan or for the enforcement of a security shall lie, unless the proceedings are instituted within twelve months of the accrual of the cause of action.

On the hearing of a summons taken out in 1950 by the plaintiffs for payment to them by the defendants, under the statutory trust created by s. 105 of the Law of Property Act, 1925, of the surplus proceeds of sale, or alternatively, of 182*l.*, being the amount of principal and interest due to them at date:—

Held, that the summons, though in form a proceeding to enforce the statutory trust, was in effect a proceeding for the recovery of the money due to the plaintiff moneylenders, and for the enforcement of their security, and was accordingly barred by the limitation

SECTION 105, LAW OF PROPERTY ACT, 1925, *In re.* C. & M. MATTHEWS LD. *v.* MARSDEN BUILDING SOCIETY.

provisions of s. 13 of the Act of 1927. The defendants must lodge the surplus money in court.

In re Thomson's Mortgage Trusts, [1920] 1 Ch. 508, distinguished.

ADJOURNED SUMMONS.

In 1933 one Martin mortgaged No. 20 Woodley Avenue, Finchley, to the defendants, Marsden Building Society, to secure a loan of 725*l.*, the principal and interest being repayable by monthly instalments.

In January, 1940, he borrowed from the plaintiffs, C. & M. Matthews Ld., who were registered moneylenders, the sum of 40*l.* with interest at 82½ per cent., repayable by monthly instalments, on a promissory note. He further gave to the plaintiffs a legal charge on the house which was already mortgaged to the defendants.

In September, 1940, the debtor Martin died. No representation in respect of his estate was taken out, and no further payments were made either to the plaintiffs or to the defendants in respect of their loans, which were only partially discharged.

In 1949, the defendants, as first mortgagees, sold the house. After discharge of the principal and interest due under the first mortgage, and costs, there remained in their hands a sum of 412*l.* as surplus proceeds of sale. The plaintiffs, as second mortgagees, claimed this sum, which the defendants were unwilling to pay over on the ground that the plaintiffs' transaction might be deemed to be harsh and unconscionable, and that their right might be barred by s. 13 of the Moneylenders Act, 1927 (1).

The plaintiffs took out this summons in 1950, asking for the enforcement of the statutory trusts declared by s. 105 of the Law of Property Act, 1925 (2), and claiming 412*l.*, or alternatively 182*l.*, the sum due to them at date, allowing for a reduction of interest to 48 per cent. from the date of the death of the debtor.

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(1) Moneylenders Act, 1927, s. 13: "No proceedings shall lie for the "recovery by a moneylender of any "money lent by him after the com- "mencement of this Act or of any "interest in respect thereof, or for "the enforcement of any agreement "made or security taken after the "commencement of this Act in "respect of any loan made by him, "unless the proceedings are com- "menced before the expiration of "twelve months from the date on "which the cause of action accrued".

(2) Law of Property Act, 1925, s. 105: "The money which is received "by the mortgagee, arising from the "sale . . . shall be held by him in "trust to be applied by him, first, in "payment of all costs, charges, and "expenses properly incurred by him "as incident to the sale . . . and "secondly, in discharge of the mort- "gage money, interest, and costs ". . . and the residue of the money "so received shall be paid to the "person entitled to the mortgaged "property, or authorized to give "receipts for the proceeds of the sale "thereof".

A. L. Figgis for the plaintiffs. This is not a proceeding to recover principal and interest or to enforce a security, which would be barred by s. 13 of the Act of 1927; it is a proceeding to enforce the statutory trusts created by s. 105 of the Act of 1925, and is not covered by the Act of 1927.

Although the plaintiffs' right to sue the borrower has lapsed, their title as second mortgagees only dates from ten years back, and has not been extinguished. They are therefore entitled to enforce the trusts. The plaintiffs might have paid off the defendants, and then sold the property as first mortgagees.

In *In re Thomson's Mortgage Trusts* (3) it was held that a second mortgagee, who sued to enforce the trusts corresponding to those under the Act of 1925, was not bringing suit for the recovery of interest charged on land within the meaning of s. 42 of the Real Property Limitation Act, 1833 (4).

E. G. Wright for the defendants (who was also directed by the court, under R. S. C., Ord. 16, r. 46, to represent the estate of the mortgagor, as no representative could be found). The rights of the plaintiffs have been wholly extinguished by s. 13 of the Act of 1927. *Thomson's* case (3) is to be distinguished, as the words of limitation were different, and the second mortgagee's rights had only partially lapsed. [*Young* v. *Clarey* (5) was referred to.]

The present summons is a proceeding by a moneylender for the recovery of principal and interest. It is also a proceeding for the enforcement by a moneylender of a security, and is barred by s. 13 of the Act of 1927.

Alternatively, the transaction was harsh and unconscionable, and the court will not enforce it, or will at least direct an inquiry as to what a fair rate of interest should be.

Figgis in reply.

HARMAN, J. [after stating the facts]. The trusts which affect this money arise under s. 105 of the Law of Property Act, 1925. [His Lordship read the section and continued:] There is no doubt that ordinarily the person entitled to the mortgaged property, or authorized to give receipts, is a puisne incumbrancer, if there be one; but the doubts which assailed the minds of the first mortgagees in this case arose because of the provisions as to limitation contained in s. 13 of the Moneylenders Act, 1927. [His Lordship read the section and continued:] It follows that the moneylenders are in this position: within twelve months of the date of the loan they could have taken proceedings to recover it, subject to the possibility that the transaction might be reopened under the Act; but after twelve months they could bring no proceedings of any sort against the borrower to recover the money, either on the promissory note or as mortgagees. They have, in fact, waited for ten years; and it is said that, having regard to the delay, they are not persons entitled to the mortgaged property or the proceeds of its sale, and that therefore they are not proper persons to claim to be beneficiaries under the statutory trust.

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(3) [1920] 1 Ch. 508.

(4) 3 & 4 Wm. 4, c. 27.

(5) [1948] Ch. 191.

It is said also that this summons is in effect a proceeding to enforce the security taken by the moneylenders, and that accordingly it is barred by s. 13 of the Act of 1927.

In answer to that the moneylenders relied on *In re Thomson's Mortgage Trusts* (6), where Eve, J., held that a second mortgagee who applied by summons against the first mortgagee and other persons interested in the surplus proceeds of sale to have determined whether he was entitled to be repaid the whole of his mortgage money, or any part of it, was not bringing an action or suit for the recovery of interest in respect of money charged on land within the meaning of s. 42 of the Real Property Limitation Act, 1833.

That section is not quite comparable to s. 13 of the Moneylenders Act, 1927; but it is said that the two cases are on parallel lines. That section provides: "No arrears of rent or of "interest in respect of any sum of money charged upon or pay-"able out of any land or rent . . . shall be recovered by any "distress action, or suit, but within six years next after the same "respectively shall have become due".

In *Thomson's* case (6) the puisne mortgagee admittedly could not recover more than six years' arrears of interest, and it was therefore said that he could not better his position by taking proceedings by way of summons against the first mortgagee, who was in possession of the proceeds of sale. It was admitted, however, that he was entitled to the mortgage money and to six years' interest on it. The only matter in controversy was the difference between the six and the nine or ten years in respect of which the interest was in arrear, and in form the summons was one to have it decided upon what footing he was entitled to repayment. It is said that that is a different proceeding from the present one.

Eve, J., in a reserved judgment, came to the conclusion that the attitude of the first mortgagee was not justified; that he ought to have paid over the whole of the surplus money to the second mortgagee; and that the second mortgagee, having received the surplus, was entitled to take out everything due to him although he could not have recovered it by way of action. He also held that the proceedings in that case were not an action to recover the arrears within the meaning of the Real Property Limitation Act, 1833, and so were not barred by it. In my judgment that case is distinguishable from this, because in that case there was no doubt that the second mortgagee was a person able to give a good receipt for the surplus money. The only question was how many years' interest could he get on it.

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(6) [1920] 1 Ch. 508.

The moneylenders here could not recover as against the borrower anything at all, and that seems to me to alter their position very much. They are not entitled to take any proceedings for the recovery of any money on the promissory note, or to enforce their security, because of the lapse of time. In effect these proceedings, although they are entitled " In the Matter of " the Statutory Trusts declared by the Law of Property Act ", are proceedings to enforce the security by obliging the first mortgagees to hand over the mortgage money, not to the mortgagor, or his representative, but to the moneylenders; and in my opinion it would not be right to say that this is not, within the meaning of s. 13, a proceeding for the recovery of the money and also for the enforcement of the security; for it does ask for payment by the first mortgagee which would be, in effect, repayment of the money and enforcement of the moneylenders' security. The moneylenders' rights are unenforceable by this time, and in my judgment therefore they are not entitled under s. 13 to bring these proceedings.

Nor are they in my opinion entitled to the mortgaged property under s. 105, because, their mortgage not having been enforced within the time limit which the law imposes, they are not entitled to the mortgaged property or authorized to give receipts for the proceeds of its sale.

In those circumstances, it seems to me that the mortgagees were entitled to withhold the mortgage money, and that the proper order for me to make on this summons is that there will be no order, except that the defendants do, after paying their proper costs, charges and expenses as mortgagees, including their costs of the summons as between solicitor and client, lodge the balance in their hands in court upon an account which they will lodge with the mortgage money. I make no order as to the costs of the plaintiffs.

Order accordingly.

Solicitors: *M. A. Jacobs & Sons; Bentleys, Stokes & Lowless, for Jobling & Knape, Morecambe and Heysham.*

F. R. D.

BURGESS *v.* COX.

HARMAN, J.

1950
Nov. 9, 10, 14, 15, 28.

[1950 B. 918.]

Vendor and purchaser—Oral contract—Memorandum in writing—Two documents—Document recording sale signed by vendor only—Construction—Validity—Material term omitted—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

On June 28, 1949, the defendant agreed orally to purchase a holiday camp, consisting of about 6 acres of freehold land and certain buildings, from the husband of the plaintiff (hereinafter called the vendor), for 10,500*l*, which was to include deposits held by the vendor in respect of future bookings at the camp. 500*l*. was paid by way of deposit, and a document was drawn up in the ~~following terms~~: "Sale of . . . Holiday Camp. Complete freehold. "Exceptions of personal furniture . . . including stock on day of "completion. Agreed sum 10,500*l*.". The words "(completion at "an early date)" were added and the document was signed by the vendor only. A copy was made and handed to the vendor, the original being retained by the defendant.

On July 1, 1949, the defendant wrote to the vendor. ". . . I am "very pleased we were able to mutually agree terms for the pur- "chase of . . . [the] Holiday Camp, and shall look forward to "taking over from you at an early date. I have . . . every reason "to believe that a really prompt completion date, as we both "desire, is almost certain . . .". The defendant proved unable to raise the purchase money, and on July 23, 1949, his solicitors wrote to the vendor's solicitors that the defendant was "unable to go on "with his purchase"; and they asked for return of the deposit.

On September 22, 1949, the vendor died, leaving the plaintiff (his widow) as his sole personal representative. On October 22, 1949, her solicitors wrote that she was endeavouring to find another purchaser, and that she did not admit the defendant's claim for the return of the deposit. The property was resold early in 1950. The plaintiff claimed damages for breach of contract, alternatively for rescission and forfeiture of the deposit. The defendant denied that any contract had been concluded, and also relied on s. 40 of the Law of Property Act, 1925. He counterclaimed for the return of the deposit.

The court held that the evidence established a concluded oral contract of sale of the holiday camp, which the defendant by his letter of July 23, 1949, had repudiated and the deposit was accordingly forfeit; on the defence raised under s. 40 of the Law of Property Act:—

Held, (1) that the court was entitled to incorporate the defendant's signature on the letter of July 1 with the document of June 28, and thus make a memorandum signed by the defendant sufficient in this respect to satisfy s. 40. *Sheers* v. *Thimbleby* (1897) 13 T. L. R. 451 applied; *Stokes* v. *Whicher* [1920] 1 Ch. 411, and *Long* v. *Millar* (1879) 4 C. P. D. 450 considered;

But (2) that the two documents when so read together did not constitute a sufficient memorandum, for neither document contained any reference to the inclusion in the sale of the deposits in respect of the bookings, which was a material term of the contract without which the deposits could not pass to the purchaser.

(3) Although in a case where the memorandum omits a term of the contract inserted solely for the benefit of the plaintiff, the plaintiff may waive that term and enforce the contract as recorded in the memorandum, yet, where the term so omitted was inserted for the benefit of the defendant, the plaintiff cannot concede it and enforce the contract with that term included in it, for the court has no power to insert a term into the contract which is not in the memorandum.

North v. *Loomes*, [1919] 1 Ch. 378, distinguished.

Action.

The plaintiff, Mrs. Beatrice May Burgess, was the widow and personal representative of the deceased vendor, Hugh Thomas Burgess. She claimed damages for breach of an agreement by the defendant, Frederick John Cox, to purchase certain freehold property owned by the deceased, consisting of a holiday camp known as Beach Approach Holiday Camp, and situated near the seashore at Hopton, Yarmouth, in the county of Suffolk, together with its equipment. There was an alternative claim for rescission of the agreement and for the forfeiture of the deposit of 500*l*. paid to the deceased when the agreement was made. The defendant denied that any concluded agreement was ever made, and he also relied on s. 40 of the Law of Property Act, 1925 (1). He counterclaimed for return of the deposit.

At Whitsun, 1949, the defendant stayed at the holiday camp with a party, including his brother-in-law, one Nicholas. At the end of his visit he discovered that it was for sale. He was attracted by the idea of purchasing it, and some ten days later obtained particulars from the deceased. On June 28, 1949, the defendant visited the camp with his brother-in-law and their respective wives as intending purchasers.

The property was of about 6 acres, there were some permanent buildings on the site, including a house called "The Laurels", and buildings used as a dining-hall and recreation hall, and a laundry. There were also garages and toilet conveniences, and a number of movable chalets in which visitors to the camp were housed, and furniture and equipment. Everything was for sale with the exception of furniture belonging to the deceased in "The "Laurels", and that in a bungalow belonging to the deceased's father, certain electrical equipment on hire, and certain property of the Ministry of Works which was due to be removed.

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(1) Law of Property Act, 1925, s. 40: (1) "No action may be brought "upon any contract for the sale . . . "of land . . . unless the agreement "upon which such action is brought, "or some memorandum or note "thereof, is in writing, and signed by "the party to be charged . . .".

The deceased pointed out that these latter articles were not for sale. At this stage it was intended that consumable goods on the premises (notably the bar stock) should be taken over at a valuation and not included in the sale price.

Discussions over the price continued from after lunch until tea-time. The plaintiff was not present during those negotiations, but she was kept informed of their progress by the deceased. The parties were at first unable to agree the price. Eventually, after various offers and counter-offers, the defendant agreed to pay 10,500*l.*, to include consumable stocks and deposits paid in respect of future bookings outstanding at the date of completion. These last amounted to a considerable sum.

The brother-in-law Nicholas, who had throughout urged the defendant to buy the property, gave the deceased a cheque for 500*l.* as agent of the defendant. He then said: "We must "have a bit of paper to show what we have agreed", and he wrote out a document in the following terms: "Sale of "Beach Approach Holiday Camp. Complete freehold. Exceptions of personal furniture in the Laurels and of Mr. Burgess "Senior Bungalow (East Lodge), including stock on day of "completion. Agreed sum 10,500*l.*". He added at the request of the deceased, who desired completion by July 28, 1949, "(Completion at an early date)". He handed the document back to the deceased, with the statement that he thought that would "cover it". The deceased then signed the document, but the defendant did not sign it or any other document on that day. A copy of the document was written out by the defendant and handed to the deceased.

On July 1, 1949, the defendant wrote to the deceased: ". . . re Disposal of Beach Approach Holiday Camp. With "reference to our visit to you on Tuesday last, I am very "pleased we were able to mutually agree terms for the "purchase of Beach Approach Holiday Camp, and shall look "forward to taking over from you at an early date. I have "already taken energetic action in connexion with this matter "and have every reason to believe that a really prompt completion date, as we both desire, is almost certain. I am "arranging part of the necessary capital through my bank. . . . "I hope we did not bother you too much on Tuesday, but having "reached agreement on this matter, I think final completion will "most certainly be within the time you desired". He signed this letter.

Draft contracts were exchanged. The deceased approved the terms, and signed his part, but the defendant, although he agreed the terms, did not sign the counterpart because he was unable to raise the money from the bank.

On July 23, 1949, the defendant's solicitors wrote to the deceased's solicitors: " . . . Our client telephoned us late last " night and said that the survey of the property had not come up " to his or the bank's expectations and consequently the bank " will not give as large an advance as he needs. We very much " regret therefore that he will be unable to go on with his " purchase. We understand he is himself writing to your client " to apologize and explain the position. With regard to the " deposit of 500*l*., paid by our client's brother-in-law to Mr. " Burgess [the deceased], we suggest that this is repaid direct " to the gentleman concerned as he has not instructed us in " this matter. We hope your client will be able to effect a sale " satisfactorily elsewhere ".

Shortly after the interview of June 28, 1949, the deceased had been taken ill, and he died on September 22, 1949, leaving the plaintiff the sole executrix of his will. On October 22, 1949, her solicitors wrote to the defendant's solicitors: " . . . The " executrix is aware of the claim for the return of the deposit " of 500*l*. but this letter must not be taken as any admission that " either Mr. F. J. Cox or Mr. Nicholas have any legal right to its " return. She is still quite prepared to carry out her husband's " contract but in view of the correspondence she is endeavouring " to find another purchaser and if a resale takes place she will " then cease to be in a position to do so ".

The defendant did not reply to that letter.

The property was sold to another purchaser for 8,000*l*., in exercise of an option granted by the plaintiff on December 28, 1949, completion taking place in March, 1950.

The writ in the action was issued on February 21, 1950.

The defendant's contention that no contract was concluded on June 28 was based on the grounds that the parties intended to have a formal contract drawn up, and that the defendant had made it a condition that he could only agree to be bound if and when he was able to raise the purchase money.

His Lordship held that the evidence established a concluded oral agreement. The arguments and judgment on the defence under s. 40 are reported below.

Pascoe Hayward, K.C., and *J. A. Plowman* for the defendant. There is no memorandum in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925. The note of June 28 was deficient: it was not signed by the defendant. It is not permissible to connect the document of June 28 with the letter of July 1; and even if it were permissible, the documents are not sufficient in themselves: see Williams on Vendor and Purchaser

(4th ed.), p. 7. If it is desired to connect two documents, there must be an express cross-reference from one to the other: see *Cave* v. *Hastings* (2). Any reference in the letter of July 1 to an agreement is not to a written contract, but merely to the terms agreed orally on June 28. Therefore these documents do not constitute a sufficient memorandum of the contract: *Ridgway* v. *Wharton* (3). [They also referred to *Long* v. *Millar* (4) and *Hill* v. *Hill* (5).]

Even if the two documents were allowed to be read together, there is not a sufficient memorandum for the purpose of the section, for there is no reference in either to the inclusion in the purchase price of the deposits on bookings of accommodation. The inclusion of those deposits in the purchase price was a material term, the absence of which makes the alleged memorandum insufficient: see *Johnson* v. *Humphrey* (6) and *Hawkins* v. *Price* (7).

McMullen (in reply). In order to furnish a sufficient memorandum for the purpose of s. 40, two documents can be connected by parol evidence: see *Cave* v. *Hastings* (8) and *Oliver* v. *Hunting* (9). The link between the two documents in *Wylson* v. *Dunn* (10) was similar to that in this case.

If the memorandum of June 28 and the letter of July 1 be placed side by side no parol evidence is necessary, and it is submitted that the court is entitled to do this: see *Long* v. *Millar* (11). Russell, J., refused to do this in *Stokes* v. *Whicher* (12) because it was not necessary for him to do so, as he found a sufficient reference in one document to the other; but he thought that *Sheers* v. *Thimbleby* (13), and to some extent *Oliver* v. *Hunting* (14), supported this proposition.

The memorandum sets out all the material terms. It was pointed out by the deceased what property was not to be included in the sale. The omission of any reference to the deposits was omission of a term inserted for the defendant's benefit, but the plaintiff could concede it and still enforce the contract: see *North* v. *Loomes* (15). [He also referred to Williams on Vendor and Purchaser (4th ed.), p. 5, and Fry on Specific Performance (6th ed.), p. 243.]

Cur. adv. vult.

November 28. HARMAN, J., reading his judgment, stated the facts, reviewed the evidence, and continued:—On the whole I

(2) (1881) 7 Q. B. D. 125.
(3) (1854) 3 De G. M. & G. 677.
(4) (1879) 4 C. P. D. 450.
(5) [1947] Ch. 231.
(6) (1946) 174 L. T. 324.
(7) [1947] Ch. 645.
(8) 7 Q. B. D. 125.
(9) (1890) 44 Ch. D. 205.
(10) (1887) 34 Ch. D. 569.
(11) 4 C. P. D. 450.
(12) [1920] 1 Ch. 411.
(13) (1897) 13 T. L. R. 451.
(14) 44 Ch. D. 205.
(15) [1919] 1 Ch. 378.

conclude that so far the plaintiff makes out her case and that a valid oral contract was made.

The next defence is that there is no note or memorandum of the contract signed by or on behalf of the party to be charged, namely, the defendant, sufficient to satisfy s. 40 of the Law of Property Act, 1925. It is surprising at this date to find a new point arising out of this section, which together with its predecessor, s. 4 of the Statute of Frauds, has been under judicial fire for over two centuries. It is well known that the terms of the memorandum need not all be contained in one document, but may be spread over many. Here the document which contains (if any does contain) the terms of the bargain is signed only by the deceased, who is not the party to be charged. The plaintiff, however, alleges that this defect is cured by the letter of July 1 signed by the defendant, which I have already read. It was pleaded that this contained a reference to the document of June 28, sufficient to satisfy the statute.

There is no direct reference in one document to the other, but it is now settled that this is not essential, and that references in a later document to an agreement may be explained by parol evidence; and if that evidence leads to another document containing the terms or the rest of the terms the memorandum is complete: see, for instance, *Cave* v. *Hastings* (16).

It has, however, been decided that if the reference in the later writing be not to a written agreement but only to terms agreed by parol there is no enforceable contract: see *Ridgway* v. *Wharton* (17). It is on this point that the defendant relies. It is said on his behalf that when parol evidence is led to explain the references in the letter of July 1 to the words "mutually "agreed terms" and "reached agreement on this matter", that evidence leads only to the conclusion of the oral agreement during the course of June 28 which I have described. It is said to be no part of this agreement that its terms were in fact recorded, and that I may not for this purpose look at the document drawn up on June 28, which does not purport of itself to be of a contractual nature.

In this connexion I have been referred to *Long* v. *Millar* (18). The plaintiff urges that this last case justifies me in laying the two documents side by side and observing the connexion between them. It is said that if this be done no oral evidence is necessary because that connexion springs to the eye and convinces the reader that the two refer to the same transaction. If this be legitimate I agree with that submission. This way of finding

(16) 7 Q. B. D. 125.
(17) 3 De G. M. & G. 677.
(18) 4 C. P. D. 450.

a memorandum was urged upon Russell, J., in the well-known argument of Mr. Clauson in *Stokes* v. *Whicher* (19).

As to that the judge made the following observations: "Mr. "Clauson has put his case upon a higher platform and said that, "even if you do not get any reference, either inferential or other-"wise, in the second, the defective, document to the first, the "authorities go to show that if, placing the two documents side "by side, there is, upon an inspection of them, such a physical "state of affairs that it is obvious that they were produced at "the same time and that they originally, to that extent, formed "a single document, you can take them and read them together, "even though one document does not by inference or in terms "contain a reference to the other. There is some colour for "that proposition in *Oliver* v. *Hunting* (20), before Kekewich, J., "and more still in the later case before the Court of Appeal of "*Sheers* v. *Thimbleby* (21). However that may be, I do not "propose to decide this case on that broad ground, because I "have come to the conclusion that, upon this document as it "stands, I can find in it a sufficient reference to another "document which contains the necessary terms".

I am here asked to do what Russell, J., declined to do. On the whole I do not think that *Long* v. *Millar* (22) goes so far; nor in my opinion does *Oliver* v. *Hunting* (23). In that case the missing element was the name of the property to be purchased, and Kekewich, J., found it in the receipt for the deposit, but the document to which that receipt pointed was in fact a written contract, or so the judge held; moreover he only professed to be following *Long* v. *Millar* (22) and *Cave* v. *Hastings* (24), both of which adhere to the rule of connecting documents by parol evidence where the one leads to the other, and that method does not carry the plaintiff home in this case.

More to the point is *Sheers* v. *Thimbleby* (25). That was a reserved decision of the Court of Appeal, and A. L. Smith, L.J., gave the leading judgment. The memorandum there consisted of two documents the later of which did not refer to the earlier; nor was there parol evidence to show that a reference in one of them led to the other.

A. L. Smith, L.J., said (26): "The one letter states: 'We "'hereby guarantee the safety of the investments, Burton's and "'Balderson's'; and the other acknowledges the receipt of the "710*l*. invested by the plaintiff Serjeant with Burton and Balder-"son as follows:—'710*l*. as under:—On mortgage of an estate at

(19) [1920] 1 Ch. 411, 419.
(20) 44 Ch. D. 205.
(21) 13 T. L. R. 451.
(22) 4 C. P. D. 450.
(23) 44 Ch. D. 205.
(24) 7 Q. B. D. 125.
(25) 13 T. L. R. 451.
(26) Ibid. 452.

"'Toynton St. Peter, the property of Mr. James Burton, 360*l.*; "'on mortgage of an estate at Friskney, the property of Mr. "'W. T. Balderson, 350*l.*'. I cannot myself doubt that these "two documents upon their face show that they are connected "together without the aid of parol evidence. It might have "been said in *Long* v. *Millar* (27) that the receipt signed by the "defendant for the 31*l.* as a deposit on the purchase of three "plots at Hammersmith might refer to a different purchase to "that referred to in the agreement to purchase; but this argument this Court would not entertain, and, I think, quite rightly. "So here it would, in my judgment, be sheer affectation to say "that without the aid of parol evidence it cannot be predicated "whether Burton's and Balderson's investments in the letter of "September 15 referred to Burton's and Balderson's mortgages "in the document of September 16, for in my opinion they "clearly do, and formed part of one and the same transaction. "It does not seem to me that the fact of the two documents "having been written, one on one day and the other on the "next, causes them to be such separate and distinct documents "that the one cannot be connected with the other without the "aid of parol evidence, for in my judgment it is not so".

If that view be right it justifies the process to which I am invited here. It seems to me that it is a very artificial doctrine which allows me to receive evidence as to the nature of the agreement referred to in the letter of July 1, but declines to allow me to look at the document recording that transaction when I find that if I place the two documents side by side I need no parol evidence at all to satisfy myself that the two refer to the same transaction. Thus the memorandum speaks of "Sale "of Beach Approach Holiday Camp" and "Agreed sum "10,500*l.*", while the letter is headed "Disposal of Beach "Approach Holiday Camp" and asserts "we were able to "mutually agree terms for the purchase of Beach Approach "Holiday Camp". As the Lord Justice said in *Sheers* v. *Thimbleby* (28), it would be sheer affectation to pretend that it is not obvious that the two documents refer to the same transaction. I think therefore I can go this far, that I am entitled to incorporate the defendant's signature on the letter of July 1 with the document of June 28, and thus get a memorandum complete in this respect.

There remains, however, another obstacle in the plaintiff's way. It is said that the two documents if read together still do not record all the terms of the contract and are therefore no sufficient memorandum of it. The omitted terms are said to be, first, the exception of the electrical appliances and the property of the Office of Works already mentioned, and, secondly, the inclusion of the deposits on advance bookings.

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(27) 4 C. P. D. 450.

(28) 13 T. L. R. 451.

As to the first of these, I am of opinion that the contract was to sell all Mr. Burgess's interest in the camp and its equipment. He was careful to point out that these articles were excluded and the defendant agreed that he did not suppose he was negotiating for them. They were therefore not included in the agreement and need not be mentioned in the memorandum.

The deposits are another matter. They belonged to the vendor and were thrown in to sweeten the bargain, and no doubt were part of the inducement to the defendant to pay the extra 500*l*. of the price. It was argued for the plaintiff that the deposits would pass under the contract without mention; and this might be so if the sale had been one of the business as a going concern with its assets and liabilities; but, as I have already held, that was not the bargain, and in my judgment the deposits required to be mentioned no less than the stock if they were to pass.

Lastly it was argued that this was a term wholly for the defendant's benefit which the plaintiff might concede and so avoid the mischief of the statute; and *North* v. *Loomes* (29) was cited in support of that view. That case is some authority for the proposition that a plaintiff may waive such a term and enforce the contract, but it does not extend to the converse case. It may be right that a defendant should not be allowed to avoid his bargain when the plaintiff is not insisting on a term detrimental to the defendant, but that is not the same thing as to say that a plaintiff may enforce a bargain not set out in the memorandum by giving something to the defendant.

In Williams on Vendor and Purchaser (4th ed.), p. 5, is this statement: "It appears, however, that if a stipulation, which "is to the detriment or for the benefit of one of the parties "exclusively, is omitted from the memorandum, that party may "submit to perform it or waive the benefit of it (as the case "may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum". This statement does not appear in the second edition, and I do not think it finds support in the cases cited.

I prefer the note in Fry on Specific Performance (6th ed.), at p. 243, which is in these terms: "It would seem, however, that "where a stipulation of no great importance and solely benefiting "the plaintiff is omitted from the memorandum, the defendant "will not, in an action for specific performance, in which the "stipulation is not asserted against him, be allowed to set up "that the memorandum is insufficient by reason of such omission

(29) [1919] 1 Ch. 378.

"to satisy the statute, if the plaintiff chooses to waive his "stipulation". In other words, if you are going to leave the term out altogether, it may be that the plaintiff can enforce the bargain. But here there is no intention of either party to leave it out and the court is being asked to insert a term which is not in the memorandum at all, and in my judgment the principle as stated in Fry does not extend to this.

I hold, therefore, that the memorandum is deficient in this respect.

Two more questions were argued. First, that the plaintiff by reselling the property had rescinded the contract and therefore could not obtain damages for its breach, and secondly, the measure of damages.

As to the first, I hold that the defendant by his solicitors' letter of July 23 repudiated the contract. It was open to the plaintiff to accept this repudiation, and this, in my judgment, she did by her solicitors' letter of October 22, 1949. This is an unhappily worded document. It treats the contract as still on foot, but by threatening to resell it conditionally accepts the defendant's repudiation. It was open to him at that time to recant and to perform the bargain, but he did not do so, and in my judgment the plaintiff was not bound to give further warning, but was at liberty after a reasonable interval to treat the contract as at an end, as she did by granting an option to a third party and issuing the writ.

As to damages, it was agreed that the date at which they must be calculated was that of the defendant's breach or shortly thereafter, that is to say, in July or August, 1949. The plaintiff's counsel conceded that the evidence of value at that time did not show a diminution of more than 500*l.* from the contract price. As the plaintiff is entitled to retain the deposit she could get no more. If, therefore, I had held the memorandum sufficient, I should have awarded the plaintiff 500*l.* and held that it was satisfied by the deposit already in her hands.

Action and counterclaim dismissed.

Solicitors: *Bartlett & Gregory, for Lucas & Wyllys, Great Yarmouth; W. J. Fraser & Son.*

I. G. R. M.

LEAH *v.* TWO WORLDS PUBLISHING CO. LD.

VAISEY, J.

1951

Jan. 11.

[1950 L. 1268.]

Copyright — Infringement — Original artistic work — Psychic artist — Likeness of deceased person—Offer for sale only on completion— "Portrait"—Meaning—Ownership—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 5, *sub-s.* 1.

Section 5, sub-s. 1, of the Copyright Act, 1911, provides: " . . . "the author of a work shall be the first owner of the copyright "therein: Provided that (*a*) where, in the case of an engraving, "photograph, or portrait, the plate or other original was ordered "by some other person and was made for valuable consideration in "pursuance of that order, then, in the absence of any agreement to "the contrary, the person by whom such plate or other original was "ordered shall be the first owner of the copyright . . . ".

The plaintiff, an artist, chiefly a portrait painter, made, by extra-sensory perception, likenesses of deceased persons whom he had never seen when they were alive, and of whom he had never seen pictures. His power to do so was made active by contact with a living person who wanted to possess a likeness of the deceased person. Usually the contact was made by telephone, and the plaintiff could generally tell in each case whether he probably could or could not make a good likeness.

A father, who was satisfied with a likeness of his deceased son made by the plaintiff in those circumstances, paid him three guineas for it, and then made a copy of it which he used in an article which he wrote for the defendants, who published it in their periodical "Two Worlds".

The father was dead at the date of this action, in which the plaintiff claimed an injunction to restrain the defendants from infringing the plaintiff's copyright in "an artistic work being a "sketch of" the son, and an inquiry as to damages arising from infringement of that copyright. There was evidence that the plaintiff had suggested that the father should draw the attention of the editor of "Two Worlds" to the question of copyright, and that the father had done so. The defendants admitted that the sketch was the plaintiff's production in a sense which made him the author.

Held, (1.) that the sketch was, on the whole, a "portrait" within the meaning of head (*a*) of the proviso to s. 5, sub-s. 1, of the Copyright Act, 1911—since it was none the less a portrait produced by the plaintiff's mental processes because his materials were entirely subjective: *Leeds* (*Duke*) v. *Amherst* (*Earl*) (1844) 14 L. J. (Ch.) 73, referred to; and (2.) that the plaintiff and not the father was the "first owner" of the copyright in the sketch, which the father had not "ordered" and for which he had not given "valuable "consideration" within the meaning of head (*a*) of the same proviso, but which had been offered to and accepted by him only after the plaintiff had completed it.

ACTION.

The plaintiff, an artist who chiefly painted portraits of human beings, had, or believed that he had, perceptions by which he could produce more or less accurate likenesses of deceased persons whom he had never seen and of whom he had never seen a pictorial representation. He did not know how and by what means those powers were exercised, but they were put in motion by some kind of visible or audible contact with a living person who was interested in obtaining the likeness which the plaintiff believed himself able to supply with no other material help.

Usually, the plaintiff first spoke by telephone to the living person who was approaching him. By the tones of the voice or otherwise, and sometimes at a very early stage, he found that, in his view, he would be very likely to be able to produce a picture calculated to satisfy the person approaching him. When the plaintiff was satisfied that there was a reasonable chance of his being able satisfactorily to exercise his powers in the particular case he arranged a meeting with the " client " and then, at one, two or more sittings or meetings, he put on paper or canvas a sketch representing his conception of the dead person. On some occasions he believed that there was at times standing beside him when he was working at his easel a visible form of the person whom he was in the process of portraying. Only when he had completed, signed and dated the sketch or drawing and had fixed it by a varnishing process which precluded tampering with or altering it was he given a photograph, portrait or ordinary painting of the departed subject whereby to test his sketch.

In the present case a father made contact with the plaintiff to see whether he could have a representation of a deceased person to whom he was united in great affection. It later transpired that that person was his son, who had died some time before. There was a telephone conversation and meetings were arranged. At one meeting a charcoal sketch was begun, and on the next day it was finished, signed, dated and fixed; and the father was, and said that he was, satisfied that it was a likeness of his deceased son. The plaintiff asked a fee of three guineas, his usual fee for an accepted portrait, which the father paid very willingly.

The father made a copy of the sketch and used it in the make-up of an article published by the defendants in their weekly periodical " Two Worlds ", which was devoted to the subject of spiritualism and spiritualistic manifestation. He wrote an article headed " ' Dead ' son drawn by psychic artist. Link in chain of " evidence of survival ". In the article was an inset of a representation (being a photograph taken by the father) of the plaintiff's sketch or drawing, a photograph of the son, and a photograph of the plaintiff.

At the date of this action the father was dead. There had been correspondence, but only the letters of the father to the plaintiff were before the court. There was also a letter from the father to the plaintiff's solicitors, in which were the words "When I submitted the article to the editor, I seriously drew "his attention to copyright, etc., as was suggested to me by "Mr. Leah, and fully expected that the editor would be more "informed on these matters than I am".

In this action the plaintiff claimed, among other things, an injunction to restrain the defendants, their servants and agents from infringing the plaintiff's copyright in an artistic work being a sketch of the son and an inquiry as to damages arising from infringement of that copyright.

P. Stuart Bevan for the plaintiff. The plaintiff is the author of the sketch, notwithstanding that he made it with the help of extra-sensory perception: *Cummins* v. *Bond* (1). The sketch is not a "portrait" within the meaning of head (*a*) of the proviso to s. 5, sub-s. 1, of the Copyright Act, 1911. "Portrait" is extensively defined in the Oxford English Dictionary, Vol. 7, at pp. 1146 and 1147. The meaning of a "drawing, painting, or "other delineation of any object, a picture, design (in general)" is stated to be "now rare or obsolete:" whereas the meaning described as "special"—which word is followed by the words "now almost always" in brackets—is "a representation or "delineation of a person, especially of the face, made from life, "by drawing, painting, photography, engraving, etc.; a likeness". There the important words are "made from life".

If, however, that contention is ill-founded and the sketch is a "portrait", still the father was not the "first owner" of it and so could not permit the defendants to publish it; for he did not "order" the sketch or give "valuable consideration" for it within the proviso to head (*a*) of s. 5, sub-s. 1. It was inherent in the nature of the whole transaction that he could not know whether he was going to like it until he had seen it in its finished state. What happened was that he agreed that the plaintiff should proceed with the sketch, and that the plaintiff did so. That is not "ordering" it. Even if that contention, too, is ill-founded and it was "ordering" it within the strict meaning of the proviso, it has to be borne in mind that a "proviso" is a limitation of what has preceded the proviso, not a positive enactment taken by itself. The main enactment in s. 5, sub-s. 1, is that the author of a work shall be the first owner of the copyright in it; and the purpose of the proviso is to set out, as it does, the circumstances in which the author shall not be the first

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(1) [1927] 1 Ch. 167.

VAISEY, J.

1951

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owner, namely, when there has been an order, valuable consideration in pursuance of it, and no agreement to the contrary, i.e., no agreement that the giver of the order and of the valuable consideration shall not be the first owner. Everything here points to the likelihood, not only of there having been no order, but of there having been a very definite agreement to the contrary. If, as the evidence goes to show, the father did discuss copyright with the editor at the plaintiff's suggestion, he cannot have done so on the footing that he, the father, was the first owner. In the circumstances of the case and also as a matter of strict law the plaintiff is entitled to the relief for which he asks.

R. H. Mais for the defendants. It is admitted that, in accordance with the decision in *Cummins* v. *Bond* (2), the plaintiff is the author of the sketch; but it is not admitted that the sketch is not a portrait. The Act itself does not define "portrait" either in s. 5 or anywhere else. "Portrait" should therefore be given as wide and general a definition as possible. Thus, even if the "rare or obsolete" meaning of "delineation", "picture", "design", be ruled out, that still leaves it open to the court to apply to "portrait" the definition "likeness", which is in a separate paragraph in the Oxford English Dictionary and is not joined with the phrase "made from life". That is exactly what the sketch in the present case is: it is a "likeness". It is not "made from life"; even so, however, on the authority of the dictionary, it is, strictly, definable as a "portrait".

The court considered the meaning of "portrait" in *Leeds* (*Duke*) v. *Amherst* (*Earl*) (3). In that case it was held that a bequest of portraits of S. and of several other persons passed a large painting of S. on horseback, in which painting other objects also were included, notwithstanding that the testator had also a portrait of S. of the same size as the portraits of the other persons mentioned in the bequest. True, the decision there does not define "portrait" with the breadth required to establish the case of the present defendants: but it is of some help as showing that the definition should not be too restricted.

The contention that the sketch was not "ordered" by the father within the meaning of head (*a*) of the proviso is unsound. True it may be that there was in the order an implication that he would not accept it and pay for it if he did not like it, for that condition attaches to all these psychic pictures made by the plaintiff: he accepts no payment for one that is not approved. That, however, is not to say that it was not "ordered"; and in fact valuable consideration was given for it when it was finished. The father was therefore entitled to include it, as he did, in the make-up of the article which he wrote for the defendants—or, rather, so to include his copy of it—without any permission from the plaintiff, at whose suit, accordingly, no action lies.

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(2) [1927] 1 Ch. 167.

(3) (1844) 14 L. J. (Ch.) 73.

Stuart Bevan in reply. All that *Leeds* (*Duke*) v. *Amherst* (*Earl*) (3) shows—if, indeed, it shows even that—is that a portrait of a person is a portrait none the less because it is grouped with other objects. That does not help the defendants in the least. It does not show that a sketch made with the help of a psychic artist's extra-sensory perception of a deceased person is a portrait of that person. All that the defendants can do to help themselves to establish that is to adduce from the Oxford English Dictionary a wide definition which, on the dictionary's own showing, is rare or obsolete and which the court, accordingly, ought not to accept.

VAISEY, J. This is a very unusual case, raising questions of considerable doubt. [His Lordship stated the facts and continued:] There seems to have been some misunderstanding, because, when this experiment had succeeded, the father did not, as I think he should have done, submit to the plaintiff for correction or approval, a proof of what he had written and what the defendants proposed to print. The sketch made by the plaintiff is reproduced as an inset in the article without any acknowledgment of the plaintiff's copyright; and indeed, the two photographs placed side by side—that of the sketch and that of the young man in life—are stated to be by the father himself. I am not sure whether the photograph by the father of the young man in life was taken originally by the father or was merely a photograph of a photograph; but, obviously, the photograph by the father of the plaintiff's sketch was taken direct from the sketch.

The plaintiff's memory must be at fault in his statement that, in the missing half of the correspondence, he drew attention to the copyright in the sketch. There is no suggestion of that in the correspondence. Quite plainly, however, there was some discussion about copyright between the plaintiff and the father, for, in a letter to the plaintiff's solicitors, the father wrote: "When "I submitted the article to the editor I seriously drew his atten- "tion to copyright, etc., as was suggested to me by Mr. Leah "and fully expected that the editor would be more informed on "these matters than I am".

Whether the editor was "more informed on these matters" than the father is not for me to say, but I think that the editor of a periodical of this description ought to be alive to the law of copyright, and to exercise some care in the use that he makes of productions, pictorial or literary, of those who contribute to his columns. I am told that, in other cases in previous issues of this periodical, this kind of material—successful delineations of deceased persons—was supplied by the plaintiff, and no question of copyright arose; nor was trouble experienced as a result of its publication.

It is to be observed that the plaintiff is careful, in his claim, to describe his work not as a "portrait" but as a "sketch". Where is the copyright in this drawing, or where was it when the writ was issued? Was it in the plaintiff, who produced the sketch, or in the father, to whom the sketch was handed? That is the question which I have to answer.

It cannot now be disputed, as it was in *Cummins* v. *Bond* (4), that the authorship of the sketch was none the less the plaintiff's because it was inspired by influences of which perhaps no easy explanation can be given. It was not denied that this sketch was the production of the plaintiff, in a sense which made him the author. So far the matter is clear, and the question depends wholly on whether the facts bring the case within head (*a*) of the proviso to s. 5, sub-s. 1. The defendants suggest (not by way of setting up any positive right in the father, but to non-suit the plaintiff) that under that proviso the father became the first owner of the copyright.

I quite agree with Mr. Bevan, and indeed it cannot be disputed, that a proviso must be construed and treated as if it were, not a parallel positive enactment, but a limitation on a proposition which is direct and objective. In my judgment, in order to bring the present case within this proviso so that it shall exclude the plaintiff from the operation of the opening words of the section, several propositions have to be established.

First, the sketch is clearly not an engraving or a photograph. Is it a portrait? On that, I am bound to say, my mind has wavered. Does the fact that the sketch is made from imaginative or mental material rather than from any material of physical attributes prevent its being a portrait? The word "portrait" has been judicially considered in an interesting case, which, however, does not help very much, namely, *Leeds (Duke)* v. *Amherst (Earl)* (5). "Engraving, photograph or portrait" is a curious collocation of words: one would have expected the third word in that grouping to be something like "painting", because engraving is a method of production, and so is photography; and it would seem that "portrait" covers all kinds of pictorial representation, however produced. I am not sure that it is necessary to express a concluded view about the matter, but I should have thought that on the whole this was a portrait, a portrait produced by the mental process of the artist, and intended to represent a deceased person as that person was when living; and that it is none the less a portrait because the materials that the artist used were entirely subjective.

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(4) [1927] 1 Ch. 167.

(5) 14 L. J. (Ch.) 73.

That, however, does not conclude the matter, for the defendants, to take the copyright out of the plaintiff and put it into the father, must further establish that the portrait was ordered by the father and made for valuable consideration. The story is not very easy to follow, and I find great difficulty in laying down as a fact that the portrait was ever " ordered ". It was an experiment. All the conditions in which a contract would arise are, here, really vague and uncertain. There might have been grave doubt whether this sketch was really acceptable, and whether it was an ordered portrait or was an experimental portrait resulting from the experiment. There, I think, is the difficulty confronting the defendants. I cannot find where the order was given. The sketch was offered and accepted after it was completed: but that there was a pre-existing order I cannot find.

I need not go into the question whether it was made for valuable consideration, because quite obviously the three guineas was paid partly for the physical possession of the piece of paper or the canvas on which the sketch was made. I do not, however, believe that it was ordered, and not until after it was made was it offered for sale; only then did it become the subject of the transfer of the physical picture to the father.

A further difficulty is that the proviso contains the words " in " the absence of any agreement to the contrary ". I think that there was an " agreement to the contrary ", though I cannot easily discover its terms, and that the arrangements between the parties would not have constituted the father the first owner of the copyright. The question is not one of assignment or of licence: the father, if he was the owner of the copyright at all, must have been the first owner of it. There again the story does not satisfy that requirement, for—to analyse the position with complete accuracy—the sketch was first owned by the author, and the copyright in it would not, for this purpose, have left him until the sketch had been considered and had been compared with the photograph.

In the result, therefore, the conditions and terms of the proviso have not been satisfied. Even if they have, I am inclined to think that, from the very few and confusing facts which have been shown, the " agreement to the contrary " would have displaced the father's rights.

Therefore, in my judgment I am left with the substantive part of the section, which places the ownership of the copyright in the author of the work. As a general proposition, in all cases under the Copyright Act, 1911, where there is doubt it is the author to

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whom the copyright should be attributed. In my judgment, in the present case, in view of the absence of half of the correspondence, of the father's unfortunate death, and of the somewhat mutilated set of facts, the conclusion to which it is safest to come is that the plaintiff has established his case and is entitled to the relief which he seeks.

What damages has he suffered? He has established his right to this copyright, and I should have thought it a waste of time and money to claim more than nominal damages. I should have thought that if the plaintiff's altruistic interest in these spiritualistic manifestations and if his obvious desire not to make money out of propaganda arising from his powers were established, there would have been an end of the matter. If he presses for an inquiry as to damages, I cannot refuse it, but I should be very well satisfied if the parties could agree, or if the plaintiff would be satisfied with, a nominal sum for damages.

[After discussion with counsel, his lordship said that the plaintiff was entitled to the injunction and costs and to fifteen guineas damages.]

Judgment for plaintiff.

Solicitors: *Pennington & Son; Hall, Brydon, Harvey & Egerton.*

K. R. A. H.

ROXBURGH, J.

1950 *Dec.* 8.

In re GIRLS' PUBLIC DAY SCHOOL TRUST LD. GIRLS' PUBLIC DAY SCHOOL TRUST LD. *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

[1949 G. 2650.]

Town and country planning—Development charge—Exemption—Land held on charitable trusts—Public school—Company owning lands and buildings paying limited dividends—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 85, *sub-ss.* 1, 2.

A company was formed for the purpose of establishing in England public day schools for the education of girls. The position on the day appointed by the Minister of Town and Country Planning under s. 119 of the Town and Country Planning Act, 1947, namely July 18, 1948, was that the articles of the company empowered the preference shareholders, in seeking to enforce their rights in relation to arrears of dividends or the return of their capital, to put the company into liquidation.

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Held, that, that being one of the purposes for which the land was held on the appointed day, it was impossible to say that it was on that day held for charitable purposes only, it being immaterial that none of the preference shareholders had any intention of enforcing his rights; that the determination by the Minister that the land was not land to which s. 85 of the Town and Country Planning Act, 1947, applied was therefore right; and that the company were accordingly not exempt from development charge under sub-s. 2 of that section.

Girls' Public Day School Trust Ld. v. *Ereaut* [1931] A. C. 12, distinguished.

ADJOURNED SUMMONS.

A company which was registered as a limited liability company on June 26, 1872, and the name of which was changed in 1905 to its present name, the Girls' Public Day School Trust Ld., specified in its memorandum of association the following objects: "(a) To establish and maintain in such parts of London and "the Provinces as shall from time to time be determined public "day schools for the education of girls of all classes above those "provided for by the Elementary Education Acts, and for the "education of boys of the same classes while under twelve years "of age . . . ; (b) To provide in connexion with any school main"tained by the trust means for training student teachers and "students in the theory and practice of education; (c) With the "approval of the Board of Education to purchase or acquire "such land, and erect, purchase or hire, and furnish such build"ings as may be from time to time found desirable for the above "purposes; (d) To borrow or raise money for the purposes of "the trust by mortgages, debentures, debenture stock or other"wise, in such manner as may from time to time be determined "with the approval of the Board of Education; (e) To do all "such other things as are incidental or conducive to the above "objects or any of them."

The memorandum of association further provided that "the "income and property of the trust whencesoever derived shall "be applied solely towards the promotion of the objects of the "trust as set forth in the memorandum of association of the "trust, and no portion thereof shall be paid or transferred "directly or indirectly by way of profit to the members of the "trust: provided that nothing herein contained shall prevent "the payment in good faith of remuneration to any officer or "servant of the trust or to any member of the trust or other "person in return for any services actually rendered to the trust, "nor prevent the payment of interest (at a rate not exceeding "four per cent. per annum), or repayment of capital in respect "of money borrowed from or lawfully due to any member of "the trust, nor prevent the payment to the members for the

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"time being of the trust of interest at a rate not exceeding four "per cent. per annum (free of income tax) on the amount of "the respective subscribed and paid-up capital held by them "respectively, and the return to them of such subscribed and "paid up capital. . . . If upon the winding up or dissolution of "the trust there remains any property whatsoever after the "satisfaction of all the debts and liabilities of the trust and payment to the members of such sums (if any) as may lawfully "be payable to them in accordance with the preceding provision, such property shall not be paid to or distributed among "the members of the trust, but shall be given or transferred to "some other educational institution or institutions having "objects similar to the objects of the trust, such institution or "institutions to be selected by the members of the trust at or "before the winding up or dissolution or in default thereof by "the Board of Education".

By a letter dated September 13, 1948, the Minister of Town and Country Planning informed the secretary of the company that he had determined that the land owned or leased by them was not land to which s. 85 of the Town and Country Planning Act, 1947, (1) applied, so that the company were not exempt from development charge under that section.

On the "appointed day", July 18, 1948, the position was as follows:—The share capital of the trust was 200,005*l.*, divided into 40,000 preference shares of 5*l.* each, and 100 "new shares" of 1*s.* each, of which 30,659 of the preference shares and all the new shares had been issued and were fully paid up. The new shares carried no right to dividends, but in a winding up had the right to repayment of the nominal value of the shares.

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(1) Town and Country Planning Act, 1947, s. 85, sub-s. 1: "This section applies to land an interest in "which is held on charitable trusts "or for ecclesiastical or other charitable purposes of any description if "the land, as distinct from the rents "and profits thereof, is used in any "manner (including use in a manner "involving the beneficial occupation "of the land by any person) for or "in connexion with the purposes for "which the said interest is held, and "not otherwise, or if the land would "be so used but for the occurrence "of war damage or but for the fact "that the land is for the time being "requisitioned land".

Sub-s. 2: "No payment shall be "made under Part VI of this Act in "respect of any such interest as "aforesaid in land which, on the "appointed day, is land to which this "section applies; and no development charge shall be payable under "Part VII of this Act in respect of "any operations carried out on such "land by the person entitled to any "such interest for or in connexion "with the purposes for which that "interest is held or in respect of any "use of the land by that person for "those purposes".

Section 119: "In this Act . . . "the following expressions have the "meanings hereby respectively "assigned to them, that is to say ". . . 'appointed day' means such "day as the Minister may by order "appoint . . .".

Provisions for the payment of a dividend up to 4 per cent. a year free of income tax cumulative for two years on the preference shares were contained in the articles and, on a winding up, the preference shareholders were entitled to priority as regards the return of capital together with two years' arrears of dividend.

All the properties of the company used as schools were exempted from income tax under Sch. A to the Income Tax Act, 1918, by virtue of a decision of the House of Lords:—*Girls' Public Day School Trust Ld.* v. *Ereaut* (2).

A summons was taken out by the company seeking a declaration that the determination by the Minister of Town and Country Planning that s. 85 did not apply to the land and buildings owned or leased by the company was wrong in law and that, on the true construction of that section, the land and buildings so used were land, an interest in which was held on charitable trusts or for other charitable purposes within the meaning of that section, and that that section accordingly applied to the land and premises in question.

Lindner for the plaintiff company. Provided that the court is satisfied that the land is used for charitable purposes, whether exclusively or not, it comes within s. 85. If that is not sufficient to satisfy the court, the land is, in any case, held for educational purposes. The fact that the company is liable under its articles to pay a dividend on preference shares does not prevent the land held on the appointed day from being land used for charitable purposes, namely, educational purposes. It is necessary to look at the user of the land on the appointed day and to find out whether it is being used for charitable purposes. [He referred to *Brighton College* v. *Marriott* (3); *Smith* v. *Kerr* (4); and *Girls' Public Day School Trust Ld.* v. *Ereaut* (5).]

If the purpose is charitable, the fact that the company had borrowed money would not have altered the fact that the land was held for charitable purposes. Looking at the company as a whole, the observations of Lord Atkin in *Girls' Public Day School Trust Ld.* v. *Ereaut* (6) should be considered as applying here.

The company exists for the purposes set out in its memorandum, namely, to pay money for charitable objects. Its duty is to carry on its work for educational purposes and not for profit.

Denys Buckley for the defendant, the Minister of Town and Country Planning. The company is not exempt from payment of development charge under s. 85. What has to be determined is whether there is something to be taxed. No one would suggest

(2) [1931] A. C. 12.
(3) [1926] A. C. 192.
(4) [1902] 1 Ch. 774.
(5) [1931] A. C. 12.
(6) Ibid. 32.

that the carrying on of a private school is a charity. The question is whether the present trust was formed to carry on business for profit or for educational activities without any profit. This is not the latter case. The land cannot be held for charitable purposes unless the company is a charity.

The constitution of this company is not such that its funds must be used for charitable purposes only. Owing to the provisions with regard to the distribution of the funds it cannot be said to be a charity. Where, on a winding up, 40,000 preference shareholders are entitled to priority as regards the return of their capital (each share being a 5*l.* share), together with substantial profits, it cannot be said that the objects are only charitable.

Lindner in reply.

ROXBURGH, J., read sub-ss. 1 and 2 of s. 85 of the Town and Country Planning Act, 1947, stated the nature of the proceedings, and continued:—There is no doubt that the main purposes of the Girls' Public Day School Trust Ld. are charitable; they are educational purposes. But it is conceded by Mr. Lindner, and I think cannot be in doubt, that for land to be within that section, all the purposes on which it is held on the appointed day must be charitable. There is no doubt—and this again is not in dispute—that the moment of time at which the question has to be determined is the appointed day; that is of great importance.

This case came before me many months ago, and the intervening months have been most profitably employed. I was then somewhat alarmed at the possible repercussions of my decision on the relationship between the Girls' Public Day School Trust Ld. and the Ministry of Education, but I am happy to say that the company has, since then, made such alterations in its constitution as entirely to remove any cause for alarm which I may have then felt. However, that cannot cure this matter, because the position was crystallized once and for all on the appointed day. I wish to emphasize, however, that the decision that I am about to reach relates, and relates only, to the state of affairs on the appointed day, and has no bearing whatsoever on the present position, which is quite different.

I must refer shortly to some provisions in the constitution of the company as they were on the appointed day, though they are no longer so. As a result of certain alterations made in 1911, the position on the appointed day was as follows. [After stating the position as above set out in the statement of facts his Lordship continued:] Under the articles of association, until January 15, 1956—which, of course, had not then come, and now the class has been altogether abolished; but this is how it then stood—the holders of the new shares were not entitled to any vote in respect of any new share held by them except that each holder of the new shares had 10,000 votes per share for the purpose of voting against (but not in favour of) any special resolution or extraordinary resolution by or by virtue of which any alteration might be made either in the memorandum or articles of association of the trust or whereby the trust might be wound up. Under art. 40A every new share was to entitle the holder to 10,000 votes from and after January 15, 1956.

Article 40B, however, provided that the votes attached to the new shares should not be exercisable against a resolution to wind up the trust either before or after January 15, 1956, if for each of the two financial years last preceding the proposal of any such resolution for winding up the trust the profits had been insufficient to pay a dividend on the preference shares. Article 40C provided that if the trust is not wound up before January 15, 1956, and if between that date and the following January 15 the holders of the new shares shall not have purchased, at a price specified in the article, the whole of the preference shares, then, if within one year after January 15, 1957, a resolution for winding up the trust is proposed, no new share shall entitle the holder to vote against such resolution for winding up.

Provisions for the payment of a dividend up to to 4 per cent. a year free of income tax cumulative for two years on the preference shares were contained in arts. 69 to 75 of the articles of association of the trust; and, on a winding up, the preference shareholders were entitled to priority as regards the return of capital together with two years arrears of dividend. It will be seen, therefore, that the preference shares were entitled to no insignificant reward: 4 per cent. free of income tax. The fact that they were entitled to a high rate of dividend remains true —though, as I hasten to recognize, they never sought to get it; for since 1911 the dividends paid on the issued preference shares in the capital of the trust have been as follows: years ending December, 1912, to December, 1921, inclusive, nil; fifteen months ending March, 1923, 4 per cent. less income tax; years ending March, 1924, to March, 1925, 4 per cent. less income tax; year ending March, 1926, nil; years ending March, 1927, to March, 1933, 3 per cent. less income tax; year ending March, 1934, 2 per cent. less income tax; years ending March, 1935, to March, 1949, nil.

It is quite obvious, therefore, and this is Mr. Lindner's really strong point, that this trust has not been conducted on commercial lines for many years past; and the rights which the preference shareholders have asserted are insignificant compared with those which they might have asserted. No doubt the explanation is that the preference shareholders were charitably minded and that this institution has been conducted on charitable lines; but it does not seem to me that that is enough to enable the plaintiffs to succeed on this appeal. I have to look at the position on the appointed day, and I have to see whether the lands of the trust were lands an interest in which was held on charitable trusts, and no other, or for charitable purposes and no other. I find it impossible to answer that question in the affirmative.

The position, in fact, on the appointed day was this: the preference dividends were in arrear by more than two years. Therefore the holders had a great preponderance of votes, quite enough votes to enable them to do anything with the company that they liked. There was nothing to prevent them on that day, or on any day until they altered their constitution, from putting the company into liquidation, causing these lands to be sold, and causing the liquidator to pay out of the net profits of sale the whole of their capital, which was a very substantial sum, and the two years' arrears of dividends in full, that is to say, at the rate of four per cent. a year free of income tax. That was one of the purposes for which the land was held on the appointed day. That nobody wished to use it for that purpose seems to me to be immaterial: the preference shareholders could have caused it to be used for that purpose had they been so minded. It seems to me impossible to say that, where one of the purposes for which the land was held was that, the land was held for charitable purposes only.

Mr. Lindner had pressed me very hard with some observations of Lord Atkin in *Girls' Public Day School Trust Ld.* v. *Ereaut* (7). The point there was whether one of the schools of this trust was a public school. The relevant words of the rule in the Income Tax Act (Sched. A VI, r. 1 (c)) which was there under consideration were: " The amount of the tax charged on " any hospital, public school, or almshouse, in respect of the " public buildings, offices and premises belonging thereto ". The House of Lords, who were familiar with the dividend position to which I have referred, nevertheless held that this school was a public school. In the course of so holding, Lord Atkin said (8): " It seems to me a travesty of facts to suggest that this school " is conducted by individuals for their own emolument. One " ought to look at the dominant purpose of those who conduct " the school. That seems to me to be, as expressed, to give a " public school education to girls. The purpose of making a " profit is completely subsidiary. From this point of view there " can in substance be no difference between persons who wish " to provide public education and do it by vesting the school in " a company raising money by debentures at interest and those " who do it by vesting the school in a company raising money

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(7) [1931] A. C. 12.

(8) Ibid. 32.

" by preference shares at a limited interest. The former case " is the *Brighton College* case (9), in which I have no doubt " that the allowance on Schedule A was rightly made. The " latter is the present case. That debenture holders are not " proprietors is obvious enough, but the distinction seems to have " too great importance when it alone converts public schools " into private ".

I must emphasize that Lord Atkin was there considering one question, and one question only, namely, whether or not the Wimbledon High School for Girls was a public school. He could not have been construing this section, for the very simple reason that it did not exist; and he has, I think, very carefully limited his observations to the matter then in hand. I was tempted to pursue the analogy which Lord Atkin undoubtedly draws between the provision of finance by way of share capital and the provision of finance by way of debentures, but it soon dawned on me, having regard to the many difficulties which may arise on s. 85, that I might thereby be doing harm to some other case and doing no good at all to the present case. I therefore restrain myself from taking that course. I do not think that any company lawyer would ever be safe in carrying the analogy between share capital and debenture capital very far. I shall, therefore, not proceed by way of analogy, but I shall endeavour to apply the exact words of the section to the precise facts of this case. For the reasons which I have given, I feel certain that the Minister was right.

Application dismissed.

Solicitors: *Slaughter & May; Treasury Solicitor.*

J. L. D.

(9) [1926] A. C. 192.

In re BAILEY.
BARRETT *v.* HYDER.

C. A.

1951
Jan. 19, 22.

Evershed, M.R., Jenkins and Hodson, L.JJ.

[1949 B. 6179.]

Will—Construction—Gift to beneficiary "if she shall be living at the death of my daughter"—Gift over in the event of death before daughter—Beneficiary survives daughter but predeceases testatrix—Lapse—Gift over fails.

If there is a gift to take effect on a certain condition, plus a gift over on non-fulfilment of the condition, and the first gift lapses for reasons independent of the condition, the court, generally speaking,

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cannot by inserting some new passage in the will get rid of the effect of the lapse and fill the gap which it has created.

A testatrix by her will made in 1929 gave all her residuary estate to her trustees upon trust "to pay the income arising "therefrom to my said daughter . . . during her life and after "her death as to capital and income in trust for my sister-in-law ". . . absolutely if she shall be living at the death of my said "daughter but if she shall predecease my said daughter then upon "trust for my nephew . . . absolutely". The testatrix's daughter died in 1935, her sister-in-law died in 1944, and the testatrix herself died five years later in 1949.

On a summons taken out by the executor of the will asking whether the nephew was entitled to the residuary estate of the testatrix:—

Held, that, since the sister-in-law, if she had survived the testatrix, would have taken an indefeasible interest in the residuary estate, the failure of the gift to her was due to lapse only, and not to the non-fulfilment of any condition imposed by the will; that the testatrix could not be supposed to have contemplated that lapse; that the event on which alone there was a gift to the nephew had not occurred; and, accordingly, that the residue was undisposed of and passed to the next of kin.

Brookman v. *Smith* (1872) L. R. 7 Ex. 271 followed. *In re Graham* [1929] 2 Ch. 127 approved.

Jones v. *Westcomb* (1711) Prec. Ch. 316, and *In re Fox's Estate* [1937] 4 All E. R. 664 distinguished.

APPEAL from Romer, J.

The testatrix, Charlotte Bailey, by her will dated April 3, 1929, gave all her residuary estate to her trustees upon trust for sale and investment, and she then directed them to hold the investments upon trust—"to pay the income arising therefrom "to my said daughter Eva Ellen during her life and after her "death as to capital and income in trust for my sister-in-law "Mary Alice Bailey absolutely if she shall be living at the death "of my said daughter but if she shall predecease my said "daughter then upon trust for my nephew George Hyder "absolutely".

The daughter Eva Ellen died on July 18, 1935; Mrs. Mary Alice Bailey survived her and died on March 18, 1944; and the testatrix herself died four years later—on February 18, 1949.

By this summons Walter Hart Barrett, the trustee of the will, asked whether the gift of the residuary estate of the testatrix in favour of George Hyder had taken effect or whether the trust in his favour failed and the residue was distributable between the next of kin of the testatrix. The defendants to the summons were William George Henry Hyder, whom Romer, J., held to be the nephew of the testatrix described by her as George Hyder, and twelve other persons who were together her next of kin.

Romer, J., felt constrained to hold that the residue passed to the next of kin. The nephew appealed.

H. E. Salt, K.C., and *H. E. Francis* for the nephew of the testatrix. It is contended that notwithstanding the fact that the sister-in-law did not predecease the daughter the gift to the nephew takes effect. The testatrix survived her sister-in-law for five years, and she must be presumed to have known of her death. The testatrix cannot have meant to die intestate. What she intended was that the sister-in-law should take if she were alive at the date of distribution, that is, at the date of the death of the survivor of the daughter and the testatrix. Romer, J., felt himself bound by the decision of Eve, J., in *In re Graham* (1). It is submitted that that case was wrongly decided and that the authorities cited by Eve, J., at the end of his judgment, do not justify the narrow construction which he put on the will then under consideration. It is submitted that the test to be applied is correctly stated in *In re Fox's Estate* (2), namely, that where the court comes to the conclusion that a testator must a fortiori have intended a gift over to take effect in the event which has actually happened, although it is not the event specified in the will, the gift over will take effect. This court has to choose between *In re Graham* (1), which was distinguished by Wynn-Parry, J., in *In re Bowen* (3), and *In re Fox's Estate* (2).

It is submitted that the testatrix in effect made the gift to her sister-in-law dependent on two conditions being satisfied, that she should survive both the daughter and the testatrix. The testatrix only provided for the gift over to the nephew in the event of the sister-in-law's predeceasing the daughter. It must follow that a fortiori the testatrix intended the gift over to take effect if the sister-in-law did not survive her.

[Reference was made to *Calthorpe* v. *Gough* (4); *Humberstone* v. *Stanton* (5) and *Brookman* v. *Smith* (6).]

H. E. Francis following. The court in considering the effect of this clause should have regard to the nature of the contingency on which the nephew was to take and to the scheme of the will. Here the gift to the nephew is not dependent on his fulfilling any personal qualification, such as attaining twenty-one years. The intention is that he should take if the sister-in-law failed to be alive at the date of distribution.

[He referred to *In re Riggall* (7).]

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(1) [1929] 2 Ch. 127.
(2) [1937] 4 All E. R. 664.
(3) [1949] Ch. 67.
(4) (1789) 3 Bro. C. C. 394.
(5) (1813) 1 V. & B. 385.
(6) (1872) L. R. 7 Ex. 271.
(7) [1949] W. N. 491.

C. A. Settle for the second defendant, one of the next of kin. Where a beneficiary who is to take on a contingency predeceases a testator there is a lapse: *Tarbuck* v. *Tarbuck* (8). The principle in *Jones* v. *Westcomb* (9) under which, where a gift is to take effect on a condition, with a gift over on the non-fulfilment of the condition, the court comes to the conclusion that the testator must a fortiori have intended the gift to take effect in the event which actually happened though it is not the event specified in the will, has no application to a case such as this, where the beneficiary fails to take by reason of the application of the doctrine of lapse. This case is covered by the decision in *Brookman* v. *Smith* (10), which binds this court. It is submitted that *In re Graham* (11) was rightly decided.

B. F. Mendel for others of the next of kin.

Harold Lightman for others of the next of kin.

Salt, K.C., replied.

EVERSHED, M.R., read the relevant provisions of the will and continued:—It is apparent that the testatrix provided, subject to a life interest in her daughter's favour, for a gift to her sister-in-law conditionally upon her surviving the daughter; and she then provided for the alternative event of the sister-in-law's not surviving the daughter. In that event she gave her residuary estate to her nephew.

The testatrix's daughter died in July, 1935, shortly after the making of the will. On the face of it, therefore, from that date the provision in the will to the effect that the nephew should take absolutely in the event of the sister-in-law's predeceasing her daughter could never take effect. It is to be noted that the testatrix (who, it must be assumed, knew of the death of her own daughter though there is no evidence about it) did not then or at any time thereafter alter her will. The next event was that the sister-in-law died in March, 1944. Finally, five years afterwards, in February, 1949, the testatrix also died. An event, therefore, occurred for which in terms no provision was made by the will, namely, that both the daughter and the sister-in-law predeceased the testatrix. If the result is that the gift over in favour of the nephew cannot now take effect, the testatrix has died intestate as to her residue. No doubt that is a circumstance proper to be taken into account in considering the question presented for our determination, for it has been said that certainly where there is ambiguity the court should tend to that construction which would not produce an intestacy. On the other hand, the fact that on a certain view an intestacy

(8) (1835) 4 L. J. (Ch.) 129.

(9) (1711) Prec. Ch. 316.

(10) L. R. 7 Ex. 271.

(11) [1929] 2 Ch. 127.

would follow does not justify the court either in giving an unnatural meaning to words, or in re-writing the will so as to produce a result which might appear to be more satisfactory.

Romer, J., felt constrained to decide in favour of the next of kin. " I confess ", he is reported to have observed, " that, were " I free from authority and able to treat myself as the supreme " authority, I would find that the necessary degree of probability " had been attained and that therefore the principle "—in *Jones* v. *Westcomb* (12)—" ought to be applied." The judge then considered *In re Graham* (13), a later decision in this court in *In re Fox's Estate* (14) and a decision of Wynn-Parry, J., in *In re Bowen* (15). He felt himself bound by the authority of *In re Graham* (13) to hold that in this case the will must take effect according to its language, and that accordingly there was no provision in the events which happened sufficient to pass the beneficial interest to the nephew. I confess that I sympathize strongly with the opinion expressed by Romer, J., for on reading this will I find it impossible to persuade myself that, had the matter been drawn to the testatrix's attention, and had she been asked the question " Having regard to the death of your daughter " and your sister-in-law what do you intend to happen to your " residue ", she would have done other than answer " in that " event it should go to my nephew ".

Having considered the authorities, I have felt, like the judge, constrained to hold that, posing that question and suggesting that answer, there is nevertheless not sufficient to justify this court in doing what I think would amount to a re-writing of the will; and that, if the court did so, we should be acting in disregard of decisions, particularly of *Brookman* v. *Smith* (16), a decision of the Exchequer Chamber, which binds this court. In the course of the argument, I have felt impressed by the circumstance that both my brethren felt less difficulty in this case than I have; but in the result I certainly cannot see any good ground which would justify any dissent on my part. Indeed, having weighed the matter to the best of my ability, I am constrained to the view that in the light of the authorities as they stand this court must uphold the judgment of Romer, J.

Two passages have been cited from Theobald on Wills (10th ed.), p. 456. The first states: " When there is a gift over upon " a certain contingency, it will not take effect, unless the exact " contingency happens. Thus, if there is a gift to A with a gift " over if he dies in the testator's lifetime, and A dies simul- " taneously with the testator, the gift over does not take effect.

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(12) Prec. Ch. 316.
(13) [1929] 2 Ch. 127.
(14) [1937] 4 All E. R. 664.
(15) [1949] Ch. 67.
(16) L. R. 7 Ex. 271.

"There are here two distinct and independent events, in which "the gift to A will lapse: death in the testator's lifetime and "death simultaneously with the testator, one of which the "testator has contemplated and the other not. No doubt it may "be said that the gift over might be read as equivalent to 'if A "'does not survive me to B'; but this would be making a will "for the testator, since the event that has happened does not "include the event contemplated, and it cannot be said that, if "the gift over was to have effect, if A died in the testator's life-"time, a fortiori it was to have effect, if A died simultaneously "with the testator".

The sentence beginning "a fortiori" is an anticipation of the so-called rule in *Jones* v. *Westcomb* (17), which is later referred to in Theobald and which was mentioned by Romer, J.

The second passage is as follows, under the general heading "Gifts over upon death of the legatee under a given age", at p. 458: "2. If A dies over twenty-one in the testator's lifetime, "the gift over does not take effect. In this case, since A, if he "had survived, would have taken an indefeasible interest, the "failure of the gift to him is due to lapse only, which the testator "cannot be supposed to have contemplated, and the event, on "which alone there is a bequest to the claimant, has not "occurred". In para. 3 (c) there is a similar rule applicable in the case of a gift to a class at twenty-one.

From those passages, if they are correct, it would appear to follow that the law stands thus: if there is a gift to take effect on a certain condition, plus a gift over on non-fulfilment of the condition and the first gift lapses for reasons independent of the condition, the court, generally speaking, cannot by inserting some new passage in the will get rid of the effect of the lapse and fill the gap which it has created. I think, having examined the authorities, that that is the law; and if so, it must inevitably apply to this case. There was here a gift, after the death of the life tenant, of the capital and income to the sister-in-law absolutely if she should be living at the daughter's death. She was living at the daughter's death; but the gift to her lapsed because she was not living at the testatrix's death. The will provided for the alternative event, alternative, that is, to the condition attached to the first gift—if the sister-in-law should predecease the daughter, which she did not do. Having survived the daughter, she would, if she had survived the testatrix, have taken the residue absolutely; the fact that she did not survive the testatrix caused the gift to lapse. In other words, the gift did not fail as a result of the non-fulfilment of any condition or term imposed by the will but because the law requires that a beneficiary under a will should survive the testatrix in order to take the benefit conferred.

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(17) Prec. Ch. 316.

That the law is as I have stated emerges from certain of the cases which were relied upon and formed the basis of Eve, J.'s decision in *In re Graham* (18) to which Romer, J., referred. That decision on its facts (though the language used is not of course identical) is indistinguishable from the present case. Therefore, if we were to hold that the nephew should succeed here, we should have to say that *In re Graham* (18), decided twenty-one years ago by Eve, J., was wrongly decided. The facts in *In re Graham* (18) were that a testatrix, after giving a life interest to her parents and to the survivor of the parents, then bequeathed her estate in trust for her husband if living at the death of the testatrix's parents. Then she proceeded: "Should he, however, have predeceased both my parents, the "trust fund shall be held in trust" for certain other persons. The husband did survive both the testatrix's parents, so that, the condition in the will being satisfied, had he survived the testatrix, he would have taken the whole property. But he, like the sister-in-law in this case, predeceased the testatrix, and that fact caused the gift to lapse according to the general law. The judge (in a reserved judgment) held that the court could not re-write the will, and that, however strongly it might be supposed that, if asked, the testatrix would have so provided by her will, nevertheless the court must give effect to the will and its terms; and in the circumstances, therefore, the gift over could not take effect, because the event on the happening of which alone it was expressed to take effect had not occurred.

The judge based himself, in arriving at that conclusion, on a series of cases, the last of which was *Brookman* v. *Smith* (19). It is unnecessary to go through them all, but I am satisfied that they cannot be distinguished from this case as Mr. Salt suggested, that is, on the ground that in this case the whole emphasis of the provision in the will was on the period of distribution as distinct, for example, from the attainment of a given age as the condition of the gift's taking effect, in which latter case, if the beneficiary attained that age (assuming that he survived the testator or testatrix) it would be unnecessary for him or her to survive the period of distribution.

That no such valid distinction can be drawn appears from *Tarbuck* v. *Tarbuck* (20), which was expressly affirmed in the Court of Exchequer Chamber. The facts in that case, so far as relevant, were these: the testator devised an estate to his son A for life, with remainder equally among his children and their heirs as tenants in common. There was a similar devise to another son B and his children, and there was a provision that if one son died without children the estate of that one should go to augment the estate given to the other. Then there was this final provision: " but if both his sons should die without leaving " lawful issue, then he gave the estates over to C in fee ". It happened that A, the first-mentioned son, had issue; but unfortunately that son A and A's son both predeceased the testator. B had no issue. Therefore, when the testator died it was impossible for the gift to A's son to take effect. But the gift over to C was expressed to be on the term that both A and B died without leaving lawful issue, an event which did not happen.

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(18) [1929] 2 Ch. 127.
(19) L. R. 7 Ex. 271.
(20) 4 L. J. (Ch.) 129.

In those circumstances Sir Charles Pepys, M.R., held that effect could not be given to the gift over. He said (21): " It is, " as I conceive, clear, that if James and Jonathan had survived " the testator, the devise to the nephews and nieces could not " have taken effect under the circumstances which happened; " and it is, I think, established by authority, that the situation " of the parties is not altered by their having died before the " testator. . . . I am therefore of opinion, that the event, on " which the nephews and nieces were to take, did not happen ". Consequently, there was, as here, an intestacy.

That case, of course, would not bind this court, but in *Brookman* v. *Smith* (22), *Tarbuck* v. *Tarbuck* (21) was considered by the Court of Exchequer Chamber. *Brookman* v. *Smith* (22) was rather more elaborate, but I think that the matter can be sufficiently stated in this way: under the relevant will there was a provision by the testator that certain property should go in these terms: " And in case every child born, or to be born " of his daughter " shall die under the age of twenty-one years and " without leaving issue, to the use of the heirs and assigns " of the testator's daughter " as if she had continued sole and " unmarried ". It happened that there were three children born to his daughter. Two had died in infancy before the date of the will, but at that time one of the children was still alive, and in fact lived to attain majority. That child also predeceased the testator, and the daughter never had any more children. When the testator died, the question then arose—could the daughter claim according to the terms of the ultimate limitation? The court decided negatively, for it was said that the event on which (and on which alone) the gift over took effect had not occurred, namely, that of children of the daughter all dying under twenty-one: one of them had lived to twenty-three, but predeceased the testator. The court decided (and in the course of the judgment

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(21) 4 L. J. (Ch.) 129, 132.

(22) L. R. 7 Ex. 271.

Tarbuck v. *Tarbuck* (23) was referred to and clearly approved) that that result must follow.

Cockburn, C.J., said (24): " Now, does the ultimate limitation " come into effect? In what case is it to come into effect? It is " to come into effect in case any child born—' to be born ' we " may leave out, because no children were afterwards born— " shall die under the age of twenty-one years, and without leaving " issue. Did that state of things exist? It did not. A child " had been born, which child did not die under the age of twenty- " one years, but attained that age, and then died in the lifetime " of the testator without leaving issue. What we are asked to " do is to take those words, ' shall die under the age of twenty-one " ' years without leaving issue ', to mean, ' shall, having attained " ' the age of twenty-one years, die in the lifetime of the testator ', " because that is what in point of fact has taken place. It seems " to me that we should be making a new will, if we were to " introduce an entirely new term to meet a new contingency " which is not provided for. A great deal has been said about " the intention of the testator, which, however, must be more " or less speculative. It is possible that he may have had some " intention as to the particular event which has happened, but " I see no evidence of it. I think it far more probable that the " case which has since arisen, and to which we are called upon " to apply the terms of this will, was not present to the minds " either of those who drew the will, or of the testator who exe- " cuted it. At the time the will was made there was a child " living, and in all probability that child might be expected to " outlive the testator, his grandfather ". The Chief Justice observed that testators normally make their wills on the assumption that the persons whom they intend to benefit will survive them, and do not accordingly make provision for what is to happen if they do not.

At one time, I confess, when I read this will without any excursion into realms of speculation, it left on my mind so strong a conviction that the testatrix must have intended her nephew Hyder to take if her sister-in-law did not survive to enjoy the residue, that the court would be justified in so construing the words, or in so adding to them by inserting new phrases as to give effect to that intention. Indeed, if it were a question of guessing, the guess in favour of the nephew would be even easier than it might have been in *Brookman* v. *Smith* (25). It is the fact, however, for reasons of which we know nothing, that this will made in 1929 was left unaltered by this testatrix for years, not only after her own daughter had died but also after her sister-in-law had died. There is the further difficulty that the language which the testatrix has used is not the language sometimes found in wills drawn by people without expert assistance, clumsy, inapt and on the face of it ambiguous. This is a lawyer-drawn will, and the language used and the conditions expressed in that language are precise. The bungling attorney's clerk has been referred to in these courts before, and if the attorney's clerk bungles it is, of course, hard that some result occurs which the testatrix would not have intended. *Brookman* v. *Smith* (25) seems to me to lay down that, in a case such as this, there is no right in the court to introduce words into the will which will fill the gap created, not by the happening of some event mentioned by the testatrix but by the lapse of the gift through, and only through, the designated beneficiary having failed to survive the testatrix.

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(23) 4 L. J. (Ch.) 129.
(24) L. R. 7 Ex. 271, 273.
(25) L. R. 7 Ex. 271.

That, then, was the state of the law in 1929, and it only remains to consider whether any subsequent authorities have in any degree affected the position. Very naturally, Mr. Salt and Mr. Francis have placed great emphasis on the decision of this court in *In re Fox's Estate* (26), not so much because on its facts it sufficiently nearly resembles this case as to be itself an authority affecting this will, but because the principle of *Jones* v. *Westcomb* (27) was there elucidated by Romer, L.J., in language which, it is said, enables—indeed compels—us to apply the rule in *Jones* v. *Westcomb* (27) to the relief of the nephew here. I have come to the conclusion that that is not so and that *Fox's* case (26) leaves the law (so far as relevant to this case) as it was before and as it was stated in the passages in Theobald on Wills which I have read.

In *In re Fox's Estate* (26) the testator had no professional assistance in making his will. It was in these terms: "I give "to my executors all my substance upon trust as to one fourth "part thereof for my daughter Fanny Sarah Fox for her separate "use as to one other fourth part for my daughter Anna Charlotte "Perry for her sole use for her life, and after her decease for her "children if she shall leave children". Then, after provisions relating to the other two fourth parts, he went on: "I declare "that benefit hereunder shall become vested on the coming of "age of the legatee and that any legacy which by the death of "any person shall lapse shall go to my said daughter Fanny "Sarah". The effect of the first part of the declaration was that in respect of the gift in remainder to the children of Anna Charlotte Perry the gift was conditional upon those children attaining twenty-one. What happened in fact was that Anna

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(25) L. R. 7 Ex. 271.
(26) [1937] 4 All E. R. 664.
(27) Prec. Ch. 316.

Charlotte Perry survived the testator by a very great number of years (over half a century, I think), but died without ever having had any issue at all. The question then arose whether, having regard to the final words, "that any legacy which by the death "of any person shall lapse", the gift introduced by those words in favour of Fanny took effect? It could not be suggested that the legacy which was given to the children of Anna at twenty-one "lapsed upon the death of any person". The death of Anna would not cause the "lapse", because Anna only had a life interest. The question, therefore, was: since the language was obviously intended to cover the case supposing that Anna had children and they died under twenty-one, would it also cover the case if she never had any children at all? This court came to the conclusion that the greater included the less, that is to say that, if the condition was expressed to take effect on the death of the children under a certain age, it must a fortiori take effect if no children were ever born at all.

The conclusion followed the rule in *Jones* v. *Westcomb* (28). The facts of that case are fully stated in the report of *Fox's* case (29). "That was a case", said Sir Wilfrid Greene, M.R., "where a testator bequeathed a term of years to his wife for life, "and after her death to the child she was enceinte with at the "date of the will, and, if such child should die before attaining "the age of twenty-one, then one third part to his wife, and "two third parts to other persons. The only event in which the "property was to be disposed of, in that case, was on the death "of that child before twenty-one. In point of fact, the wife was "not enceinte at all. It was held, nevertheless, that the bequest "took effect." The principle of *Jones* v. *Westcomb* (28) is stated accurately (and the statement has been cited and relied on in this case and in other cases) by Romer, L.J., in these terms (29): "The principle", that is of *Jones* v. *Westcomb* (28), "is applicable, therefore, only in those cases where the court, "looking at all the relevant circumstances of the case, including, "of course, the will itself, comes to the conclusion that the "testator must a fortiori have intended the disposition over to "take effect in the event which has actually happened, although "it is not the event which he has specified in his will as the one "in which the gift over is to take effect".

It is the main plank of Mr. Salt's and Mr. Francis's argument that this is, as was *In re Fox's Estate* (30), an a fortiori case, and for this reason: the whole point, they say, of making the provision which this testatrix did that her sister-in-law should only take the estate if she survived the life tenant, the daughter, was the testatrix's insistence that she, the sister-in-law, should

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(28) Prec. Ch. 316.

(29) [1937] 4 All E. R. 664, 666.

(30) [1937] 4 All E. R. 664, 669.

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be actually there and alive at the date of distribution to take the property for her personal enjoyment. It is obvious, if that is so (it is argued), that the testatrix must be treated as having laid down two conditions which had to be satisfied: that the sister-in-law will take only if she survives both the daughter and also the testatrix; for, unless she survived the testatrix, the law would (as the testatrix must be taken to have known) cause the gift to lapse. If, therefore, that is the real meaning of the first part of the clause, then, since the testatrix only provided for the gift to the nephew in the event of the sister-in-law's predeceasing the daughter, it must follow a fortiori that the same result will occur if the sister-in-law, whether she survived the daughter or not, does not survive the testatrix. That is an attractive argument —I certainly have found it so—but I have already indicated that I cannot see that the acceptance of that argument is consistent with *Brookman* v. *Smith* (31); nor can I see that it follows from the statement of principle which I have read from *Jones* v. *Westcomb* (32).

It is to be observed that in *Jones* v. *Westcomb* (32) there was after the life interest a gift to a person believed to be in being, or about to come into being, to take effect at twenty-one, and then a gift over expressed to take effect in the event of that person's not attaining twenty-one years. In order to give effect to this gift over, it was unnecessary to add to, or alter in any way, the meaning or construction of the first gift, the gift to the child believed to be in its mother's womb. All that it was necessary to do was to say that the gift over expressed to take effect on the child's not attaining twenty-one years should also take effect on the child's not coming into existence at all. There is no inconsistency by adding that rider, so to speak, to the second part of the gift. There was, in other words, in *Jones* v. *Westcomb* (32) no question of a person who, had he survived the testator, would have become absolutely entitled, but the gift to whom lapsed by reason of earlier decease. Nothing of that kind arose in *Jones* v. *Westcomb* (32). The same is equally true of *In re Fox's Estate* (33). The will there was more difficult to construe in one sense, but the point again was that there was no need to alter in any way, or affect, the original gift in remainder to the children of Anna. The only question was whether a provision, expressed to take effect on the death of those children under twenty-one years, should operate also in the event that there were no children at all who would ever attain twenty-one years.

The difficulty, by way of contrast, in this case is that the first part of this clause shows that it is to the original gift in remainder that the first essential addition or emendation must be made, and we are faced with the difficulty that we have to try to read the gift over in a sense, or in language, completely contradictory of the language which is there used. The language used is: "If "my sister-in-law shall predecease my daughter, then", etc. We have to make that fit in the precisely opposite event of the sister-in-law's having survived the daughter—but then having predeceased the testatrix. That is the problem which confronted the Court of Exchequer in *Brookman* v. *Smith* (34) and which required an addition beyond anything which the court said could legitimately be made.

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(31) L. R. 7 Ex. 271.

(32) Prec. Ch. 316.

(33) [1937] 4 All E. R. 664.

To make this will meet the facts as Mr. Salt wants them met, we must, so far as I can see, first of all say that the gift to the sister-in-law expressed to be conditional on her surviving the testatrix's daughter must also be expressed to be conditional on her surviving the testatrix; for only if there are those words is there the necessary condition for the application of the rule in *Jones* v. *Westcomb* (35), namely, that the gift over is incomplete because it in terms only provides for one of the two events which were conditional upon the previous gift taking effect. I therefore think that there is an important distinction between *Jones* v. *Westcomb* (35) and *In re Fox's Estate* (36) on the one hand (and the older decisions which I have mentioned), and Eve, J.'s decision in *In re Graham* (37) on the other, and that the distinction can be expressed in the passage already quoted from Theobald on Wills (10th ed.), p. 458, where it is stated, referring to cases of the class of *In re Graham* (37): "In this case, since "A"—I will read there "the sister-in-law"—"if [she] had "survived, would have taken an indefeasible interest, the failure "of the gift to [her] is due to lapse only, which the [testatrix] "cannot be supposed to have contemplated, and the event, on "which alone there is a bequest to [the nephew], has not "occurred". I think that that is the conclusion from those cases. I think it is correct; I think it does not affect the *Jones* v. *Westcomb* (38) type of case or *In re Fox's Estate* (36), which is, for the reasons I have tried to state, essentially different.

I have dealt at length with this part of the argument out of respect to Mr. Salt and Mr. Francis. Also it is necessary in conclusion to say a word about *In re Bowen* (39), which came before Wynn-Parry, J., who was there able to do what Romer, J., (and, indeed, I) would have liked to do here, and to hold that *Jones* v. *Westcomb* (38) applied so that the ultimate gift over took effect. There is a difference between *In re Bowen* (39) on

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(34) L. R. 7 Ex. 271.
(35) Prec. Ch. 316.
(36) [1937] 4 All E. R. 664.
(37) [1929] 2 Ch. 127.
(38) Prec. Ch. 316.
(39) [1949] Ch. 67.

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the one hand and *In re Graham* (40) and this case on the other. The relevant gift in *In re Bowen* (41) was a gift of " my real and " personal estate . . . to my trustees upon trust for my dear " mother during her life and from and after her decease upon " trust for my uncle Evan Bowen. . . . In the event of my said " uncle Evan Bowen dying in my mother's lifetime then I give " my said real and personal estate " to a named person. It is to be noted that the gift to Evan Bowen was not expressed to be conditional upon his surviving the testator's mother. The gift was an absolute one, subject to a life interest of the mother, and it did not depend upon Evan Bowen's surviving the mother. In actual fact Evan Bowen did not survive the testator. The gift over did not so to speak match the earlier gift, because it was expressed to be in the event of Evan Bowen's " dying in my mother's life- " time ". If the testator's mother had survived the testator, and Evan had also survived the testator but died in the mother's lifetime, it might well have been a question whether the gift over took effect according to its strict terms, or whether he had an absolute interest. That question did not arise. But, as there was no express condition to the gift to Evan Bowen, in the first place those who argued for the ultimate remaindermen—those corresponding with the nephew here—had not the difficulty (as in this case) of having to add to the express condition in the first part of the gift. Because the gift to Evan Bowen was not expressed to be conditional, that particular problem was not presented, and the case was therefore different from *In re Graham* (40). So Wynn-Parry, J., was able to say (42): " In " the case now before me it appears to me, on the true construc- " tion of this will, that the gift to the uncle was not conditional. " I think that the case of *In re Graham* (40) is distinguishable, " and I feel free to apply the test indicated by Romer, L.J., in " *In re Fox's Estate* (43)".

As Wynn-Parry, J.'s case is different from the present, it is unnecessary for me to say anything more about it. I therefore express no view whether it was rightly decided. Suffice it to say that it did differ in a material respect, at any rate in the view of Romer, J., and clearly differed in language, from this case, and that it does not afford any guidance to the decision of this case.

I come back to my first conclusion, reached with a feeling of regret, that, in face of the law as I find it to be, and notwithstanding the very strong impression that this will has made upon my mind as to the testatrix's intention, or, perhaps I should more accurately say, as to what her intention would have been expressed to be had she contemplated the events which happened, this appeal must be dismissed.

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(40) [1929] 2 Ch. 127.
(41) [1949] Ch. 67.
(42) Ibid. 72.
(43) [1937] 4 All E. R. 664.

Jenkins, L.J. I agree that the appeal fails, and I share the regret already expressed by my Lord that, as a matter of established principle, it is impossible for this court to repair the imperfections which the events that actually happened have disclosed in the disposition of this testatrix's residuary estate. But it is not the function of a court of construction to improve upon or perfect testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case. In the present case, the gift is a trust to pay the income arising from the testatrix's residuary estate to her daughter during her life " and after her death as to capital and income in trust for " my sister-in-law Mary Alice Bailey absolutely if she shall be " living at the death of my said daughter but if she shall " predecease my said daughter then upon trust for my nephew " George Hyder absolutely ". As my Lord has said, the events which actually happened were that the daughter died in 1935, that the sister-in-law survived her, but that she died in 1944, and that the testatrix herself died in 1949. It is thus apparent that the event upon which the gift to the testatrix's nephew was to take effect, according to the express terms of the will, did not happen because the sister-in-law did not predecease the daughter. Prima facie, therefore, the gift to the nephew failed in accordance with the cardinal principle read by my Lord from Theobald on Wills (10th ed.), p. 456: " When there is a gift over upon a " certain contingency, it will not have effect, unless the exact " contingency happens ".

It is sought by the nephew in this case to escape from that general rule on the principle to be deduced from the case of *Jones* v. *Westcomb* (44), as explained by the Court of Appeal in *In re Fox's Estate* (45). I agree with my Lord that it is really impossible to bring this case within that class of exception. On examination, I think it will be found that all the cases in which the principle in *Jones* v. *Westcomb* (44) has been applied are cases in which the contingency either has been expressed in imperfect or ambiguous terms or relates to an event of which it may be said in the language of Romer, L.J., in *Fox's* case (45) and in the language cited by him from Theobald on Wills (10th ed.), p. 456, that the gift over " must a fortiori have been " intended to take effect " in the event which actually happened. I need not multiply examples.

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(44) Prec. Ch. 316.

(45) [1937] 4 All E. R. 664.

In *Jones* v. *Westcomb* (44) a child who it was assumed would be born, was not born. The gift over was expressed to take effect in the event of the death of the child before attaining twenty-one years, and it was held that the gift over took effect in the actual event of the child's never coming into existence at all. That, I think, is clearly an a fortiori case. The event provided for may be said to include the event which happened. Similarly, in *In re Fox's Estate* (45) the gift over was to take effect in the event of what the testator inaccurately termed lapse owing to the death of any legatee. What actually happened was that a daughter, whose children were to take in remainder after her, died never having had any children. It was held that the event of a failure in that way of the daughter's children should be included by implication as one of the events in which the gift over was to take effect.

Another example is *Davies* v. *Davies* (46), where the testator gave his residuary estate in trust for his wife for life provided that she should survive him for twelve months and remain unmarried; and he gave his wife certain powers of disposition over the estate. Then there was a gift over in case of his wife's dying within twelve months from his own decease. What actually happened was that the wife died in his lifetime and it was held that the gift over took effect. That, I think, could fairly be described as an a fortiori case, and also, perhaps, as a case where the language of the gift over was not wholly accurate and might be capable of bearing a construction making it equivalent to, "If my wife shall not be alive at the expiration of the period "of twelve months from my decease".

But in the present case the testatrix, as it seems to me, has provided in clear and unambiguous language on the one hand the event in which the gift to the sister-in-law is to take effect, that is, "if she shall be living at the death of my said daughter"; and, on the other hand, the event in which the gift to the nephew is to take effect, that is, "if she", the sister-in-law, "shall pre-"decease my said daughter". The first event happened and the second did not. Speaking for myself, I find it impossible to hold that, as a matter of necessary implication from the language used by this testatrix, an intention is sufficiently expressed, or must be imputed to her, of making a gift to her nephew not only in the event expressed in the will but in the opposite event, which actually happened, of the sister-in-law's surviving the daughter, should the sister-in-law, having so survived, die in the lifetime of the testatrix. In my view, it is really impossible to hold that the testatrix contemplated or provided for this combination of events at all. It may very well be that had it been pointed out to the testatrix that the sequence of events which in fact took place might happen, and that in such case there would be an intestacy, she would have been anxious to supply the deficiency; and in all probability, so far as one can judge, she would have said that in those circumstances also she wished her nephew to take. But it is one thing to say that if it had been pointed out to the testatrix that she had not provided for a certain eventuality she would probably have provided for it in a certain way, and quite another to hold that the contingencies expressed in her will in clear terms must be added to or altered in order to give effect to what would probably have been the testatrix's intention if she had appreciated that the contingencies as expressed did not provide for that other possible state of affairs. That course, I think, clearly is not open to us on the authorities or indeed on any principle of construction.

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(44) Prec. Ch. 316.

(45) [1937] 4 All E. R. 664.

(46) (1882) 47 L. T. 40.

In my view this case falls within the principle stated in *Tarbuck* v. *Tarbuck* (47) and in *Brookman* v. *Smith* (48), as opposed to the line of cases in which the *Jones* v. *Westcomb* (49) principle has been adopted. This is a case in which, as in *In re Graham* (50), the first taker of an absolute interest under the term of the will had satisfied the condition of the gift in the lifetime of the testatrix, and the testatrix cannot be supposed to have contemplated the failure of the gift by lapse. The condition on which the sister-in-law was to take had been fulfilled in the testatrix's lifetime by her surviving the daughter, and the failure was due to lapse and lapse alone. For these reasons I agree with my Lord, as I have said with regret, that the appeal should be dismissed. I also agree with him that it is unnecessary to decide whether *In re Bowen* (51) is validly distinguishable on the ground on which Wynn-Parry, J., found himself able to distinguish it.

HODSON, L.J. I agree with the construction placed upon this will by the judge. In the events which have happened, it has been found that the gift over cannot take effect. That is quite clear on the plain words of the will itself. But it was argued before the judge on the principle of *Jones* v. *Westcomb* (52) that the court was at liberty to uphold the gift if it could find that, had the testatrix contemplated the events which happened, there was an overwhelming probability that she intended the remaining gift to take effect. That is to my mind putting an argument upon the basis of *Jones* v. *Westcomb* (52) which that case will not bear. As my Lords have pointed out, it could be said in *Jones* v. *Westcomb* (52) that the greater

(47) 4 L. J. (Ch.) 129.
(48) L. R. 7 Ex. 271.
(49) Prec. Ch. 316.
(50) [1929] 2 Ch. 127.
(51) [1949] Ch. 67.
(52) Prec. Ch. 316.

includes the less. That cannot be said here, where it is necessary for the nephew to contend that the exact opposite of what has happened produces the necessary result from his point of view. I think that Romer, J., was right in the view which he took that this case was on all fours with *In re Graham* (53), where Eve, J., in a considered judgment, reviewed the old cases including the case in the Exchequer Chamber, *Brookman* v. *Smith* (54).

The language of Cockburn, C.J., seems to me to be directly in point in considering this particular case. He said (54): " Are we " to force the words of the will, or rather to interpolate new " words into it, in order to make it meet this altered and, as I " think, in all probability, unforeseen state of things? I think " we cannot do that. If there is anything ambiguous in the " will, and from the context you can gather the intention of the " testator, it is possible that in such a case you may make the " language of the remainder of the will meet what you clearly " conceive to be the meaning of the man making it. But I see " nothing in that which is expressed, and nothing in the rest of " the will which would lead me to suppose that it was intended " to provide for this contingency, which it would have been so " easy to provide for, which a few words would have made " perfectly clear, and which, if it had been present to the mind " of the testator, he would have provided for. I do not think " that we are to make the words of the will embrace that which " they do not embrace, and which I do not think, by implication, " they were intended to embrace. That would have been my " view of the case, independently of the authority of the case of " *Tarbuck* v. *Tarbuck* (55), which is directly in point. That " decision seems to me to be based on sound principles, nor can " I find that it has been anywhere overruled, either directly or " indirectly ".

In this case there is no ambiguity, and it seems to me impossible to say that by necessary implication the contingency which has arisen must be treated as having been provided for. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Adam Burn & Son; Henry Boustred & Sons, for Percy Walker & Co., Hastings; Crofts & Ingram and Wyatt & Co. for Sprott & Sons, Crowborough; Judge, Hackman & Judge; Lovell, Son & Pitfield, for Robinson & Allfree, Ramsgate.*

B. A. B.

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(53) [1929] 2 Ch. 127.
(54) L. R. 7 Ex. 271, 274.
(55) 4 L. J. (Ch.) 129.

In re WRAY, Decd. WRAY *v.* WRAY.

C. A.

1951
Jan. 19.

[1950 W. No. 705.]

Evershed, M.R., Jenkins and Hodson, L.JJ.

Will—Construction—Substitutionary gift to beneficiary's "personal "representatives and to form part of his estate"—Life interest bequeathed by beneficiary to his widow—Codicil to will of testatrix directing will to be read as if widow were dead—Effect.

Followed. *In re* Spensley's Will Trusts [1952] 1 Ch. 886

A testatrix made her will in 1945. By cl. 2 she appointed her brother Charles Wray, his wife, Gladys Wray, and the plaintiff to be her executors and trustees, and gave to each of them a legacy. By cl. 6 she gave her net residuary estate to her trustees upon trust to pay the income to her sister during her life, and after her death to hold the residuary estate upon trust for her brother Charles absolutely provided that "if the said Charles Wray shall die in "my lifetime or in the lifetime of my said sister . . . I direct "that the same shall be dealt with as if the said Charles Wray had "survived me and my said sister Frances Wray and be transferred "and paid to his personal representatives to form part of his estate "and be treated as directed by his will". In 1948 the testatrix made to her will a codicil by cl. 4 of which she provided: "I "revoke the appointment of Gladys May Wray in cl. 2 of my "will as executrix and direct that my said will shall take effect as "if her name was omitted from my will and as if she were dead". The brother died in 1948, having by his will given his residuary estate upon trust for his wife Gladys Wray for her life, and after her death upon trust for his four children as tenants in common in equal shares. The testatrix survived him and died in January, 1949.

Vaisey, J., held that the effect of the codicil was that Gladys Wray took no life interest in the residuary estate of the testatrix, but that it passed directly under the brother's will to his four children as tenants in common. On appeal:—

Held, that the principle to be applied was that when an interest was clearly given by a will it was not to be held to be revoked in the absence of clear words of revocation. If there were a gift under a will and an ambiguous clause in a codicil which might or might not be intended as revocation, then the gift in the will should stand. In accordance with that principle, where a codicil contained a clause expressly revoking a particular disposition in a will followed by superadded words in the same clause capable of being given a wider import so as to revoke other dispositions to which the clause in its inception was not directed, the court would lean to the view that the words of revocation which, taken alone, would appear to be of general import were to be regarded as restricted to that particular matter to which the clause was directed.

Consequently, the words "as if she were dead" in cl. 4 of the codicil must be construed as limited to matters covered by the earlier part of that clause, for those words were not sufficiently clear to operate as a revocation of the referential trusts in cl. 6 of the will. Accordingly, Gladys Wray was entitled to a life interest in the residuary estate of the testatrix.

In re Percival (1888) 59 L. T. 21, and *In re Freeman* [1910] 1 Ch. 681 followed.

In re Cousen's Will Trusts [1937] Ch. 381 considered.

APPEAL from Vaisey, J.

Miss Hetty Wray, by cl. 2 of her will dated April 18, 1945, appointed her brother Charles Wray, her sister-in-law, Charles Wray's wife, Mrs. Gladys May Wray, and her nephew, Edward Geoffrey Wray, the plaintiff, who was the son of Charles Wray by a former marriage, to be executors and trustees of her will, and she gave to each executor who accepted the office a legacy of 50*l.* By cll. 3 to 5 of her will she made certain specific bequests and devises and gave certain pecuniary legacies in favour of her sister Frances Wray and other persons. By cl. 6 she gave her residuary estate to her trustees upon trust for sale and investment. She then directed them to hold the investments constituting her residuary estate upon trust to apply the income for the benefit of her sister Frances Wray during her life. Clause 6 then provided that on the death of Frances Wray "my trustees "shall hold the capital and income from such investments in "trust for my said brother Charles Wray absolutely provided "that if the said Charles Wray shall die in my lifetime or in the "lifetime of my said sister Frances Wray I direct that the same "shall be dealt with as if the said Charles Wray had survived "me and my said sister Frances Wray and be transferred and "paid to his personal representatives and form part of his estate "and be treated as directed by his will".

Charles Wray by his will dated December 20, 1945, gave his residuary estate to his trustees upon trust to pay the income to his wife Gladys Wray during her life, and, subject thereto, he directed his trustees to hold his residuary estate upon trust for his four children by his former marriage, namely, the plaintiff and the last three defendants to the summons, Mrs. Kidd, Mrs. Amor and Mrs. Jabtonowski, in equal shares.

It did not appear from the evidence whether the testatrix was aware of the provisions of her brother Charles Wray's will. After the death of her sister, the testatrix made a codicil dated November 12, 1948. By cl. 1 she gave a number of pecuniary legacies including a legacy of 100*l.* to Gladys Wray. She revoked the various bequests and devises in favour of her deceased sister and then by cl. 4 provided as follows: "I revoke the appointment "of Gladys May Wray in cl. 2 of my will as executrix and direct "that my said will shall take effect as if her name were omitted "from my will and as if she were dead". She ended the codicil with the following words: "subject as aforesaid I confirm my "said will".

Charles Wray died on December 8, 1948, and the testatrix survived him and died shortly afterwards on January 27, 1949.

By this summons, to which Gladys Wray and the three other children of Charles Wray were defendants, the plaintiff asked whether the income of the residuary estate of the testatrix was payable to Gladys Wray during her life or whether the capital and income of the residuary estate were then held upon trust for himself and the other three children of Charles Wray in equal shares.

Vaisey, J., held that the income of the residuary estate was not payable to Gladys Wray but was held upon trust for the four children. The defendant Gladys Wray appealed.

Pennycuick, K.C., and *B. F. Mendel* for the defendant Gladys Wray. The question is whether the life interest which Gladys Wray took under the referential trusts contained in cl. 6 of the will of the testatrix was or was not taken away from her by cl. 4 of the codicil which the testatrix made. Gladys Wray contends that cl. 4 is only directed to the revocation of her appointment in cl. 2 of the will and of the bequest thereby given to her and that the words "as if she were dead" only relate to the provisions referred to in cl. 4 itself and have no reference to the trusts contained in cl. 6 of the will. In *In re Cousen's Will Trusts* (1) Farwell, J., held that a referential trust failed because the beneficiary under that trust predeceased the testatrix herself. That decision had no application to the present case, because Gladys Wray survived the testatrix, and it is not disputed that she takes under the referential trust unless the effect of cl. 4 of the codicil is to prevent her doing so. It is to be observed that by the codicil the testatrix has given a new legacy to Gladys Wray and it would be odd if the meaning of the words "as if she were "dead" in cl. 4 were that she was to be treated as if she were dead for all purposes. It appears from *In re Percival* (2) and *In re Freeman* (3) that, where there is a clear gift contained in a will, it will not be cut down by a codicil unless plain words are found in the codicil which have that effect. If the language of this codicil is examined, it appears that the testatrix only intended by cl. 4 to revoke cl. 2 of the will. The general words at the end of cl. 4 must be construed as only referring to the limited matters covered by the beginning of that clause.

Cross, K.C., and *Raymond Walton* for the three children of Charles Wray. It is submitted that the words "as if

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(1) [1937] Ch. 381.

(2) (1888) 59 L. T. 21.

(3) [1910] 1 Ch. 681.

"she were dead" must be given their natural meaning, and that Gladys Wray takes no life interest in the residuary estate of the testatrix. If the testatrix had meant that provision to be limited in operation to the provisions of cl. 2 of her will she would have used other words. In *In re Percival* (4) and *In re Freeman* (5) the codicil in question contained recitals making it quite clear that the testator in those cases only intended his codicil to cover a limited subject-matter. There are no such recitals in this case, which is accordingly distinguishable.

D. H. McMullen for the plaintiff.

Evershed, M.R. Vaisey, J., felt the greatest doubt and difficulty in this case, and said that another court might come to a different conclusion. After listening to the arguments I have done so.

I will first explain the relevant law appearing in *In re Cousen's Will Trusts* (6), the validity of which decision Mr. Pennycuick has not challenged. It might have been supposed that a gift such as that in the will of the testatrix would result in the residuary estate being transferred for all purposes to the estate of the named beneficiary, so as to go to the persons taking his estate or, if they had died, to their estates. It was, however, laid down in *In re Cousen's Will Trusts* (6) that the result of such a provision, notwithstanding such a formula as "and to form "part of his estate", is that the persons who may be specified (in this case) by Charles Wray take the estate of the testatrix as direct beneficiaries under her will, with the consequence that, in order to be entitled so to take, they must survive the testatrix herself.

To illustrate the point by a simple example, if it be supposed that Charles Wray, who predeceased the testatrix, had left the whole of his estate to his wife Gladys Wray, and if it be supposed that she had also predeceased the testatrix, then this provision would be wholly ineffective; for Gladys Wray, not having survived the testatrix, would take nothing, and her estate could take nothing, albeit she was the universal legatee and devisee under Charles Wray's will.

The validity of that decision is not challenged, and I am not to be taken as suggesting that it could be challenged; but, as my brother Jenkins observed during the argument, to the lay mind it is perhaps a somewhat technical legal rule. It would, or it might, appear to an inexpert person that by a provision such as that with which we are concerned a testator is simply saying that in the event supposed he is handing his estate to another's personal representatives, who are to treat that estate for all purposes as an accretion to their own estate. For the reasons that I have indicated, that is not in fact how such a gift operates. [His lordship referred to the facts, and continued:]

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(4) 59 L. T. 21.
(5) [1910] 1 Ch. 681.
(6) [1937] Ch. 381.

The question is whether, having regard to the rule in *In re Cousen's Will Trusts* (7), the effect of cl. 4 of the codicil is that Charles Wray's testamentary disposition giving a life estate to his widow must now be treated quoad the estate of the testatrix as ineffective, so as to make the residuary estate of the testatrix go by virtue of his dispositions shorn of that life estate direct to the plaintiff and the last three defendants. Vaisey, J., held that it had that effect.

On a matter of this sort, turning on the language of a will, I always feel reluctant to differ from the judge of first instance. But, after listening to the argument, I have come to a clear conclusion that cl. 4 of the codicil was not intended by this testatrix to have so far-reaching an effect.

If the matter were free from authority, I am not sure that I should not be compelled, in spite of the impression that this codicil has had upon my mind, to come to the contrary view, for I might be constrained to hold that the duty of the court was to give effect, so far as possible, to all the words used, including the words " and as if she were dead ", with the result that these referential trusts were limited in their effect. The matter is not, however, free from authority.

We have been referred to two cases, *In re Percival* (8) and *In re Freeman* (9), both decisions of this court. In both cases a clause in a codicil containing language perfectly general prima facie in its effect was held nevertheless to be restricted to the particular subject-matters to which the clause by its opening words was directed. It is a truism to observe that every case must obviously depend upon its own particular facts. The language used in this case is different, in certain respects, from that used in those cases.

Mr. Cross said, as did Vaisey, J., that *In re Freeman* (9) ought to be regarded as having reached a high-water mark in matters of this kind, and that the tide should not be allowed further to encroach. I am not sure that I fully understand what is meant by that phrase. These cases do show a disposition on the part of the court in cases of revocations in codicils to depart somewhat from the general rule of giving effect, where possible, to all the words used, and to confine such revocatory clauses to the particular subject-matter to which they are directed. In other words, they emphasize in cases of this kind that that which

(7) [1937] Ch. 381.

(8) 59 L. T. 21.

(9) [1910] 1 Ch. 681.

has been clearly given by will should not be treated as taken away by codicil unless that intention is clearly expressed.

In re Percival (10) will illustrate what I have tried to express. A testatrix by her will bequeathed to one granddaughter a watch and to another granddaughter a brooch. Later in the will the first granddaughter was given a legacy of 200*l*. The testatrix by a codicil provided, so far as material, as follows: "Whereas by "my said will I have bequeathed my watch to my granddaughter, "Mary Emma Maude Dutton, and my brooch, containing a portrait of my late husband, to my granddaughter, Jane Beatrice "Margaret Boote. . . . Now I hereby revoke and make void the "said legacies and bequests in my said will contained in favour "of the said Mary Emma Maude Dutton and Jane Beatrice "Margaret Boote"—who were the named granddaughters. So far the matter is obvious and simple. Then the clause goes on: ". . . and declare that my said will shall be read and construed "in all respects as if the names of the said Mary Emma Maude "Dutton and Jane Beatrice Margaret Boote had not been inserted "therein, and in all other respects I confirm my said will".

The question was whether the second part of that clause revoked the pecuniary legacy of 200*l*. to the first granddaughter. If effect were given to the words used in their ordinary sense that must have been the result, for not otherwise could the will be read and construed "in all respects" as if her name had not been inserted therein. This court held, looking at the clause in its context and in the light of the whole testamentary dispositions, that it could not have been in the mind of the testatrix to deal with anything more than the specific gifts of the watch and the brooch. That was, I think, a strong case. It is true—and this is a very forcible point—that that result was much assisted, as Mr. Cross has observed, by the circumstance that the clause was introduced by recital, and a recital is a strong indication that what follows in the operative part covers what is intimated by the recital and nothing more.

Mr. Cross makes the same point with regard to *In re Freeman* (11). There, as in this case, there was appointment of three persons, including one Bowyer Nichols, to be executors and trustees, and there was a specific legacy to each executor proving. There was then a part of the will (and it was a long one) in which legacies were given to various persons, including Mrs. Bowyer Nichols. The residue was to be divided equally between three persons, namely: Lady Duckworth, Bowyer Nichols, and one Leverson, or such of them as should survive. The name "Bowyer Nichols" (except as being also his wife's name)

(10) 59 L. T. 21.

(11) [1910] 1 Ch. 681.

occurred only at the beginning of the will, where the appointment of executors was to be found, and in the residuary clause.

The relevant part of the codicil was as follows: " Secondly by " my said will I have appointed Bowyer Nichols to be one of the " executors thereof and I have given him a legacy of 1,000*l.* for " his trouble in acting as such executor Now I hereby revoke the " appointment of the said Bowyer Nichols as such executor and " also the said legacy of 1,000*l.* given to him as aforesaid And " I appoint Harry Freeman . . . to be an executor of my said " will in the place of the said Bowyer Nichols, and I give to the " said Harry Freeman a legacy of 200*l.* free of legacy duty for his " trouble in acting as such executor ". As Joyce, J., observed, there is no punctuation, but starting with a capital letter, the codicil then continued: " And I declare that my said will shall " be construed and take effect as if the name of the said Harry " Freeman were inserted in my said will throughout instead of " the name of the said Bowyer Nichols and in all other respects " I confirm my said will ".

There the question was whether effect could be given to that language, and in particular to that final passage, save by substituting the name of Harry Freeman for that of Bowyer Nichols in the only other place in which it did occur in the will, namely, with regard to the residue. Again, the Court of Appeal—although Kennedy, L.J., expressed his doubts on the matter—came to the conclusion that, as in *In re Percival* (12), this clause, truly construed in its context, related, and was only intended to relate to the appointment of executors.

Mr. Cross relies strongly upon the opening recitals, and it might also be said that it is one thing to strike a name out and it may be another thing to substitute by so oblique a method one person for another as residuary legatee. However, those two cases—although the words are obviously different from those in this case—show, I think, a tendency in the court, when considering revocatory clauses of this kind, not to be too strict in trying to give full effect to all the words used.

I come now to the clause here in question, for it is, of course, plainly a matter of the meaning of the words that this testatrix has used. I note that there is here no recital. To that extent, perhaps, Mr. Cross has an easier case than he would have had if there had been here a recital. But still cl. 4 is all one sentence, not a long one, occupying only just over three lines: " I revoke " the appointment of Gladys May Wray in cl. 2 of my will as " executrix and direct ", etc.

It is conceded that some of this language is tautologous. It is a point in this case that the statement that the will " shall

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(12) 59 L. T. 21.

" take effect as if her name was omitted from my will " would not have had any effect as regards this residuary gift, because the right of Gladys Wray to take by virtue of the referential trusts did not depend upon her name being mentioned in this will at all, and it was in fact not mentioned in cl. 6 of the will. Therefore, Mr. Cross argued, the point of adding " and as if she were dead " is to make this clause apply to cl. 6 of the will. Of course, per contra, since the words " and as if she were dead " had been put in, it was not necessary to say anything more. There is some tautology, on any view of the case.

Mr. Cross said that, if this clause were intended only to have the limited effect for which Mr. Pennycuick contends, it should have gone on, after the revocation of cl. 2, to direct that " the " said cl. 2 " should have effect, whereas it does, in fact, say " my said will shall take effect ", etc. That is, however, no stronger language than using such words as " in all respects ", or " throughout ", which were the words used in *In re Percival* (13) or *In re Freeman* (14).

In the end, as Mr. Cross rightly said, this is a question of the impression made on the mind of the reader, and further elaboration will not assist. Bearing in mind the tendency which I think is to be discerned from the two cases that I have cited, I conclude that cl. 4 was not intended to have any effect on, or to be related in any way to, these referential trusts.

I think it very unlikely that a testatrix who had provided, as this testatrix had provided, that in the specified events which occurred it was for her brother Charles Wray to determine by his will how her estate was to go, should choose this very oblique way of providing that his selection should be subject to the limitation that Gladys Wray should not take under it, particularly as she could have chosen this roundabout way of doing it only if she had absorbed the lesson of *In re Cousen's Will Trusts* (15), or if her advisers had and had explained it to her.

It is a peculiar feature of the case that we have no evidence whether, when she made this codicil, she had any knowledge of what her brother Charles Wray's will was. It might have been an easier question to answer if that fact had been known, but, in the absence of evidence, we must assume that she was still prepared to leave it to Charles Wray to decide, and he might, of course, alter his mind from time to time as to how, in the events supposed, his estate would go.

There are also other considerations. It will be observed that if Charles Wray survived he took absolutely. The estate of the testatrix in that event would be added to his own and if he left a will in the form his will actually took (which was probable), then Gladys Wray would take, in effect, a life interest in the estate of the testatrix after Charles Wray had enjoyed it. If the testatrix was anxious that Gladys Wray should in no circumstances take anything of hers, it is a little odd that it was left to the accident whether Charles Wray did, or did not, survive the testatrix. It would also be odd, if cl. 4 has so wide a disinheriting effect as Mr. Cross argued, that in the earlier part of the same codicil the testatrix gave Gladys Wray a legacy of 100*l*. That gift might no doubt be a solatium for other losses; but then she did not know that Gladys Wray was losing anything: she did not know when this codicil was made what interest Gladys Wray might take under Charles Wray's will. At least the gift shows that cl. 4 was not actuated by a desire that Gladys Wray should take nothing in any circumstances.

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(13) 59 L. T. 21.

(14) [1910] 1 Ch. 681.

(15) [1937] Ch. 381.

I have referred to the fact that there is here a dual formula, "as if her name was omitted from my will", and, "and as if "she were dead". Those circumstances were absent from *In re Freeman* (16) and *In re Percival* (17), but it is to be noted that this use of the phrase "and as if she were dead" has its ancestry in one of the well-known conveyancing books of precedents, Prideaux (23rd ed.), Vol. 3, p. 804, and is a form recommended for use in a clause in terms intended only to operate to revoke the appointment as executor, although, of course, if its terms are given full effect, it would wholly eliminate the person in question from any benefit under the will in any part of it. I will not, however, pursue the matter further. I agree that, taking the view I do, and as things have turned out, Gladys Wray takes a life interest under the will of the testatrix, although she said that her will was to be construed as though Gladys Wray were dead. But the apparent anomaly, I think, overlooks the technicality of *In re Cousen's Will Trusts* (18). The truth is that in the events which have happened the estate of the testatrix went over to her brother Charles Wray's estate, and Gladys Wray takes an interest under the will of the testatrix by reason of the fact that she was the life tenant under Charles Wray's will, and not because she was given any life tenancy or other interest in terms under the will of the testatrix at all.

For these reasons, with due diffidence, because I am differing from the opinion of Vaisey, J., I conclude that this testatrix did not intend to prevent the terms of Charles Wray's will having the effect which otherwise they would have, namely, of conferring upon Gladys Wray a life interest in the residue.

(16) [1910] 1 Ch. 681.
(17) 59 L. T. 21.
(18) [1937] Ch. 381.

JENKINS, L.J. I agree. As we are differing from the judge I will give my own reasons for agreeing with my Lord. The principle to be applied in a case such as this is, I apprehend, that an interest clearly given by a will is not to be held revoked in the absence of clear words of revocation. That comes to this, that, if there is a gift under a will and an ambiguous clause in a codicil which may or may not be intended as a revocation, then the gift in the will should not be allowed to stand. Illustrations of that principle are to be found in *In re Percival* (19) and *In re Freeman* (20), to which my Lord has referred. Those cases show that, in pursuance of that principle, in a codicil in which there is a clause containing an express revocation of a particular disposition followed by superadded words in the same clause capable of being given a wider import so as to revoke other dispositions to which the clause in its inception was not directed, the court will lean to the view that the words of revocation, which taken alone would appear to be of general import, are to be regarded as restricted to the particular matter to which the clause is directed. The question in each case where the point arises must be whether, on the true construction of the relevant clause in conjunction with the remainder of the testamentary disposition, it is proper to hold that the words of revocation are so limited. As I have said, the leaning of the court is to limit them in that way if it is reasonably possible to do so as a matter of construction.

In the present case cl. 4 of the codicil, as my Lord has pointed out, is one single sentence: " I revoke the appointment " of Gladys May Wray in cl. 2 of my will as executrix and direct " that my said will shall take effect as if her name was omitted " from my will and as if she were dead ". It is one continuous sentence. It begins by directing itself to a particular clause and to a particular matter, namely, the appointment of Gladys Wray as executrix, and it finishes with superadded words which, if taken alone, might be held to be of more general import. The question is on which side of the line that clause should be regarded as falling, having regard to the leaning of the court to which I have already referred.

I agree with my Lord that the difficulty is really wholly occasioned by the use of the concluding words " as if she were " dead ". If the clause had stopped with the provision " as if " her name was omitted from my will " it would automatically have been limited to the provisions of cl. 2 of the will appointing her executrix and giving her a legacy of 50*l*. because, in fact, that is the only place in the will in which her name is mentioned; but the words " as if she were dead " are prima facie of wider import, and would in themselves be apt to take away any interest to which they applied, even although it was an interest given to Gladys Wray otherwise than by name. The question is whether they are to be construed in that unrestricted fashion.

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(19) 59 L. T. 21.

(20) [1910] 1 Ch. 681.

In my view, as my Lord has held, the answer to that question should be no. My reasons for so holding as a matter of construction of this particular will and codicil are these: it is to be observed that in the very codicil in which cl. 4 occurs the testatrix gives Gladys Wray a sum of 100*l*. Quite clearly she is meant to take that sum of 100*l*. provided that she in fact survives the testatrix. If the testatrix meant the words " and as if she " were dead " to be given the wider effect which is attributed to them by the judge, it seems to me hardly conceivable that she would, without further explanation or clarification, have given by the very same instrument this legacy to Gladys Wray. The result of the construction adopted by the judge is that, while Gladys Wray obviously is to be treated as surviving the testatrix, if she in fact survives her, for the purposes of the legacy given her by the codicil, she must nevertheless be treated for the purposes of the will as having predeceased the testatrix, and indeed as having been actually dead at the date of the codicil. That anomaly, if I may so describe it, seems to me to point strongly to the view that the words " and as if she were dead " must be given a limited construction.

Next one finds in cl. 2 of the codicil that, the testatrix's sister Frances having died, the testatrix thought it advisable to revoke the interest given to her, which she does in these words: " My " sister Frances Wray being now deceased I do hereby revoke " cl. 4 and all other provisions of my said will in her favour And " also I do hereby revoke the bequest of the said shares in " Humber Fruit Brokers Limited contained in cl. 3 of my said " will ". That shows that when the testatrix is minded to revoke a gift she, or those advising her, know the proper formula, and the specific expressions to use for that purpose. In my judgment that, too, supports the view that the words " and as if she were " dead " in cl. 4 should not be given the wide meaning.

Next, I think that an important circumstance is to be found in the character of the gift which is said to be revoked. I have already adverted to the effect on the construction of these documents of the legacy given to Gladys Wray by the codicil, and, as I have already mentioned, I regard that as a strong indication in favour of limiting the application of the words " and as if she " were dead ".

With that in mind one examines the character of the gift said to be revoked. It is not as a matter of language a gift taken under the testatrix's will at all. As a matter of law no doubt it is an interest taken under the testatrix's will, and it is an interest which can only be taken by a beneficiary who survives the testatrix. That is clear, but it is nevertheless an interest given by reference to the will of another person, the testatrix's brother Charles Wray, who was, in fact, alive and thus capable of making a new will in any terms he chose at the date when the codicil was penned. It seems to me that the view taken by the judge in this case has less to support it when the gift is in that referential form than it would in the case of an express and direct gift made in the ordinary way by the will. This is something which is not within the four corners of the testatrix's will at all. It is a gift which depends entirely on the testamentary dispositions of Charles Wray. Having regard to its peculiar character, speaking for myself, I should find great difficulty indeed in holding, and I am not prepared to hold, that the mere occurrence of the words " and as if she were dead " in cl. 4 of the codicil can be said to operate with sufficient clarity, or indeed at all, as a revocation of a gift of this peculiar referential character.

Finally, one must bear in mind that the testatrix ends her codicil with the words " Subject as aforesaid I confirm my said " will ". One of the provisions of the will was that, if Charles Wray should die in the lifetime of Frances or in the testatrix's lifetime, the residuary estate should be dealt with as if Charles Wray had survived the testatrix and Frances, and be paid to his personal representative and form part of his estate and be treated as directed by his will. That provision is confirmed. It is true that it is confirmed " subject as aforesaid ", but it is a strong thing, in my view, to construe the words " and as if she were " dead " in cl. 4 of the codicil as abridging or curtailing the effect of that disposition so as to read into it a stipulation to the effect: " Provided always that Gladys shall be disqualified from participating by virtue of this referential trust under any testamentary " disposition of Charles in any part of my residuary estate ". I think it would be extremely difficult on the strength of cl. 4 of the codicil to treat the disposition in favour of Charles Wray's estate as modified in this way.

Accordingly, to end where I began, it seems to me that the question of revocation or no revocation should be resolved in favour of Gladys Wray in accordance with the leaning of the court disclosed by the cases, and that cl. 4 of the codicil, notwithstanding the difficulties of construction which have been properly pointed out by Mr. Cross, should be construed as limited in its operation to the appointment of Gladys Wray as executrix and the concomitant legacy to her of 50*l*. Accordingly, I agree that the appeal should be allowed.

HODSON, L.J. The judge recognized this case as one of difficulty, and that a different opinion might be taken elsewhere, and out of respect to him and his judgment I wish to add a few words of my own.

I agree with him that on the first reading of the revocatory cl. 4 in the codicil, the conclusion at which he arrived seems to be the obvious one. The clause reads as follows:—" I revoke " the appointment of Gladys May Wray in cl. 2 of my will as " executrix and direct that my said will shall take effect as if her " name was omitted from my will and as if she were dead ". The last part of that clause directing that the will should take effect as if her name were omitted from the will and as if she were dead seemed to me at first sight as plain as possible, an indication that the testatrix intended that Gladys Wray should take no interest whatever in her estate. In the first place, however, it has to be recognized that Gladys Wray was not named in the clause of the will under which she benefits in the events which have happened. Apart from cl. 2 she only benefits under the will of the testatrix because she was placed in that position by the will of her husband; she takes only under a referential trust, in which her name does not appear.

Having heard the arguments addressed to the court, and having considered *In re Percival* (21) and *In re Freeman* (22), to which reference has been made, with the arguments which were accepted in those two cases, I am led to the same conclusion in this case. In other words, cl. 4 of the codicil must be read as referable to its particular subject-matter only, so that, in order that it may be properly understood, some such words as " for " this purpose " must be implied before the word " direct ", and so that cl. 4 reads: " I revoke the appointment of Gladys May " Wray in cl. 2 of my will as executrix and for this purpose direct " that my said will shall take effect as if her name was omitted " from my will and as if she were dead ".

The argument addressed to the court in *In re Percival* (23) and *In re Freeman* (24), which led the court to come to its conclusion, was no doubt supported by the fact that in each case the recital directed the attention of the testatrix to the subject-matter of the particular bequest which was treated as being the only part of the document to be revoked. As Mr. Cross has pointed out, in this case there is no recital and there is nothing to emphasize the particular nature of the subject-matter, and therefore the less reason to depart from the plain meaning of the words in their unqualified construction. On the other hand, there are features in the two cases which seem to me to count the

(21) 59 L. T. 21.
(22) [1910] 1 Ch. 681.
(23) 59 L. T. 21.
(24) [1910] 1 Ch. 681.

other way. For example, in one case the words "in all respects" appear together with the word "will", and in the other case the word "throughout" is used, these words emphasizing the unqualified nature of the revocation. Notwithstanding those strong words, the court found that the revocation was limited to the particular subject-matter. Moreover, in each of those cases the names of the persons affected appear in the will itself, so that it was stronger, as it seems to me, to ignore the plain words or to construe the plain words in a limited manner than it is in this case, where the name of Gladys Wray does not appear in the will itself, and indeed, as it seems to me on construction of this particular document, the words of revocation in the codicil are inapt to refer to this referential trust. The use of the word "name" in itself is inapt, because there are no names in the material clause of the referential trust except the name of the person by reference to whom the trust is to be ascertained.

Moreover, there is another special reason in this case why I think that the words of revocation ought to be cut down in their meaning, in that Gladys Wray did receive a legacy under the codicil of 100*l.*, which it is not suggested was revoked by the very strong words "my said will shall take effect as if her name was "omitted from my will". That seems to me, at any rate, to be a pointer indicating that those wide words should not be construed to their fullest extent and carry their greatest weight. I think that the language of cl. 4 of the codicil, taken as a whole, can lead to only one conclusion, namely, that the testatrix was directing her mind to the revocation of the appointment of Gladys Wray as executrix and the legacy attached thereto, and had no effect to disinherit her so far as the referential trust is concerned. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Russell Jones & Walker, for Pearlman & Rosen, Hull; Smith & Hudson.*

B. A. B.

READ'S TRUSTEE IN BANKRUPTCY *v.* SMITH.

[1949 R. 163.]

ROX-
BURGH, J.

1951
Jan. 24.

Tender—Price of work and labour done—Tender of amount less than that claimed—Refusal—Action to recover full amount claimed—Payment into court of amount tendered—Judgment for plaintiff for full amount claimed—Payment out to plaintiff, in part satisfaction of judgment, of amount paid into court—Costs of action.

The bankrupt did war damage repairs to premises of the defendant. The defendant did not admit any contract, but did admit that 204*l.* 16*s.* 9*d.* was the reasonable price for the efficient execution of the work done, and he paid 55*l.*, leaving 149*l.* 16*s.* 9*d.* outstanding. He alleged in the work certain defects which, he said, would cost 43*l.* 5*s.* to put right, so that the reasonable total price would be 161*l.* 11*s.* 9*d.* He took from that the 55*l.* which he had paid and tendered 106*l.* 11*s.* 9*d.*, which the plaintiff (the bankrupt's trustee in bankruptcy) refused. The surveyor who supervised the work was employed also by the building society who were mortgagees of the premises, and he certified for 204*l.* 16*s.* 9*d.* to the War Damage Commission, who paid that amount to the defendant.

In this action the plaintiff claimed the balance of 149*l.* 16*s.* 9*d.* The defendant pleaded that that was excessive and paid into court the 106*l.* 11*s.* 9*d.*, pleading tender before action brought. The plaintiff pleaded that the defendant, by his agent the surveyor, had agreed with the War Damage Commission that the work was efficiently completed and was estopped from denying that it was. The defendant thereupon took out third party proceedings against the building society, alleging that they were liable for the supervision of the work, and so responsible for any defaults and negligence of the surveyor. The plaintiff abandoned the plea of estoppel at the trial and the defendant did not open his claim in the third party proceedings or seek to prove negligence by the surveyor. The court awarded the plaintiff 139*l.* 16*s.* 9d.—10*l.* less than he claimed and 33*l.* 5*s.* more than the defendant had paid into court.

The matter subsequently came again before the court for decision of the question whether the plaintiff had recovered 139*l.* 16*s.* 9*d.*, and whether the judgment should direct that he should be at liberty to have payment out of court of the 106*l.* 11*s.* 9*d.* in part satisfaction of the judgment. Counsel for the defendant contended that that would be incorrect, and that the proper order would be that the plaintiff should recover 33*l.* 5*s.* and should, in addition, be at liberty to take out the 106*l.* 11*s.* 9*d.*

Held, (1.) that there had not been "tender" by the defendant, because what he purported to tender was only part of the sum due, and because he did not even admit, let alone hold himself out as always ready to perform, the contract on which the action was based: *Dixon* v. *Clark* (1848) 5 C. B. 365 followed; (2.) that it was not a correct proposition of law that, when a defendant brought money into court, the plaintiff should have judgment only for the difference between the sum claimed and the sum offered merely because the plaintiff, had he so chosen, could have accepted the sum offered in full settlement, and that, accordingly, the plaintiff had recovered 139*l*. 16*s*. 9*d*., and should be at liberty to have the 106*l*. 11*s*. 9*d*. paid out to him in part satisfaction of the judgment; *James* v. *Vane* (1860) 29 L. J. (Q. B.) 169 considered and not applied; (3.) that, the plaintiff having recovered more than 100*l*. and his conduct being open to no criticism save that he had brought the action in the High Court, the court ought not to treat its discretion as wholly at large and would, accordingly, give the plaintiff costs of the action; (4.) that the court was bound to dismiss with costs the third party proceedings as abandoned proceedings because the defendant did not seek to prove negligence on the part of the surveyor although it was always open to him to seek to do so.

ACTION.

The bankrupt did certain work and labour in effecting war damage repairs to premises owned by the defendant. The defendant did not admit that the work was executed pursuant to any contract between the bankrupt and himself, but admitted that the reasonable total price for the proper and efficient execution of the items executed was 204*l*. 16*s*. 9*d*. He paid 55*l*., leaving outstanding 149*l*. 16*s*. 9*d*.: but he contended that the work had not been properly done and that the reasonable cost of remedying the defects which he alleged was 43*l*. 5*s*. 0*d*., so that the reasonable total price was 161*l*. 11*s*. 9*d*. From that he subtracted the 55*l*. which he had paid and tendered 106*l*. 11*s*. 9*d*. which the plaintiff (the bankrupt's trustee in bankruptcy) refused. The surveyor who had supervised the work worked for the Portman Building Society, who were mortgagees of the premises, as well as for the defendant. He certified to the War Damage Commission for 204*l*. 16*s*. 9*d*., and the War Damage Commission in fact paid that sum to the defendant.

In this action the plaintiff claimed the 149*l*. 16*s*. 9*d*., being the balance of the sum of 204*l*. 16*s*. 9*d*. remaining after giving credit for the 55*l*. already paid by the defendant. The defendant pleaded that the claim was excessive and he paid into court 106*l*. 11*s*. 9*d*. with a plea of tender before action brought. The plaintiff pleaded that the defendant, by his agent the surveyor, agreed with the War Damage Commission that the work was fully and efficiently completed and, by reason of that agreement, was estopped from denying that it was so completed.

The defendant took out third party proceedings against the Portman Building Society, alleging that they were responsible for the supervision of the work and so liable for the surveyor's acts and defaults and, if he failed to use reasonable care and skill, responsible to the defendant for his negligence.

At the trial, the plaintiff abandoned his plea of estoppel, and counsel for the defendant contended that therefore the plaintiff ought to pay the costs of the third party proceedings irrespective of the merits or demerits thereof. In fact, however, counsel for the defendant never "opened" the defendant's claim in the third party proceedings in any real sense, though he did address to the court observations about it, and he took no steps to prove that the surveyor had failed to use reasonable care and skill. Roxburgh, J., awarded the plaintiff 139*l*. 16*s*. 9*d*.—10*l*. less than he claimed and 33*l*. 5*s*. 0*d*. more than the defendant had paid into court.

On that, the question arose whether the plaintiff had recovered 139*l*. 16*s*. 9*d*. and whether the judgment should be so framed that it should direct that the plaintiff should be at liberty to have payment out of court, in part satisfaction of the judgment, of the 106*l*. 11*s*. 9*d*. which had been paid into court. Counsel for the defendant contended that that would be wrong and that the court ought to order that the plaintiff should recover 33*l*. 5*s*. 0*d*. and that he should, in addition, be at liberty to take out of court the sum paid into court.

C. A. Settle for the plaintiff. The proper order is that the plaintiff should be at liberty to have the 106*l*. 11*s*. 9*d*. paid out of court in part satisfaction of the judgment. The judgment was for 139*l*. 16*s*. 9*d*., and it would be quite wrong to order that the plaintiff should recover 33*l*. 5*s*. 0*d*. and should also be at liberty to take out the sum paid into court.

True, the defendant paid in that sum with a plea of tender. Strictly, however, there has been no "tender", for the sum was only part of the whole sum due, and the defendant never has been and is not now ready to perform the contract on which the action is based; in fact, he denies that it is based on any contract at all: *Dixon* v. *Clark* (1). The plaintiff, in refusing the 106*l*. 11*s*. 9*d*. took the only course that he possibly could take. His action was for 149*l*. 16*s*. 9*d*. and he obtained judgment for 139*l*. 16*s*. 9*d*.: so, had he accepted the 106*l*. 11*s*. 9*d*., he would, as it turns out, have given up 33*l*. 5*s*. 0*d*. In the circumstances, the plaintiff should have his costs.

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(1) (1848) 5 C. B. 365, 376.

Michael Hoare for the defendant. The proper order is that the plaintiff should recover 33*l*. 5*s*. 0*d*., and should be at liberty to take out the 106*l*. 11*s*. 9*d*., which latter sum he could have accepted when it was offered. The 33*l*. 5*s*. 0*d*., which is all that he has recovered above what was tendered to him, is not an amount sufficient to entitle him to his costs: *James* v. *Vane* (2). Also, he ought to pay the costs of the third party proceedings, whether those proceedings were well or ill founded. He sought, in the first place, to say that the defendant was estopped from denying that the work was fully and efficiently completed because he had agreed, by his agent the surveyor, that it was. That plea of estoppel forced the defendant to take out the third party proceedings and the plaintiff, having abandoned that plea, ought to pay the costs of those proceedings.

Settle in reply. *James* v. *Vane* (2) seems to be an authority standing by itself. It appears neither to have been cited in argument in any case, nor to have been used in any textbook. It cannot be correct in law that, because a plaintiff would not accept in full satisfaction a sum smaller than that to which he was entitled, he ought, if that smaller sum was paid into court, to have judgment only for the difference between the smaller sum and the full amount. Yet that seems to emerge from *James* v. *Vane* (2), where the court held that the plaintiff had recovered less than 20*l*. and that he was therefore not entitled to have his costs taxed on the higher scale. *James* v. *Vane* (2) should not be followed. Also the defendant should not have the costs of the third party proceedings, for his claim in them was never opened in court.

M. G. Hewins for the third party, the Portman Building Society. In any event, the third party should not have to pay any costs whatever. The defendant may plead with some justification that he was compelled to take out the third party proceedings because of the plaintiff's estoppel point; but the fact remains that the third party was brought here, and, as the event has proved, unnecessarily.

ROXBURGH, J., stated the facts and continued:—I have awarded the plaintiff 139*l*. 16*s*. 9*d*., 10*l*. less than he claims and 33*l*. 5*s*. 0*d*. more than the defendant paid into court. On that judgment, what does the plaintiff recover? But for an authority which is causing me much difficulty, I should have answered without hesitation that he recovers 139*l.* 16*s.* 9*d.*, and that the judgment should direct that he should be at liberty to take the 106*l.* 11*s.* 9*d.* paid into court out of court in part satisfaction of the judgment. Mr. Hoare, however, contended that that is incorrect, and that the court ought to order that the plaintiff should recover 33*l.* 5*s.* 0*d.*, and that he should, in addition, be at liberty to take the sum paid into court out of court.

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(2) (1860) 29 L. J. (Q. B.) 169.

Quite clearly, what took place was not a "tender" in the technical sense. In *Dixon* v. *Clark* (3) Wilde, C.J., delivering the judgment of the court, said: "The argument further involved "the general question, whether a tender of part of an entire debt, "is good: and several ancient and modern authorities bearing on "this question were referred to, but no case directly in point was "cited; nor have we been able to find any. On consideration, "however, we are of opinion, upon principle, that such a tender is "bad. . . . In actions of debt and assumpsit, the principle of the "plea of tender, in our apprehension, is, that the defendant has "been always ready (toujours prist) to perform entirely the contract on which the action is founded; and that he did perform "it, as far as he was able, by tendering the requisite money; "the plaintiff himself precluding a complete performance by "refusing to receive it. And, as, in ordinary cases, the debt is "not discharged by such tender and refusal, the plea must not "only go on to allege that the defendant is still ready (uncore "prist), but must be accompanied by a profert in curiam of the "money tendered. If the defendant can maintain this plea, "although he will not thereby bar the debt (for that would be "inconsistent with the uncore prist and profert in curiam), yet "he will answer the action, in the sense that he will recover "judgment for his costs of defence against the plaintiff,—in "which respect the plea of tender is essentially different from "that of payment of money into court. And, as the plea is thus "to constitute an answer to the action, it must, we conceive, be "deficient in none of the requisite qualities of a good plea in "bar".

In the present case, there were two defects in the plea of "tender" regarded as a technical plea. Only a part of the sum due was tendered. I have held that the sum due was 139*l.* 16*s.* 9*d.*, and the sum tendered was only 106*l.* 11*s.* 9*d.* I am not concerned with appropriation in this case. It was an entire claim, and the sum of 106*l.* 11*s.* 9*d.* was tendered in satisfaction of it. Moreover, so far from being "toujours prist" to perform entirely the contract on which the action is founded, the defendant, in his defence, did not admit it. For those reasons this plea of tender was technically bad.

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(3) 5 C. B. 365, 376.

In *James* v. *Vane* (4) it is stated that "the declaration contained counts for goods sold and delivered, work and service "done and materials provided, use and occupation of rooms and "apartments, and upon accounts stated", though how all those matters were reduced to two sums I do not know. The statement continues: "Plea, except as to 26*l*. 10*s*. 6*d*., parcel, etc., "never indebted. Secondly, as to the said sum of 26*l*. 10*s*. 6*d*., "that the defendant was always ready and willing to pay to the "plaintiff the said sum of 26*l*. 10*s*. 6*d*., parcel of the money "claimed, and that before action he tendered and offered to pay "the same to the plaintiff, but he refused to accept it, and "that the defendant now brought into court the said sum of "26*l*. 10*s*. 6*d*. ready to be paid to the plaintiff".

That would appear to be a good plea of tender, if the sum due was only 26*l*. 10*s*. 6*d*., which, of course, was the footing on which it was pleaded. It was intended to be a technical plea of tender, which would have been well founded if the court had not awarded a larger sum. The statement proceeds as follows: "Issues were taken and joined upon these pleas. At the trial, "which took place at the last Durham Assizes, it appeared that "the action was brought to recover two sums of 24*l*. 8*s*. 10*d*. "and 4*l*. 10*s*. 6*d*., and the jury found as to 26*l*. 10*s*. 6*d*., that "the defendant did tender and offer to pay the same to the "plaintiff, but he refused to accept it, and that the said sum "was not enough by 2*l*. 8*s*. 10*d*. to satisfy the claim of the "plaintiff in respect of the matter to which the within plea was "pleaded".

It would seem that the plea of tender was bad, because, as *Dixon* v. *Clark* (5) established, purported tender of a part of an entire debt cannot be good tender. Possibly the items of 24*l*. 8*s*. 10*d*. and 4*l*. 10*s*. 6*d*. were treated as separate, and, in some way, the 26*l*. was allocated or appropriated to the 24*l*. item. Certainly there is nothing to show that that was so, but I cannot see how, otherwise, the plea of tender can have been good.

The report continues: "The judge refused to certify that the "cause was a proper one to be tried before him, and, upon

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(4) 29 L. J. (Q. B.) 169.

(5) 5 C. B. 365, 376.

"taxation, the Master decided that the plaintiff was entitled to "costs upon the higher scale, and taxed them accordingly. "Subsequently, Hindmarch obtained a rule, calling upon the "plaintiff to shew cause why the Master should not review his "taxation".

In the present case, if there had been a good tender in law, the judgment should have been in the form for which Mr. Hoare contended; that is to say, if the defence of tender had been proved, the action should have been dismissed with costs, and nothing should have been recovered in it; but, of course, the plaintiff, notwithstanding that the action is dismissed with costs, should have been allowed to take out of court the sum paid into court. Likewise, had the claim been for two sums of, e.g., 100*l*. and 30*l*., and had the defence of tender been made good as to 100*l*. and the 100*l*. been brought into court, and the 30*l*. claim been resisted, but ultimately found to be good, judgment would have been for 30*l*. and not 100*l*., and the plaintiff would have been at liberty to take the 100*l*. tendered out of court, and in such a case I have no doubt that the sum recovered would be 30*l*. and not 130*l*.

On the other hand, can that be so if no good plea of tender is established? Apart from *James* v. *Vane* (6) I should have thought, plainly, not. It is said that the plaintiff might have accepted the 106*l*. Of course he might have, but only in full satisfaction of his claim; he could not take it and then go on with the action. If he could have done so, it might, of course, fairly have been said that all he would have recovered in the action was the 33*l*. 5*s*. 0*d*.; but if he was not prepared to accept the 106*l*. in full satisfaction, he could not take any of it. He had no option but to pursue his claim.

Where is the doctrine to end? For example, if, before action brought, but with proceedings threatened, a solicitor writes: "My client will pay half of your claim if you are prepared to "accept it in full satisfaction", is it to be said in the action, if the claim wholly succeeds, that the plaintiff has not recovered the whole debt, but only half of it, because he could have had the other half without any action? In my view, that reasoning is unsound.

If it were quite clear what the court decided in *James* v. *Vane* (6) I should be bound to give effect to that decision; but I must confess to considerable bewilderment. Cockburn, C.J.,

(6) 29 L. J. (Q. B.) 169.

says (7): "Upon the substantial justice of the case I have no "doubt. Where a plaintiff claims an amount which is the result "of one demand, and which cannot be separated, he may say "to the defendant when a smaller sum is tendered to him, 'I "'will not take less than the whole sum which I claim', but "where the whole demand is made up of an aggregate of items, "and the defendant comes and says, 'I acknowledge that I owe "'you so much, and there is your money for you', the plaintiff "is wrong if he refuses to take it; and quoad that amount, he "ought not to be allowed to keep the claim alive in its entirety, "for the purpose of suing the defendant upon it in the superior "court, so as to get costs upon the higher scale". That passage makes me certain that there were some facts in the case which are not elucidated in the report. The report does not suggest that the 26*l*. tendered was appropriated to any one of the two claims; it looks as though 26*l*. was paid in in answer to the claim aggregating over 28*l*., and therefore, the sum paid in, on the face of it, was insufficient. The plaintiff, in my view, was wholly entitled to pursue his action for the 28*l*. How it could be said that he was doing so only to sue the defendant in a superior court so as to get his costs on the higher scale I cannot see. There must have been some facts which do not appear in the report.

Cockburn, C.J., continues: "His claim is really for the excess "above that which he ought to have taken when it was offered to "him", but it was offered to him in full satisfaction of his demand, and he could not take it except in full satisfaction of his demand, and, ex hypothesi, he was not bound to take it, because he was entitled to demand more. There again there must be something which remains obscure owing to some omission from the report.

Cockburn, C.J., continues: "If he declines to accept that "which the defendant was always ready to deliver over to him, "and thus goes on with the action with a view of getting higher "costs, he ought to be prevented from getting them. That is "the substance of the matter". That may have been "the "substance of the matter" in *James* v. *Vane* (7). It is certainly not "the substance of the matter" in this case; for there is no doubt whatever that, while I do think that this action ought to have been brought in the county court, there is no reason whatever for suggesting that the plaintiff did not accept the

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(7) 29 L. J. (Q. B.) 169, 170.

106*l*. 11*s*. 9*d*. because he wanted costs on the higher scale; clearly, he could not accept it save on the footing of abandoning 33*l*. 5*s*. 0*d*. of his lawful claim. I am convinced that there must be a very great distinction between *James* v. *Vane* (7) and the present case.

Cockburn, C.J., continues: "That is the substance of the "matter; and then arises the question, whether the plaintiff "must be allowed to get them upon any technical ground? My "brother Piggott says, that a plea of tender is not in bar of the "action, and, therefore, that the plaintiff must be considered as "recovering the whole, because the effect of the action is, that "he gets the whole; but when the matter is looked at, it appears "not to be so. The effect is this: suppose an action is brought "for a given sum of money, and a tender is pleaded of that "amount, and the money is brought into court; if the plaintiff "does not take it, and goes on with the action, the defendant "would have judgment and costs". I entirely agree; but he continues: "and, therefore, upon technical grounds, and upon "the law of the case, the plaintiff has only recovered the excess "above the sum which was tendered to him, and that excess "which he has recovered is not sufficient to entitle him to have "his costs taxed upon the higher scale". I must confess that I cannot follow the sequence of thought involved in the word "therefore". A good plea of tender is a defence, and accordingly the action fails, and is dismissed with costs; but a bad plea of tender is no defence, and, therefore, the action succeeds —and succeeds, as far as I can see, to the full amount of the claim. Why, because when a good plea of tender is made out, the judgment takes that special form, it should follow, whenever a bad plea of tender is pleaded, that the plaintiff should recover, not the amount of his debt, but only the amount of his debt less something which was proffered under a bad plea of tender, I confess I have difficulty in seeing.

Crompton, J., is of the same opinion, and he says (8): "If a "tender had been pleaded of the whole amount claimed, he "could not be said to recover that amount by getting judgment "in the action. The effect of the plea of tender, and of its being "proved, is, that the plaintiff is deprived of costs upon the "higher scale, for he has made claim for something that he does "not recover". There again, with all respect, I cannot follow. The effect of a plea of tender, and of its being proved, is, not that the plaintiff is deprived of costs on the higher scale, but that his action is dismissed with costs. That is quite clear, and is so stated by Cockburn, C.J.

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(7) 29 L. J. (Q. B.) 169.

(8) Ibid. 171.

Then Crompton, J., says: "If he would recover nothing if "the whole had been tendered to him, the same rule applies "here, and shows that he only recovers that amount which is in "excess of the sum tendered". I cannot help thinking that, where Crompton, J., uses the word "tendered", he means tendered in a technical sense, and that he has somehow overlooked the fact that there was no tender in the technical sense in *James* v. *Vane* (9) or, possibly, the truth is that there was a technical tender for some reason which the report does not disclose, in which case, of course, the reasoning is very easy to follow.

In refusing to apply *James* v. *Vane* (9), which, so far as I know, has never since been discussed, I am taking a liberty, but I do feel justified in doing so, for the reasons which I have stated, and because I feel certain that there must be in that case circumstances differentiating it from the present case. I cannot believe that the law is that when anybody brings money into court, or even offers money out of court, judgment ought to be given only for the difference between the sum claimed and the sum offered merely because the plaintiff, had he been content so to do, could have taken the sum offered in full satisfaction without any proceedings.

I hold, therefore, that the plaintiff has recovered, or will recover in this action, 139*l*. 16*s*. 9*d*., and that he is to be at liberty to take out of court, in part satisfaction of this judgment, the 106*l*. 11*s*. 9*d*. paid into court.

This form of order which I have deliberately made for the reasons which I have given, of itself shows that the plaintiff has recovered more than 100*l*. Ought I to deprive him of any costs? In my view, s. 47 of the County Courts Act, 1934, is intended to supply a code in this matter, and although, no doubt, the discretion of the court over costs is very wide, in a matter which is wholly within s. 47, it would, in my view, be unwise to depart from that code. Had there been no such code, and had I thought that my discretion was wholly at large, I should have awarded the plaintiff only such costs as he would have had if he had brought this action in the county court; but having regard to the code, and to the circumstances that he has recovered over 100*l*. and that his conduct is open to no criticism save that he has

(9) 29 L. J. (Q. B.) 169.

brought this action in the High Court, I do not think that I ought to treat my discretion as wholly at large, and accordingly I award the plaintiff his costs of the action.

I come now to the third party proceedings. As, at the trial, the plaintiff abandoned his plea of estoppel, Mr. Hoare, for the defendant, contended that the plaintiff ought to pay the costs of the third party proceedings without regard to their merits or demerits. I must confess that I cannot follow that reasoning. If Mr. Hoare had opened the third party proceedings, and had proved some negligence on the part of the surveyor, and proved also that the Portman Building Society were responsible for his negligence, that might well have been so; but, in fact, Mr. Hoare never " opened ", in any real sense, the claim in the third party proceedings, although he did address a few observations to me about it, and he took no steps to prove that the surveyor had failed to use reasonable care and skill. I was most careful not to hold the surveyor guilty of any negligence in my judgment. I knew at the time that that was the issue in the third party proceedings which I was going to hear later, and I knew also that it was quite irrelevant for the purposes of the action in which I was delivering judgment. I had, however, for the purposes of the action, to make certain aspersions on the surveyor's conduct with regard to several matters, and I undoubtedly did so. I do not in any way wish to withdraw any one of them; but the fact that somebody has done one thing that he ought not to have done, or has failed to do one thing which he ought to have done, is no evidence that he did or did not do something else. What happened on the survey was this. The surveyor did not personally survey the work, but sent a clerk in his employment to do so, and there is no evidence that the clerk was lacking in competency: and there was also the War Damage Commission's valuer. After hearing a good deal of evidence, I thought that 10*l.* should be taken off the bill of 204*l.* I think that Mr. Hoare was really asking too much in asking me to hold that the mere fact that the court, after hearing a good deal of evidence, came to the conclusion that the claim was excessive by that small percentage, would be enough to establish negligence without any further evidence, and without giving the surveyor any opportunity of dealing with the issue.

I do not wish for one moment to withdraw my decision to take off 10*l.*; but I am fully alive to the fact that some other judge might have awarded the plaintiff the whole of his 149*l.*, and I am quite aware that a third judge might have deducted

20*l*. There is no absolute certainty about such matters, and a 5 per cent. margin is negligible, in my judgment, in an action of this kind. Accordingly, I feel bound to dismiss the third party proceedings as abandoned proceedings, because it was always open to Mr. Hoare to seek to prove the surveyor's negligence; but he (very properly, in the circumstances) did not wish to carry the matter any further. Accordingly, the third party proceedings are dismissed with costs.

Judgment for plaintiff.

Solicitors: *Tarry, Sherlock & King; Warmingtons; Hewlett & Co.*

K. R. A. H.

HARMAN, J.
1950
Dec. 15.

In re ROGERS' SETTLEMENT. ARNOTT AND ANOTHER *v.* ROGERS AND ANOTHER.

Settlement — After-acquired property clause — Property caught by — Covenantor acquiring property (1) *previously in the settlement,* (2) *extraneous to the settlement.*

By a pre-nuptial settlement the intended husband settled a fund on the usual trusts to pay the income to the husband for his life and after his death to the intended wife if she survived him for life, and after the death of the survivor to pay the capital to such issue of the marriage as the husband should appoint or in default of appointment among the children equally. The intended wife covenanted to bring into the settlement property above a certain value subsequently acquired by her.

There were two children of the marriage, a daughter who attained twenty-one but died intestate and a spinster, and a son. The husband by a revocable appointment made after the daughter's death appointed that after the death of the husband and the wife, but subject to their life interests, the fund and its income should be held in trust for the son absolutely. In the lifetime of both his parents the son died an infant and intestate. Later the husband died without having revoked the appointment, leaving the wife surviving him. On the question whether the wife's interest in the moiety of the son's appointed fund was caught by her covenant to settle after-acquired property:—

Held, that such a covenant operates only on property which has never been the subject-matter of the settlement, and that therefore

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

property which was already in the settlement and on which the settlement operated was not caught by the covenant.

Observations of Lord Macnaghten in *Mackenzie* v. *Allardes* [1905] A. C. 285, 292 applied.

By his will (which was recited in the settlement) the father of the intended wife settled a fund upon trust for her for life and after her death in trust for all or any of her issue as she should by deed or will appoint, with a proviso enabling her to appoint a life or less interest in favour of a surviving husband. She appointed a life interest in favour of the husband, and after the death of the daughter of the marriage appointed the fund, subject to the life interests of herself and the husband, in trust for the son absolutely. On the question whether her interest in the moiety of that fund was caught by her covenant to settle after-acquired property:—

Held, that, as the fund had never been the subject-matter of the settlement, it was so caught.

In re Benett-Stanford Settlement Trusts [1947] L. J. R. 1073 distinguished.

ADJOURNED SUMMONS.

By a settlement dated August 11, 1902, made on the intended marriage of the daughter of Sir John Arnott with A. E. Rogers, and made between the future husband of the first part, the future wife of the second part, and the trustees of the third part, a fund (the "husband's fund") was settled upon trust for the husband for life and after his death for the wife for life, and after the death of the survivor of them for such issue of the intended marriage as the husband should by deed or will appoint; and, in default of appointment, in trust for the children of the intended marriage who, being sons or a son, attained the age of twenty-one years or, being daughters or a daughter, attained that age or married, and if more than one in equal shares.

By cl. 17 of the settlement, the wife covenanted with the trustees "that if at any time during the same coverture she shall "become entitled in any manner and for any estate or interest "to any real or personal property of the value of 500*l.* or "upwards at one time and from one and the same source (. . . "except personal chattels . . .) then she and all other necessary "parties will at the cost of the trust estate as soon as may be "and to the satisfaction of the trustees convey such real or "personal property to the trustees upon trust to stand seised or "possessed of the same as personal property on trusts precisely "similar to those declared concerning the said legacy and share "of the residue in the said recited will of the said Sir John "Arnott deceased".

The intended marriage was duly solemnized on August 12, 1902. There were two children of the marriage, a son and a daughter.

In 1927, the daughter died intestate and a spinster, having attained the age of twenty-one years. By a revocable appointment dated March 14, 1927 (made after the death of the daughter), the husband appointed that after the death of himself and his wife, and in the meantime subject to their respective life interests, the husband's fund and its income should be held in trust for the son absolutely. In 1934 the son died an infant and intestate. On January 1, 1950, the husband died without having revoked the appointment.

By his will (which was recited in the settlement of 1902) Sir John Arnott settled a fund upon trust for the wife for life and after her death in trust for all or any of her issue as she should by deed or will appoint, and in default of appointment in trust for all or any of the child or children of the wife who, being sons or a son, attained the age of twenty-one years, or, being daughters or a daughter, attained that age or married, and if more than one in equal shares, with a proviso enabling the wife to appoint a life or less interest in favour of a surviving husband.

The wife appointed a life interest in favour of her husband and by an appointment dated August 8, 1928 (after the death of the daughter), appointed that the fund, subject to the respective life interests of herself and her husband, should be held in trust for the son absolutely.

A summons was taken out by the trustees of the settlement to have determined whether in the events which had happened, as above recited, the property devolving upon the wife by reason of the deaths intestate of her son and daughter was subject, and if so, to what extent to the provisions of cl. 17 of the settlement.

F. B. Marsh for the trustees of the settlement.

J. A. Brightman for the first defendant, the wife. On the death intestate of her son, the wife became absolutely entitled to a moiety of his estate. The son's estate contained (i) an absolute reversion (in the events which happened) to the husband's fund expectant on the deaths of his parents, the husband and wife, and (ii) a reversion to the legacy and share of residue under Sir John Arnott's will, expectant (in the events which happened) on the death of the wife and subject to her power of revocation. For the purposes of this part of the argument, it will be assumed that these reversions stand on the same footing and that the wife's moiety of each is caught by the after-acquired property clause. The effect of an after-acquired property clause is to engraft trusts on property which would otherwise be taken by the covenantor absolutely. The trusts engrafted on the moieties of the son's reversions in the present case are, a life interest to the wife, and a reversion to the son, being the only subsisting trusts of the settlement. The life interest in favour of the wife can take effect, but the reversion to the son must fail, because a person cannot become entitled to property under his own will, or, it is submitted, on his own intestacy: see per Joyce, J., in *In re Currie's Settlement* (1). The effect of subjecting the wife's moieties of the son's reversionary interests to the after-acquired property clause, is to engraft one trust only on them, namely, the life interest of the wife. Save as to her life interest, the engrafted trusts fail. If property is given absolutely in the first instance, and trusts are engrafted which fail, the absolute interest takes effect so far as the trusts have failed: *Hancock* v. *Watson* (2). The result is that the wife takes her moieties of the two reversions contained in the son's estate absolutely: she takes a life interest by virtue of the trust engrafted by the after-acquired property clause, and the reversion expectant on her own death by the effect of the rule in *Hancock* v. *Watson* (2). The present case is exactly within the principle enunciated in *In re Benett-Stanford Settlement Trusts* (3), that if the effect of applying an after-acquired property clause to an interest given by a testator to the covenantor is to bring some residual interest back to the testator's estate, the principle of *Lassence* v. *Tierney* (4) applies, because there is then an absolute gift with a trust engrafted on it which does not exhaust the whole beneficial interest, with the result that the absolute gift remains.

If the above contention be wrong, then *Mackenzie* v. *Allardes* (5) is relied on, and it is contended that the wife's moiety of the son's reversion to the husband's fund is not caught by the after-acquired property clause, since the clause does not apply to an interest, arising under the settlement, in property already comprised in the settlement. As regards the wife's moiety of the son's reversion to the legacy and share of residue under Sir John Arnott's will, it must be conceded, if the first argument be wrong, that this moiety passes through the after-acquired property clause once and then the moiety falls back into the son's estate, but it is contended that it does not so pass a second time. The result is that the wife takes a quarter of this reversion absolutely.

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(1) [1910] 1 Ch. 329, 334.
(2) [1902] A. C. 14.
(3) [1947] L. J. R. 1073.
(4) (1849) 1 Mac. & G. 551.
(5) [1905] A. C. 285.

S. W. Templeman for the executors of the will of the husband. It is conceded that the after-acquired property clause catches a vested interest in remainder acquired during coverture whether or not the interest falls into possession during coverture. As a result of the appointment to the son and his death intestate the wife is entitled to one half of his estate including his interest in remainder in the husband's fund, and this interest is caught by the after-acquired property clause. Having once been caught, it devolves upon the trusts declared by Sir John Arnott's will. Under those trusts and by virtue of the death of her daughter unmarried and intestate having attained the age of twenty-one years, the wife became entitled to a vested interest in remainder in one half of the interest so caught, namely, in one quarter of the husband's fund. This interest is again caught by the after-acquired property clause and so on ad infinitum until the interest of the wife is reduced to the value of 500*l.* excepted by cl. 17 of the settlement. The same process takes place in relation to the legacy and share of residue settled by the will of Sir John Arnott. There is no point at which the process can logically be halted. That unexpected result is due to the fact that the daughter died intestate having attained the age of twenty-one years; but unexpected results not infrequently arise from the application of an after-acquired property clause. If the argument for the wife is accepted, an equally unexpected result will arise in that the wife will become absolutely entitled to one half of the husband's fund.

In re Benett-Stanford Settlement Trusts (6) does not apply; in that case no matter how often the property became subject to the after-acquired property clause it devolved upon the estate of the son and thence to the mother absolutely. In the present case there is an effective disposition in that, whenever the after-acquired property clause applies, one half of the interest caught by the clause devolves on the husband; and this process can continue until the interest is exhausted.

HARMAN, J. This is a case where in the upshot an absurd result has been produced. [His Lordship stated the facts and continued:] When the son died in 1934 his interest in half the fund went to the husband, as to which no question arises, and the

(6) [1947] L. J. R. 1073.

other half went to his mother, the wife. She became entitled to that interest in 1934, it being then a vested interest in remainder expectant on her husband's death. It is said, however, that the wife was bound by reason of the covenant contained in cl. 17 of the settlement to convey to the trustees the moiety of the son's reversionary interest in the fund which came to her. In my judgment, however, the after-acquired property clause in the settlement [cl. 17] was never intended to catch property which was already in the settlement and on which the settlement operated. It would be ridiculous if property already in the settlement should come into the settlement again and go on the limitations of the settlement, and so on, in an everlasting succession. I cannot think that that is what the after-acquired property clause was intended to do. Although the wife acquired this property after the date of the settlement on her son's death in 1934, this was the very property in which, under the settlement itself, she had a life interest already, and it is ridiculous to suppose that she would have to re-settle in order to give herself another life interest in the same property. Accordingly, in my judgment, this property is not within the operation of the after-acquired property clause.

I find some support for this view in Lord Macnaghten's speech in *Mackenzie* v. *Allardes* (7). That case was concerned with Scottish law. Lord Macnaghten made these general observations (8): "As regards clauses in marriage contracts providing "for the settlement of after-acquired property, I quite agree that "effect must be given to the intention of the parties apparent on "the face of the contract construed fairly, although the result "may seem to be whimsical or even unreasonable. But still "there are some considerations which it is as well to bear in "mind as aids to the construction of such clauses. These "considerations may, of course, be excluded either designedly or "accidentally by the language used, but unless they are so "excluded they are, I think, of general, if not universal, applica-"tion. One is that change of investment—mere alteration in "the outward form of property—is not 'acquisition' within the "meaning of a provision of this sort. Another is that property "which has reached its destination through the medium of the "trust, or property which, in accordance with the declarations "of the parties to the contract, comes to be at the absolute "disposal of one of the parties, does not again fall under the

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(7) [1905] A. C. 285.

(8) Ibid. 292.

HARMAN, J.

1950

ROGERS' SETTLEMENT, *In re.* ARNOTT *v.* ROGERS.

"operation of the trust unless there is a clear direction to that "effect. In the present case I cannot find in the marriage con-"tract of 1848 any indication that money, which under or in "accordance with the trust would come to the hands of Mrs. "Dunbar—money which was to be hers to hoard or spend, to "waste or save, just as she pleased—was under any circum-"stances or in any event to be brought back under the operation "of the trust and pass through the mill again. Such a result "seems inconsistent with provisions carefully made to safeguard "her separate use and enjoyment of the income which was "originally her own. It is, I think, opposed to the whole scope "of the instrument". Of course, the facts there were very different, for in that case the subject-matter was an accumulated fund which represented the savings of a lifetime out of income. But Lord Macnaghten said that after-acquired property clauses of this kind are not meant to catch the property settled by the settlement. I therefore hold that, so far as the husband's fund is concerned, it is not caught by the after-acquired property clause.

The wife here was the daughter of Sir John Arnott, who made a will in her favour. By that will he bequeathed to her a legacy and a share of his residue absolutely, with a proviso settling both on trust to pay the income to her for life, and after her death in trust for her issue as she should appoint and in default of appointment in trust for her children who attained the age of twenty-one years or married. There was a power for her to give a life interest to her husband. The wife enjoyed the first interest, and she exercised the power to appoint a life interest to her husband, which never came into effect because he predeceased her. When her daughter died she made a revocable appointment, shortly after her husband had appointed his fund, directing the trustees of the will of Sir John Arnott, after the death of herself and subject to her husband's interest, to stand possessed of the legacy and the residuary share in Sir John's estate in trust for the son absolutely. This fund too, on the son's death intestate, goes half to his mother, the wife, and half to the husband; and clearly the husband keeps the half that goes to him. It is contended in this case also that the wife's half is caught by the after-acquired property clause in the settlement.

The argument, however, which has been advanced with respect to the husband's fund does not apply here, because this property has never been the subject-matter of the settlement: it is property coming from outside the settlement to the wife, being property which was settled upon the trusts declared by Sir John's will. On the son's death intestate half the fund reverts to the wife, but, if caught by the after-acquired property clause, goes back again to the son, and so on ad infinitum. This seems a ridiculous result.

To obviate this consequence I have been urged to follow a decision of Jenkins, J., in *In re Benett-Stanford Settlement Trusts* (9). There there was a marriage settlement with remainder to the children of the marriage and an after-acquired property clause entered into on the part of the wife. There was only one child—a son—who attained a vested interest. He died a bachelor and left a will leaving everything he possessed to his mother. He was entitled under another settlement, at his death, to an absolute interest in the remainder of the settled property, and this interest, it was said, devolved on terms such as to be subject to the after-acquired property clause. Jenkins, J., held that there could not be a perpetual passing of the property between mother and son. The question raised in that case could be put as follows: should the property be left in the son's estate by reason of some modification of the trusts of the settlement so as to bring in an ultimate trust as to which he was to be a beneficiary; or should it go to the mother on the footing that the after-acquired property clause had to be disregarded in the circumstances?

It was also argued in that case that there was an intestacy as to the son's estate in that his testamentary dispositions were ineffective since they brought back the property to himself. On that point Jenkins, J., said (10): " . . . there was an effective " disposition of the whole of the son's interest in favour of his " mother absolutely. If, therefore, the effect of applying to the " absolute interest so given the trusts engrafted on it by the after- " acquired property clause was to bring some residual interest " back to the son's estate, that would be a case in which, in my " judgment, the principles of *Lassence* v. *Tierney* (11) would " apply; that is to say, there would be an absolute gift with a " trust engrafted on it which did not exhaust the whole beneficial " interest, with the result that the original absolute gift would " remain ". That is saying, as I understand it, that the son's will must be combined with the mother's covenant, and the combined effect of the two would be to bring back to the son that which he had left to the mother. It was said that a will should not be so construed as to make out any gift to the testator himself, and, therefore, the engrafted trust was to be disregarded and the gift to the mother to be left standing.

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(9) [1947] L. J. R. 1073.

(10) Ibid. 1077.

(11) (1849) 1 Mac. & G. 551.

I do not think that I can take that view in the present case. Here the son has left no will and I do not think that that dilemma arises. The result is that the fund goes from the son to the mother, never having been in the settlement before, and is subject to her after-acquired property clause. I would gladly follow Jenkins, J.'s decision if I thought it applicable to the present case, but I do not think that it is.

It follows from the first part of my decision that the after-acquired property clause only operates once: the interest having once been brought by it into settlement, its effect is exhausted and the absurdity to which I have referred is to that extent mitigated.

Declaration accordingly.

Solicitors: *Carleton-Holmes & Co.*

ROX-BURGH, J.
1951
Jan. 23.

In re GINGER, DECD.

WOOD ROBERTS AND ANOTHER *v.* WESTMINSTER HOSPITAL BOARD OF GOVERNORS AND OTHERS.

[1949 G. 1982.]

Will—Direction to trustees "to found a cot in the Westminster "Hospital . . . and to use for this purpose the sum of 1,000*l. free of "duty"—Validity.*

A testatrix by her will made in 1940 provided: "I direct my "trustees to found a cot in the Westminster Hospital now at West-"minster, S.W.1, in memory of my uncle [naming him] . . . and "to use for this purpose the sum of 1,000*l.* free of duty".

At the date of the will the hospital had a scheme for endowing beds and cots, which provided: " . . . Perpetual endowment, bed, "1,000*l.*, cot, 600*l.* Endowment during life of donor, bed, 400*l.*, cot, "250*l.* Support by annual donation, bed, 50*l.*, cot, 30*l.* Subject "to the general rules and regulations of the hospital, persons "endowing or supporting beds and cots as above will enjoy the "privilege of naming such beds and cots, and also of nominating "patients to occupy them . . .". In November, 1948, the testatrix died.

In July, 1948, the National Health Service Act, 1946, came into operation, and the Westminster Hospital was designated as a teaching hospital and, at the date of this summons, comprised a group of hospitals. The old Westminster Hospital was still carrying on the work of a hospital at St. John's Gardens, Westminster, and the continuity of the hospital work was beyond dispute. The hospital could allocate one of its existing cots to the testatrix's bequest and could affix near to the cot an inscription commemorating her uncle: but it could not allow her trustees to nominate patients.

By this summons her executors asked whether the gift ought to be paid to the Board of Governors of the hospital, or was a valid charitable bequest which ought to be administered by a scheme cy-près, or lapsed.

Held, (1.) that the right to nominate patients was not a condition of the bequest, which, accordingly, was not invalidated by the fact that her trustees could not nominate; (2.) that the bequest was payable to the Board of Governors of the hospital, they undertaking to name in perpetuity a cot in memory of the uncle in the Westminster Hospital, St. John's Gardens, or such other building to which the hospital might be removed, and further undertaking to invest the sum in investments for the time being authorized by law and to apply the income for purposes of hospital services rendered by the Westminster Hospital in St. John's Gardens or in such other building as aforesaid.

Attorney-General v. *Belgrave Hospital* [1910] 1 Ch. 73 applied.

ADJOURNED SUMMONS.

A testatrix by her will dated May 30, 1940, provided in cl. 7: "I direct my trustees to found a cot in the Westminster "Hospital now at Westminster, S.W.1, in memory of my uncle "[naming him] . . . and to use for this purpose the sum of "1,000*l.* free of duty".

At the date of the will the hospital had a scheme for endowing beds and cots. The scheme, set out in its report for the year ending December 31, 1939, was: ". . . Perpetual endowment, "bed, 1,000*l.*, cot, 600*l.* Endowment during life of donor, "bed, 400*l.*, cot, 250*l.* Support by annual donation, bed, 50*l.*, "cot, 30*l.* Subject to the general rules and regulations of the "hospital, persons endowing or supporting beds and cots as "above will enjoy the privilege of naming such beds and cots, "and also of nominating patients to occupy them, it being always "understood that the medical officers of the hospital shall decide "whether any patient so recommended is a fit and proper person "to be admitted, in accordance with the laws of the hospital".

On July 5, 1948, the National Health Service Act, 1946, came into operation, and the Westminster Hospital was designated as a teaching hospital. On November 23, 1948, the testatrix died.

By this summons her executors asked whether the gift bequeathed by cl. 7 of the will ought to be paid to the Board of Governors of the hospital, or was a valid charitable bequest which ought to be administered by a scheme cy-près, or lapsed.

G. C. D. S. Dunbar for the executors.

J. L. Arnold for the Board of Governors of the hospital. The proper course is to direct that the bequest be paid to the Board of Governors of the hospital. They will undertake to invest it in securities for the time being authorized by law and to apply the income in defraying, as far as possible, any expenses which are exclusively referable to the cot named in the commemoration of the uncle and, in so far as there may be no such expenses to be defrayed, to apply it to the general purposes of the hospital. This undertaking will be given in reliance on s. 59 of the National Health Service Act, 1946 (1), and will bring the hospital's case strictly into line with the decision in *Attorney-General* v. *Belgrave Hospital* (2).

N. S. S. Warren for the residuary legatee. The gift fails. The will provides that the trustees shall found a cot. True, Swinfen Eady, J., in *Attorney-General* v. *Belgrave Hospital* (3) held that " founding " a bed did not necessarily involve establishing a new bed, and that it would be sufficient for an already existing bed to be appropriated for the purpose of the " founding ": but the coming into operation of the National Health Service Act, 1946, has made both that and the nominating of patients impracticable. On the true construction of the testatrix's will, a new cot would have to be " founded ", i.e., another cot would have to be added to the cots already in the hospital and, in view of the express wording of the scheme, it would have to follow that her trustees, she being the " founder ", would have the right to nominate patients, which the hospital cannot allow them to do. In view of the National Health Service Act, it is quite impracticable that the bequest should be applied as the testatrix intended: and, accordingly, the fund should go to the residuary legatee.

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(1) National Health Service Act, 1946, s. 59, sub-s. 1: ". . . the " Board of Governors of any teach- " ing hospital . . . shall have power to " accept, hold and administer any " property upon trust for purposes " relating to hospital services . . .".

(2) [1910] 1 Ch. 73.

(3) Ibid. 77.

Denys Buckley for the Attorney-General. The Attorney-General adopts the argument of the Board of Governors of the hospital in support of the contention that the gift is a valid charitable bequest. On the true construction of the will, what the testatrix has really done is to give some money to the hospital and couple with the gift the name of her uncle. It is, of course, possible to contend that that is to " found " a bed, or, in this case, a cot, and that it follows from that that the number of cots in the hospital must be increased by one: but it is an unsound contention, for Swinfen Eady, J., made it clear in *Attorney-General* v. *Belgrave Hospital* (4) that there is no distinction between " endowing " and " founding " a bed.

Also, the scheme, and any right which it gives to the testatrix's trustees representing her, as " founder " of a cot, to nominate patients, can be disregarded. Impracticable such nomination may be, in view of the National Health Service Act, 1946. It must be remembered, however, that the testatrix may have known nothing of the scheme when she made her will: and, even if she did know of it, she had no reason to assume that it would still be on foot at her death. Thus, the question of nomination, practicable or not, does not arise. Gifts can still be given to hospitals in spite of the coming into operation of the National Health Service Act, 1946, and regardless of any scheme: *In re Frere, decd.* (5). The gift in the present case has been quite properly given to the hospital and should be upheld.

ROXBURGH, J. The scheme is somewhat nebulous, not suggesting what should happen if, for example, two persons each give 500*l.* to name a bed. Are they to nominate in rotation, or jointly, or how is the scheme to work? Again, what is to happen if the bed or cot is endowed by will? Have the testator's executors the right to nominate patients? On that, too, the scheme is silent, as, also, on what is to happen when a bed or cot is endowed by an innumerable number of small donors.

I do not think that the testatrix must (as Mr. Warren, for the residuary legatee, contended) be deemed to have been accepting, by implication, the terms of the scheme by her will. If she was treating herself as founding a bed and was attaching importance to rights to nominate, she would clearly have asked

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(4) [1910] 1 Ch. 73, 76.

(5) Ante, 27.

ROXBURGH, J.

1951

GINGER, DECD., *In re.* WOOD ROBERTS *v.* WESTMINSTER HOSPITAL BOARD OF GOVERNORS.

what rights to nominate were vested in deceased persons: but if, as Mr. Warren, for the residuary legatee, suggested, she is treating her trustees as founding the bed by her direction, she had no reason to assume that the scheme in operation in 1939 would still be so, wholly unmodified, at her death. What she must really have had in mind was, first, to give a charitable legacy to the hospital, and, secondly, to commemorate her uncle.

Since her will, but before her death, the National Health Service Act, 1946, came into operation and the Westminster Hospital was designated a teaching hospital. It now comprises a group of hospitals. On that point the case is covered by *In re Morgan's Will Trusts* (6). What may be called, for simplicity, the old Westminster Hospital is still carrying on the work of a hospital at St. John's Gardens. The continuity of the hospital work is beyond dispute: but that is by no means the end of the case.

The hospital can allocate one of its existing beds to this bequest and affix near by an inscription commemorating the uncle: but it cannot allow the trustees to nominate patients.

Mr. Warren, for the residuary legatee, contends that the bequest is therefore impracticable, saying, first, that " found " means " establish as a new thing " (and indeed, but for authority, there would be a good deal to be said for that construction of the word " found "), secondly, that the right to nominate is an essential condition of the bequest, and, thirdly, that the bequest cannot be allocated to any particular bed. All those points save one are answered by *Attorney-General* v. *Belgrave Hospital* (7), the unanswered one being the suggestion that the right to nominate is a condition of the bequest. There is nothing to lead me so to hold—not a word about nomination of patients in the bequest. I hold, accordingly, that the question of nomination is not involved in it.

In *Attorney-General* v. *Belgrave Hospital* (7) Alfred John Randall gave " to the Belgrave Hospital for children . . . to " found a bed there to be called the ' Eleanor bed ' the sum of " 1,000*l*. . . .". It was decided that only the income of the legacy could be applied for current purposes, but Swinfen Eady, J., said many things which throw light on the question before me. First it is stated in the summary of the facts: " There was " evidence that the annual cost of maintaining a bed or cot in a " London hospital was about 75*l*., much more than the income of

(6) [1950] Ch. 637.

(7) [1910] 1 Ch. 73.

"1,000*l.* invested in trust investments". No doubt that means that a rough estimate was made of the total cost of maintaining a London hospital—though I should have thought that they would vary according to the size of the hospital—and the total cost must have been divided by the number of beds: and that is how the figure of 75*l.* per bed must have been obtained. Clearly, nobody calculated the actual cost of maintaining any particular bed in any particular hospital; indeed, I am quite sure that no such calculation could have been made.

Swinfen Eady, J., said (8): "Dealing with the language of "the will . . . it is quite obvious that the intention of the testator "was to establish something. He says 'to found a bed', which "involves the idea of establishing it; and it is established by "providing a capital sum, the revenue from which may maintain "it or be applied to its maintenance. The suggestion is that "the language of the will would be satisfied if some bed already "existing in the hospital is called the 'Eleanor bed', and that "when that is once done the fund may be applied as part of the "annual income of the charity and expended in the year in "which it is paid over, if necessary, and dealt with as annual "income. In my opinion the idea involved in founding a bed "negatives any such dealing with the fund".

Then he says that many different phrases are used involving the same idea, and continues: "Whether the words are 'to "'found a bed', or 'to establish a bed', or 'to endow in "'perpetuity a bed', or other similar or analogous expressions, "the result is the same, namely, that the fund is to be used for "the purpose of investment, so that by the income thereof, "from time to time, so far as it will extend, the needs of the bed "or cot may be satisfied".

In my judgment, he cannot really mean "the needs of the "particular bed or cot", for no hospital could keep a separate account in respect of each of its beds and apportion the general costs of the hospital between the respective beds. He must mean that the fund is to be invested so that the income may be applied for the maintenance of the hospital with its beds in it; and the statement that the income will maintain a bed is really merely an indication of the extent to which the income in question will maintain the hospital. If, for example, a hospital has 100 beds and certain income is said to maintain a bed, that really means

(8) [1910] 1 Ch. 73, 75, 76.

that that income is approximately a one-hundredth part of the whole expenditure of the hospital.

Swinfen Eady, J., continues (9): "I determine that, according to the true construction of the will, the 1,000*l.* cannot be properly applied as annual income of the charity, but should be invested and the income applied, so far as it will extend, in the maintenance of a bed to be called the 'Eleanor bed'. It was suggested that that must necessarily involve establishing some new bed, but I see no reason for that. It will be sufficient for some bed already existing in the hospital to be appropriated for this purpose, and the bed named the 'Eleanor bed', as I gather has been done. The fund must be invested, and the income will be applied towards the maintenance of the bed".

As, in my judgment, that means towards the maintenance, not of the particular bed, but of the hospital to the extent of one bed in it, I think that that case answers both of Mr. Warren's remaining points.

The passing of the National Health Service Act, 1946, does not, in my view, much affect the present case. Apart from the right to nominate, the position is much the same as formerly, save that the hospital is entitled to very substantial contributions from the State for its maintenance. In my view, the hospital can quite easily give an undertaking bringing the case precisely into line with *Attorney-General* v. *Belgrave Hospital* (10). Mr. Arnold has said that it is willing to give the undertaking, the proposed form of which has the Attorney-General's approval.

I shall accordingly direct payment of 1,000*l.* to the Board of Governors of the hospital on their undertaking to name in perpetuity a cot in memory of the uncle in the Westminster Hospital, St. John's Gardens, or such other building to which the hospital may be removed, and on their further undertaking to invest the sum in investments for the time being authorized by law, and to apply the income for the purposes of hospital services rendered by the Westminster Hospital in St. John's Gardens or in such other building as aforesaid.

Judgment accordingly.

Solicitors: *Oldman, Cornwall & Wood Roberts; Trollope & Winckworth; Blyth, Dutton, Wright & Bennett, for Menneer, Idle & Brackett, St. Leonard's-on-Sea; Treasury Solicitor.*

K. R. A. H.

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(9) [1910] 1 Ch. 73, 77.

(10) [1910] 1 Ch. 73.

YATES (INSPECTOR OF TAXES) *v.* STARKEY.

C. A.

1951
Feb. 16, 19;
Mar. 5.

Evershed, M.R., Jenkins and Hodson, L.JJ.

Applied. BARKER *v.* BARKER [1952] P. 184

Revenue—Income tax—Allowances—Divorce Court order for children's maintenance—"Annual sum . . . less tax, in trust for . . . the . . . "children"—Validity—Construction—Whether a "settlement"—Taxpayer a "settlor"—Right to claim allowances—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-ss.* 1 *and* 3—*Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 4.

A decree of divorce was made against a taxpayer on the petition of his wife, who was awarded the custody of the three children of the marriage. By an order of the Probate, Divorce and Admiralty Division of July 16, 1946, the taxpayer was ordered to pay to his former wife as from December 10, 1945—the date of the decree absolute— "an annual sum of 100*l.* less tax, in trust for each of the "three children . . . the respondent to claim allowances . . .". The wife, as guardian of the children, preferred repayment claims on their behalf, on the basis that the annual sums were income of the respective children. The claims were allowed by the revenue authorities. The taxpayer claimed that he was entitled to the benefit of the allowances in respect of the children. He contended that the court had no power under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937) to create a trust, and that, no trust being therefore created, the children had no income of their own and he was entitled to claim the allowances under s. 21 of the Finance Act, 1920 (as amended). Alternatively, if a trust were created, the income should by virtue of s. 21 of the Finance Act, 1936, be treated as the income of the taxpayer. Vaisey, J., decided first that the order was within the competence of the court, and, secondly, that it created a settlement within s. 21 of the Act of 1936. On appeal, the taxpayer conceded that, whether the court was competent to make the order of July 16, 1946, or not, since it was an order which was made and never appealed from, it was binding on the parties for the purpose of these proceedings.

Held, first, that on its true construction the order of July 16, 1946, created a trust in favour of each child of the taxpayer of the yearly sum payable on his or her account; secondly, that the order must be taken to have created a "settlement" for the purposes of s. 21 of the Finance Act, 1936, by virtue of the inclusion by sub-s. 9 (*b*) of that section in the definition of "settlement" of "any . . . trust"; and, thirdly, that the taxpayer was a "person "who has provided . . . funds . . . for the purpose of" such settlement in the shape of the annual sums of 100*l.* paid by him under the order and he was accordingly a "settlor" within the definition of "settlor" in sub-s. 9 (*c*) of s. 21. It followed that s. 21 of the Finance Act, 1936, applied to the payments made under the order of July 16, 1946.

Hood-Barrs v. *Inland Revenue Commissioners* (1946) 176 L. T. 283, applied.

Per Hodson, L.J. (Evershed, M.R., and Jenkins, L.J., expressing no concluded opinion on the matter). An order in the form of the order of July 16, 1946, was not within the intendment of sub-s. 3 of s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, since it could not properly be described as an order "securing" a gross or annual sum of money for the benefit of the children. An order to pay maintenance was properly made under sub-s. 1 of s. 193, and the mere addition to the order of the words "in trust" did not convert it into an order to secure under sub-s. 3. Accordingly, there was no jurisdiction to make such an order.

Observations of Clauson, L.J., in *Stevens* v. *Tirard* [1940] 1 K. B. 204, 213, approved.

Decision of Vaisey, J. (ante, p. 45), affirmed.

APPEAL from Vaisey, J. (1).

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Kent Division held at Dartford county court on March 16, 1949, Dennis William Frederick Starkey appealed against his coding for income-tax purposes, as determined by the inspector of taxes under Pt. II of the Income Tax (Employment) Regulations, 1944 (St. R. & O., 1944, No. 251), as amended, for the years ending respectively April 5, 1947, April 5, 1948, and April 5, 1949.

The taxpayer objected that further allowances were due to him in respect of his three children. He was the respondent in divorce proceedings brought by his wife, who was granted a decree of divorce, which was made absolute on December 10, 1945, and the custody of the children of the marriage. By an order of the Probate, Divorce and Admiralty Division made on July 16, 1946, he was ordered to pay or cause to be paid to his former wife, "as an interim provision until further order, as "from December 10, 1945, an annual sum of 100*l*. less tax, in "trust for each of the three children . . . the respondent to claim "child allowances . . .".

The sums specified in the order were duly paid, less tax, and the wife as guardian of the children had preferred repayment claims on their behalf, on the basis that the annual sums were income of the respective children. The claims were allowed by the revenue authorities.

The taxpayer contended that the court had no power under s. 193 of the Supreme Court of Judicature (Consolidation) Act,

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(1) Ante, 45.

1925 (2), to create a trust in favour of the children, and that no trust was therefore created; that the children accordingly had no income of their own; and that he was entitled to claim allowances under s. 21 of the Finance Act, 1920, as amended by s. 24 of the Finance Act, 1940.

The taxpayer contended, alternatively, that, if a trust had been created, the sums payable under it ought, by virtue of s. 21 of the Finance Act, 1936 (3), to be treated as his income.

The inspector of taxes contended: (i) that the order of July 16, 1946, created a trust in favour of the children; (ii) that s. 193, when considered with s. 10, sub-s. 4, of the Act of 1937, was wide enough to authorize the creation of a trust; (iii) that, even if the order were not properly made, it was effective to create a trust until set aside; (iv) that the payments made under it were the income of the children in their own right notwithstanding s. 21 of the Finance Act, 1936; (v) that the taxpayer was not entitled to claim child allowances under s. 21 of the Finance Act, 1920; and (vi) that the words "the respondent to claim child "allowances" only meant that if at any time a claim for child allowances should become competent, the taxpayer was the person designated by the order as entitled to claim the benefit of it.

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(2) Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937, sub-s. 1: "In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children, the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, on any decree of divorce "to be taken for placing the children "under the protection of the court".

Sub-s. 3: "The court may, if it "thinks fit, on any decree of divorce "or nullity of marriage, order the "husband, . . . to secure for the "benefit of the children such gross "sum of money or annual sum of "money as the court may deem "reasonable, and the court may for "that purpose order that it shall be "referred to one of the conveyancing "counsel of the court to settle and "approve a proper deed or instrument to be executed by all necessary parties".

(3) Finance Act, 1936, s. 21, "sub-s. 1: "Where, by virtue or in "consequence of any settlement to "which this section applies and during the life of the settlor, any "income is paid to or for the benefit "of a child of the settlor in any "year of assessment, the income "shall . . . be treated for all the purposes of the Income Tax Acts as "the income of the settlor for that "year and not as the income of any "other person".

Sub-s. 9: "In this section ". . . (*b*) the expression 'settlement' "includes any disposition, trust, "covenant, agreement, arrangement "or transfer of assets; (*c*) the "expression 'settlor', in relation to "a settlement, includes any person "by whom the settlement was made "or entered into directly or indirectly, "and in particular (but without prejudice to the generality of the foregoing words of this definition) "includes any person who has provided or undertaken to provide "funds directly or indirectly for the "purpose of the settlement . . .".

The general commissioners held that the order created a trust in favour of the three children, but that under s. 21 of the Finance Act, 1936, the income of each child under the trust must, for income tax purposes, be treated as that of the taxpayer, who was entitled to claim the child allowances. Vaisey, J., held, first, that the order of July 16, 1946, was within the competence of the court and operated to create a trust in favour of the three children; and, secondly, that the order was a "settlement" and the taxpayer a "settlor" within s. 21 of the Finance Act, 1936.

The inspector of taxes appealed.

On the appeal, the taxpayer conceded that, whether the order of July 16, 1946, was properly made in the form it took or not, it was an order which had been made and never appealed from, and accordingly must be accepted as between the parties to it for the purposes of these proceedings, as a valid and binding order.

Upjohn, *K.C.*, *J. H. Stamp* and *R. P. Hills* for the inspector of taxes. Two points arise for decision in this case: first, whether the court had jurisdiction under s. 193 (as amended) of the Judicature Act of 1925 to make an order in the form of the order of July 16, 1946. Vaisey, J., decided in favour of the Crown. It is submitted that, since it was an order of a superior court, neither party can say it is not binding. A party can only challenge such an order by appeal. Secondly, assuming there was jurisdiction to make the order, did it create a settlement within s. 21 of the Finance Act, 1936? It is submitted it did not, but that the order operated according to its tenor, giving to each child 100*l*. a year, which became the child's own income. In order to create a settlement there must be a voluntary act, and a man can only be said to be a "settlor" if he acts of his own volition. It is not possible to say that a man has entered into a settlement, directly or indirectly, when all he has done is to make payments pursuant to an order of the court. To hold that this order created a settlement would have absurd consequences. An order of the court is wholly outside s. 21.

The order of July 16, 1946, was a new form of order, in that it provided that the payments should be held "in trust" for the infants. It is submitted that sub-s. 3 of s. 193 gives the court jurisdiction to make an order in that form. The effect of the order was to give the children security for the payments by the creation of a trust in their favour. Clauson, L.J., was wrong in *Stevens* v. *Tirard* (4) in expressing the opinion that there is no jurisdiction under s. 193 to take income from the father and make it the income of his infant children. This order was either an order for maintenance under sub-s. 1 of s. 193 or it was an order for security under sub-s. 3 of that section. On either footing, it was within the jurisdiction of the court under s. 193.

J. H. Stamp following. On the question whether this order was ultra vires, it is submitted that an order under sub-s. 3 to secure payments for the benefit of a child can take the form of payment to a trustee for the benefit of a child. The taxpayer fulfils his obligations by paying the sum to the wife. The law then creates the settlement. The husband is not entitled to the child allowances. These sums are the income of the children. It is not possible to strike out of the order the words "in trust" and make these annual sums the income of the mother.

John Clements for the taxpayer. If this order were an order for payment of maintenance under sub-s. 1 of s. 193, then, notwithstanding the words "in trust" in the order, these sums are the income of the mother and not the income of the children. The general rule is that if a sum is paid to a parent for the maintenance of a child, the sum is not impressed with any trust in favour of that child. If these payments were not directed to be paid as maintenance under sub-s. 1, they cannot be regarded as a security under sub-s. 3. An order to pay annual sums is not a security. To create a security there must be a settlement of property.

It is conceded that it is not open to the taxpayer to contend that this order was a nullity. The real question is what is the true construction of this order, on the footing that it is within s. 193. It is submitted, first, that this is an order for payment of maintenance under sub-s. 1; accordingly, that the payments are the income of the mother: *Jodrell* v. *Jodrell* (5); and that the words "in trust" can be ignored. [He referred to *Twentyman* v. *Twentyman* (6), and *Stevens* v. *Tirard* (7).]

Secondly, on the assumption that the order created a trust, it is submitted that it created a "settlement" within s. 21 of the Finance Act, 1936. The taxpayer was a person who

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(4) [1940] 1 K. B. 204, 213.
(5) (1851) 14 Beav. 397.
(6) [1903] P. 82.
(7) [1940] 1 K. B. 204.

"provided funds . . . for the purpose of the settlement". He is accordingly a settlor within the definition in sub-s. 9 (*c*) of s. 21 and the order was a settlement within that section. [He referred to *Hood-Barrs* v. *Inland Revenue Commissioners* (8).]

Upjohn, K.C., in reply. It is submitted that for there to be a "settlement" within s. 21 there must be a "settlor". When a man makes payment under an order of the court he is not acting of his own volition. He is accordingly not a settlor.

Cur. adv. vult.

March 5. The following judgments were read:—

EVERSHED, M.R. In this case I have had the advantage of seeing in advance the judgments about to be delivered by my two brethren. I have, though not without serious doubt upon the main question argued, reached the same conclusion as they, and think, with them, and for the reasons which they give, that the appeal should be dismissed.

I should add nothing of value to the judgments of my brethren if I stated at length the reasons for my conclusion; and, in the circumstances, I wish to make but few observations.

On the first question determined by Vaisey, J., namely, whether the order made in the present case was within the competence of the court under s. 193 of the Judicature Act, 1925 (as amended), it has, by reason of Mr. Clement's concession, been unnecessary for us to express a concluded view. I must not, however, be taken to be assenting to the opinion expressed by the learned judge. I agree with my brethren in thinking that there are serious difficulties in the way of such a construction of the section. As at present advised the section does not, in my judgment, contemplate on the face of it an order in the form in which the order was made (and it could only be by a strained use of the language that such an order could in any case be brought within its terms). Nor does it seem to me that such a form of order achieves a particularly useful result. It will no doubt be considered by those responsible for such matters whether orders in this form should continue to be made.

On the other and the main point in the case, namely, that of the application of s. 21 of the Finance Act, 1936, the decisive words to my mind are those of the definition of "settlor" in sub-s. 9 (*c*): " . . . any person who has provided . . . funds . . . " for the purpose of the settlement ". Had it not been for these words, I should for my part have accepted Mr. Upjohn's argument. For, though the trust created by the terms of the order is sufficient to make what the order achieves a " settlement ", I do not think that the respondent could be properly regarded as a " settlor " within the ordinary sense of the term or within the language of the definition apart from the words which I have quoted. But I think that these last-mentioned words are, on the whole, too strong and compelling for Mr. Upjohn, in his somewhat unaccustomed role of an advocate on behalf of the Crown, to succeed in establishing the more restricted construction of the words of a taxing statute. It is true that what is signified by the words quoted is " included " in the earlier part of the definition; and I have felt the force of Mr. Upjohn's illustrations of the " anomalies " that, he says, must follow from the contrary argument: for example, the case of a debt owed by A to B but assigned by B to trustees for the infant children of A and then enforced against A by the trustees. But, for the reasons given by my brethren and the judge below, I do not think that these considerations are sufficient to prevail against the view that, if a settlement has (as I think it has) been effected by the order, then, at the time when the relevant question has to be asked, the taxpayer has in truth provided the funds for the purpose of the settlement, namely, the annual sums which are the subject matter on which the trust (specified in the order) operates. In my judgment the appeal fails.

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(8) (1946) 176 L. T. 283.

JENKINS, L.J. The question in this case is whether in the circumstances I am about to mention the taxpayer is entitled for the purposes of his assessment to income tax for the three years ended April 5, 1949, to children's allowances of 60*l*. per annum for each child under s. 21 of the Finance Act, 1920, as amended by later enactments, in respect of the three infant children of his marriage to his former wife, Barbara Mary Starkey.

The marriage was dissolved on the petition of the wife by a decree made absolute on December 10, 1945, the custody of the three children being given to her, and by an order in the divorce proceedings dated July 16, 1946, it was ordered (inter alia) that the taxpayer " do pay or cause to be paid to the said petitioner " (i.e., Mrs. Starkey) " as an interim provision until further order " as from the date of the decree absolute " the annual sum of 100*l*.

"less tax in trust for each of the three children . . . all the said "sums to be payable monthly; credit to be given for any sums "paid since the said date, respondent to claim child allowances".

The taxpayer duly paid Mrs. Starkey the annual sum of 100*l*., less tax, for each child as required by the order, and she as the children's guardian made and was allowed the appropriate repayment claims on their behalf, on the footing that the effect of the order was to make the annual sum payable in respect of each child thereunder the income of that child.

The taxpayer, on the other hand, claimed the statutory children's allowances of 60*l*. for each of the three children, which he could only be entitled to do on the footing that the order did not have the effect of making the three annual sums of 100*l*. payable thereunder income of the three children, inasmuch as under s. 21, sub-s. 3, of the Finance Act, 1920 (as amended), the allowance is inadmissible in respect of any child entitled in his or her own right to an income exceeding 60*l*. a year.

The taxpayer's claim was supported before the General Commissioners and Vaisey, J., on two grounds: First, it was contended that the court had no power under ss. 190 and 193 of the Judicature Act of 1925, as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937, to create a trust, and consequently that notwithstanding the words "in trust for each of the three "children" contained in the order of July 16, 1946, no trust in their favour was created, with the result that none of them was entitled to any income in his or her own right and, accordingly, that the taxpayer's claim to the children's allowances was well founded.

Secondly, and by way of alternative, it was contended that even if the order was effective to create a trust, the taxpayer was nevertheless entitled to claim the children's allowances, because on this footing: (i) the order was a "settlement" in relation to which the taxpayer was the "settlor" within the meaning of s. 21 of the Finance Act, 1936; (ii) accordingly, the income paid to or for the benefit of each of the three children of the settlor (i.e., the taxpayer) by virtue of the settlement (i.e., the 100*l*. paid to Mrs. Starkey in trust for each of them in accordance with the order) must under the same section be treated for all the purposes of the Income Tax Acts as the income of the settlor (i.e., the taxpayer) and not as the income of any other person; and (iii) it follows that for the purposes of the taxpayer's claim to children's allowances under those Acts the 100*l*. payable in respect of each child must be treated as the taxpayer's income and not as the child's and the claim to such allowances admitted accordingly.

The General Commissioners rejected the first contention but accepted the second, and Vaisey, J., on appeal by the Crown, came to the same conclusion on both points.

The question of the power of the court, by an order in the form here used, to create a trust is one upon which I feel some difficulty. I have no doubt that sub-s. 3 of s. 193 of the Judicature Act of 1925 enables the Court to order the husband to secure an annual sum for the benefit of a child of the marriage by means of a trust. On the other hand, there are cogent grounds for the view that the power under sub-s. 1 to "make "such provision as appears just with respect to the custody, "maintenance and education of the children" is limited in its financial aspect to the expressed amount of maintenance and education, and does not extend to the creation of a trust in favour of a child, so as to make any income so dealt with income of the child: see *Stevens* v. *Tirard*, per Clauson, L.J. (9). It is said on the part of the Crown that the order here in question was a perfectly good order on the taxpayer under s. 193, sub-s. 3, to secure an annual sum of 100*l*. for the benefit of each child by paying that sum to Mrs. Starkey in trust for him or her. Speaking for myself, I feel considerable doubt about this. An order "to secure" seems to me to suggest a disposition or obligation of some sort made or entered into pursuant to the order, as opposed to a mere direction to pay contained in the order itself. This is borne out by the provision for reference to conveyancing counsel at the end of sub-s. 3. It is also supported by the clear distinction drawn in s. 190 between an order on a husband to secure a gross or annual sum to the wife for any term not exceeding her life under sub-s. 1 and a direction on a husband to pay to the wife during the joint lives a monthly or weekly sum under sub-s. 2.

It is, however, unnecessary to express any concluded opinion on this question, as Mr. Clements for the taxpayer admitted, in my view quite rightly, that whether the order of July 16, 1946, was properly made in the form it takes or not, it must, as an order made and never appealed from, be accepted as between the parties to it, and for the purposes of these proceedings, as a valid and binding order. Having made that admission, Mr. Clements confined himself on this part of the case to an argument directed to showing that on the true construction of the order as it stands it creates no trust. I hope I will not be regarded as disrespectful to his careful argument to this effect, if I dispose of it simply by saying that for my part I find the express words of trust in the order too plain to admit of any other conclusion than that the order did, as a matter of construction, create a trust in favour of each child of the yearly sum of 100*l.* payable on his or her account.

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(9) [1940] 1 K. B. 204, 213.

On the footing that the order did have this effect, it is not disputed that, apart from s. 21 of the Finance Act, 1936, each of the three children became under the order entitled in his or her own right as cestui que trust to the annual sum of 100*l.* payable thereunder by the taxpayer to Mrs. Starkey in trust for such child.

It remains to consider the second question, i.e., whether this conclusion is displaced for income tax purposes by s. 21 of the Act of 1936.

Mr. Upjohn for the Crown strenuously contended that s. 21 had no application to the present case. He said, in effect, that wide as are the definitions of "settlement" and "settlor" in sub-s. 9 of the section, and apt as they are to include transactions which are not "settlements" and parties who are not "settlors" in the ordinary sense of those words, the section is nevertheless aimed only at "settlements" and at "settlors", and those expressions in themselves postulate at all events certain essential characteristics which are not displaced by the definitions, and without which no transaction can be a settlement and no person can be a settlor within the meaning of the section, any more than they can be classed as such in the ordinary sense. These essential characteristics, Mr. Upjohn argued, were in the case of a settlement that it should be a disposition or obligation of some sort made or entered into by some person of his own free will, and in the case of a settlor that he should be a person who has of his own free will entered into the disposition or obligation in relation to which he is so described. Thus, he contended, an order of the court directing a father to make payments in trust for his children cannot create a settlement, or make the father a settlor within the meaning of s. 21 or at all, because the essential characteristic of free will implicit in the conceptions of "settlement" and "settlor" is wholly lacking. He claimed, moreover, that this general proposition is reinforced by a critical examination of the definitions of "settlement" and "settlor" actually provided by sub-s. 9.

This argument was presented with persuasive force, and I confess that I found it at first sight attractive. But in its more general aspect I think on examination it discloses itself to be really based on the error against which Lord Greene, M.R., sounded a warning in the case of *Hood-Barrs* v. *Inland Revenue Commissioners* (10), where he said: "Then Serjeant Sullivan "formulated his proposition as to the interpretation of such a "clause as this interpretation clause in this way. You can only "go to such an interpretation clause, he said, if it is doubtful "whether the transaction in question falls within the word used "in the original sub-section, namely, in this case the word "'settlement'. In other words, if you find in the word 'settlement' in s. 21, sub-s. 1, something of doubtful import, you "then turn to the interpretation clause to see whether that "clause throws any light upon it. Speaking for the moment "without reference to authority, that appears to me to restrict "the operation of such an interpretation clause as this in a quite "unwarranted and unprecedented manner. The whole object of "an interpretation clause expressed in this way, I should have "thought, was to give to a word, which, for the sake of convenience, is used in the body of the section, an extended "meaning which it would not otherwise bear. Irrespective of "what it originally may mean, taken by itself, it is to have that "extended meaning, and I can see no justification in principle or "on authority for cutting it down in the way suggested". In the succeeding passage on the same page Lord Greene, M.R., went on to dispose, in a manner that I fully accept, of the contention that authority inconsistent with the statement of principle I have just quoted was to be found in certain observations of Lord Macmillan in the case of *Chamberlain* v. *Inland Revenue Commissioners* (11).

Clearly the order in the present case did not create a settlement and the taxpayer was not in relation thereto a settlor within any ordinarily accepted meaning of those terms. But that is not the question. The question is whether the order created a settlement and the taxpayer was a settlor in relation thereto in the sense (whatever it may be) in which those terms are used in s. 21.

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(10) 176 L. T. 283, 291.

(11) (1943) 59 T. L. R. 343.

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In order to resolve this question I must, on the principle stated by Lord Greene, M.R., in *Hood-Barrs* v. *Inland Revenue Commissioners* (10), approach the construction of s. 21 with no preconceived idea as to the meaning of "settlement" or "settlor". For their meaning in this particular section I must go to the definitions provided by sub-s. 9, construe those definitions, and apply them according to their true construction, however remote from the ordinary conceptions of "settlement" or "settlor" the content of the definitions may in any given instance appear to be. Approaching the matter in this frame of mind, I find that by sub-s. 9 (*b*) the expression "settlement" is defined as including "any disposition, trust, covenant, agreement, arrangement, or "transfer of assets".

The order here in question (particularly as it was not made by consent) was hardly a disposition, agreement or arrangement. It certainly was not a covenant. Nor, I think, was it a transfer of assets, though the contrary was suggested by Mr. Clements, and compliance with it did involve transfers of assets in the shape of the payment of three sums of 100*l.* per annum. But at all events, having regard to the admission made as to the validity of the order for the purposes of these proceedings, and in view of its express terms, it must clearly be taken to have created a trust in favour of each child with respect to the annual sum of 100*l.* payable thereunder on his or her account. Prima facie, therefore, the order must be taken to have created a settlement for the purposes of s. 21 by virtue of the inclusion in the definition of "any . . . trust".

Passing to sub-s. 9 (*c*), I find further that "the expression "'settlor', in relation to a settlement, includes any person by "whom the settlement was made or entered into directly or "indirectly and in particular (but without prejudice to the "generality of the foregoing words of this definition) includes any "person who has provided or undertaken to provide funds directly "or indirectly for the purpose of the settlement, or has made "with any other person a reciprocal arrangement for that other "person to make or enter into the settlement".

Now the taxpayer can hardly be said to have "made or entered "into" the order or the trusts thereby created in any ordinary sense of that expression. But if the order by reason of the trusts thereby created constitutes a settlement within sub-s. 9 (*b*), as in my view prima facie it does, it seems to me reasonably plain that prima facie the taxpayer is "a person who has provided . . . "funds . . . for the purposes of" such settlement in the shape of the three sums of 100*l*. per annum paid by him in compliance with the order.

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(10) 176 L. T. 283, 291.

In that part of his argument which turned on a close examination of sub-s. 9 (*b*) and (*c*) Mr. Upjohn sought to displace the conclusions which, as above indicated, the definitions in question prima facie appear to suggest, by contending (in effect): (i) that it is wrong to consider the definition of "settlement" in isolation, because a "settlement" must at all events be something in relation to which there is a settlor, and therefore the meaning of the definition of "settlement" can only be arrived at with reference to and in the light of the definition of "settlor"; (ii) that when the definition of "settlor" in sub-para. (*c*) is looked at it is found to include "any person by whom the settlement was made or entered into directly or indirectly", which shows that the order cannot constitute a settlement within the definition contained in sub-para. (*b*), since an order of the court, at all events when made otherwise than by consent, cannot be said to have been "made or entered into" by anyone, unless indeed by the court itself; (iii) that for the same reason the taxpayer cannot be said to be a "settlor" in relation to the order within the definition contained in sub-para. (*c*); (iv) that the remainder of the definition contained in sub-para. (*c*), introduced by the words "and in particular . . .", does not displace the above submissions, because it merely gives particular examples of the various ways in which a settlement is to be considered as having been made or entered into "directly or indirectly" for the purposes of the section, and does not enlarge the ambit of the definition beyond persons who have, whether directly or indirectly, made or entered into settlements; or, in other words, persons who as free agents do some act or enter into some obligation which directly or indirectly brings a settlement into being or provides it with funds on which to operate; and (v) finally that the reference to "a person who has provided . . . funds directly "or indirectly for the purposes of a settlement" is in any case wholly inappropriate to describe a person from whom funds have been compulsorily extracted by an order of the court, as opposed to a person who has furnished them of his own free will.

I find myself unable to accept this argument. As to the general proposition that the "settlements" to which s. 21 applies must as a matter of necessary implication be limited by reference to the essential characteristic of a "settlement" in the ordinary sense, as a disposition or obligation made or entered into as a matter of free will, I have already stated the primary ground on which I think this argument fails. I would, however, add that I think the suggested limitation would introduce exceptions from the operation of the section for which I, for my part, can see no warrant whatever in its terms, and would moreover make it capricious and uncertain in its effect. The actual case under consideration is that of a plain order on a father to make payments to a trustee for his children. But what of an actual settlement on his children executed by a father under an order of the court enjoining him to do so? I would find it hard indeed to justify the exception of such a settlement from the provisions of s. 21 on any principle of construction; yet the father would be equally under compulsion in the latter case as in the former, and it would seem to me capricious in the extreme to treat the two cases differently.

Again, what of payments made by a father in trust for his children under a consent order or an undertaking given to the court? Transactions such as these might or might not be said to possess the necessary element of free will, supposing them to have been entered into, as they well might be, under the threat of a compulsory order as the alternative. Thus the suggested limitation soon leads to a debatable area. If such a consent order or undertaking is to be held within s. 21, while a compulsory order is outside it, the application of the section will be made to turn on what is in effect a distinction of form rather than substance. If, on the other hand, the consent or undertaking is held to be excluded from s. 21 as given, in effect, under compulsion, I know not what other degrees of compulsion might be held sufficient for that purpose.

The argument for the suggested limitation based on reasonableness does not impress me. I fail to see why a father who is compelled by order of the court to make proper provision for his children out of income which would otherwise be his for tax purposes should, as a matter of reasonableness, be accorded different treatment in point of tax liability from a father who makes like provision of his own free will.

As to the points made by Mr. Upjohn on the construction of sub-s. 9 (*b*) and (*c*), I agree that the two definitions should be read together, but I cannot accept the conclusion that he draws from so doing. I do not think the meaning of the part of sub-para. (*c*) introduced by the words "and in particular" is limited in the way he suggests. I think it gives particular cases of persons who are to be considered as having made or entered into a settlement directly or indirectly for the purposes of the section, although they are not persons who can be said to have made or entered into it in the ordinary sense. That reading of it gives the proper enlarging force to the word " includes ", and is borne out by the fact that the particular examples enumerated are not cases of " making or entering into " a settlement in the ordinary sense at all. The words " without prejudice ", etc., are, I think, merely put in lest it might be said that the enumerated examples exclude by implication cases which, apart from special definition, would amount to " making or entering into " a settlement " directly or indirectly " in the ordinary sense of those words. I do not agree that the words " has provided " necessarily connote an exercise of free will. It seems to me that the taxpayer here if asked " Who is providing for the maintenance of your children? " could with perfect accuracy have replied " I am doing so under an order of the court ".

I should add that I can derive no assistance one way or the other from the reference to " child allowances " contained in the order.

For these reasons I am of opinion that the General Commissioners and Vaisey, J., came to a right conclusion as to the application of s. 21 of the Finance Act, 1936, in this case, and that the appeal accordingly fails and should be dismissed.

HODSON, L.J. By an order of the Probate, Divorce and Admiralty Division made on July 16, 1946, the taxpayer, the respondent to the appeal, was ordered, inter alia, to pay to his former wife " as an interim provision until further order as from " December 10, 1945, an annual sum of 100*l.* less tax in trust " for each of the three children, the respondent to claim child " allowances ". The sums specified were paid less tax and the wife as guardian of the children had preferred repayment claims on their behalf on the basis that the annual sums were the income of the respective children. The claims were allowed by the Revenue authorities.

The taxpayer contended that the court had no power under ss. 190 and 193 of the Supreme Court of Judicature Act, 1925, as amended by s. 10, sub-s. 4, of the Matrimonial Causes Act, 1937, to create a trust in favour of the children, and that no such trust was therefore created. In the alternative, the taxpayer contended that, if a trust had been created, the sums payable

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under it ought, by virtue of s. 21 of the Finance Act, 1936, to be treated as his income. In either case, the same result would be reached, for whether the sums paid were regarded as part of the mother's income or part of his income he would be entitled to the child allowances under s. 21 of the Finance Act, 1920, as amended by s. 24 of the Finance Act, 1940, on the footing that the children had no income of their own.

The judge, on appeal by the inspector of taxes from the general commissioners, rejected the first contention of the taxpayer, and accepted the second.

The Crown appealed to this court, and the argument has, in the main, centred upon the question whether the judge was right in his conclusions: (a) that the order or the trust created by the order was a settlement within the meaning of s. 21 of the Finance Act, 1936, and (b) that the taxpayer was a settlor within the meaning of the same section.

The taxpayer, however, in this court, in resisting the appeal, renewed his first argument which had failed before the judge, but put it in a slightly different form. He admitted that the argument based on want of jurisdiction would not avail by itself, since the order could not be treated as a nullity. He did, however, contend that on its true construction, this was an order for the payment of sums of money to the mother for the maintenance of her children simpliciter. He argued: (1.) that sums paid for maintenance of children are not at common law impressed with a trust (*Jodrell* v. *Jodrell* (12)); (2.) that the order was, on the face of it, in excess of jurisdiction and the court should endeavour to construe the words so as to bring them within the language of the statute under which the order was made; (3.) that the words " an interim provision " point away from the creation of a trust; (4.) that the words " the respondent to claim child " allowances " are inconsistent with the construction which makes such a claim impossible having regard to the provisions of the Finance Acts.

It is true that sums ordered to be paid for maintenance of children, simpliciter, are treated for tax purposes as the income of the mother: *Stevens* v. *Tirard* (13). But in that case no question of the construction of additional words such as " in " trust " fell to be considered. As to the second contention, since the order is not to be treated as a nullity, I think that effect must be given to the words " in trust ", and it is inadmissible to read the order as if it had not contained these words. Thirdly, the words " as an interim provision " are not in themselves inconsistent with a creation of a trust; and, lastly, the words " the respondent to claim child allowances " can, I think, only mean that if at any time a claim for child allowances should become competent the taxpayer was the person designated by the order as entitled to make the claim.

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(12) 14 Beav. 397.

(13) [1940] 1 K. B. 204.

I am, therefore, of opinion that as between the taxpayer and the Crown the order did, as the judge found, create a trust in favour of each of the three children.

Since, however, we were told that orders in a form closely corresponding to the one under consideration have been made from time to time in other cases and may be made again, I think it desirable to refer to the section itself in order to avoid misunderstanding as to the limited effect of the decision of this case. By s. 193, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that: " In any proceedings for " divorce . . . the court may from time to time . . . make such " provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose " parents is the subject of the proceedings . . .". Sub-s. 3, added by the Matrimonial Causes Act, 1937, provides that: " The " court may, if it thinks fit, on any decree of divorce . . . order " the husband . . . to secure for the benefit of the children such " gross sum of money or annual sum of money as the court may " deem reasonable, and the court may for that purpose order that " it shall be referred to one of the conveyancing counsel of the " court to settle and approve a proper deed or instrument to be " executed by all necessary parties ". It is, I think, clearly contemplated by sub-s. 3 that there shall, in the appropriate case, be a transfer by the husband to trustees of securities or other tangible assets, or some other form of collateral cover, for the purpose of securing payments for the benefit of the children.

An order such as that made in this case is not, in my judgment, within the intendment of this sub-section and cannot be properly described as an order securing a gross or annual sum of money for the benefit of the children. An order to pay maintenance is properly made under sub-s. 1, and the mere addition of the words " in trust " does not, in my opinion, convert it into an order to secure under sub-s. 3.

The procedure adopted in the case of maintenance for wives under s. 190 of the same Act is analogous. There orders to secure

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and to pay are dealt with separately in sub-ss. 1 and 2. Sub-s. 1 deals with orders to secure a gross or annual sum to a wife for any term not exceeding her life. Sub-s. 2 provides that the court may, in addition to or instead of an order under the foregoing sub-section, direct the husband to make to the wife payments during their joint lives.

The practice has always been under these sections and their predecessors to order a husband to give security when, and only when, security in the tangible sense indicated above is available or can be made available for the purpose.

If s. 193, sub-s. 3, has no application, then the order for payment in trust for the children in this case can only derive from s. 193, sub-s. 1. This sub-section was expressly considered by Clauson, L.J., in *Stevens* v. *Tirard* (14), where he stated: " . . . there is, as I think, the gravest doubt whether under " s. 193 there would be any jurisdiction in the court to take " income away from the father and make it the infant's income, " though the court has full jurisdiction to take money from the " father and make it available for the benefit of the infant by " putting it in the hands of the mother in whom, under the whole " scheme which is completed by this order, are vested the rights " of custody and the duty of maintaining the infant ". It may be said that this statement was obiter, but for my part I would respectfully agree with the opinion expressed in the passage I have read.

I have dealt with this part of the case perhaps at undue length, merely to emphasize that in my view nothing now decided is to be taken as authority for the validity (from the point of view of jurisdiction) of the order which is the subject of this appeal.

The question remains whether upon the construction of the order, which prima facie makes the payments made thereunder the income of the children, they are affected by the provisions of the Finance Act, 1936, s. 21, sub-s. 1, so as to be treated for the purpose of the Income Tax Acts as the income of the father, that is to say the taxpayer. Section 21, sub-s. 1, reads: " Where, by " virtue or in consequence of any settlement to which this section " applies and during the life of the settlor, any income is paid " to or for the benefit of a child of the settlor in any year of " assessment, the income shall, if at the commencement of that " year the child was an infant and unmarried, be treated for all " the purposes of the Income Tax Acts as the income of the

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(14) [1940] 1 K. B. 204, 213.

"settlor for that year and not as the income of any other "person". Sub-s. 9 (*b*) reads as follows: "The expression "'settlement' includes any disposition, trust, covenant, agree- "ment, arrangement or transfer of assets", and sub-para. (*c*) reads: "The expression 'settlor', in relation to a settlement, "includes any person by whom the settlement was made or "entered into directly or indirectly, and in particular (but with- "out prejudice to the generality of the foregoing words of this "definition) includes any person who has provided or undertaken "to provide funds directly or indirectly for the purpose of the "settlement, or has made with any other person a reciprocal "arrangement for that other person to make or enter into the "settlement". The definitions do not purport to cover every form of settlement or every kind of settlor but by use in each case of the word "includes" show that they are designed to catch within their net things which and persons who otherwise might be held not to be so caught.

Since the order creates a trust there is prima facie here a settlement within the plain words of sub-s. 9 (*b*), and a settlor within the meaning of sub-s. 9 (*c*). It is, however, contended by the Crown that a settlor to come within the section must be a person who acts voluntarily and not a person who acts merely under compulsion of law as the taxpayer has acted in this case. This argument is supported by a reference to the definition clauses in sub-s. 9, since the words "entered into", "provided" or "undertaken to provide" are not at first sight very apt to describe the actions of a person who under the compulsion of a court order not made by consent makes payments to another to be held in trust for his children.

The words "directly" or "indirectly" in the definition, it is said, do not assist since a payment made directly by a voluntary act does not become an indirect payment by the intervention of compulsion. In short, an involuntary act is not indirectly voluntary. This no doubt is correct, but the question still remains whether a person who makes payments in the circumstances of this case, who would otherwise be a settlor, who has provided funds for the purpose of a settlement within the scope of s. 21, sub-s. 1, ceases to be such a settlor because he acts under compulsion.

Mr. Upjohn argued that a compulsory settlement would not be within the intendment of the section as, if that were so, it would cover the case of a father who, sued by his own infant son in tort, paid money into court by compulsion of a judgment

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for the benefit of the infant until he attained the age of twenty-one, the circumstances being that the father had obtained the money under the terms of a contract with an insurance company. I confess I am not impressed by the supposed absurdity of this result, for if the legislature has set limits to the extent to which a taxpayer may divest himself for tax purposes of income by voluntary means, I see no reason why the same principle should not be applied to income of which the taxpayer is compulsorily divested.

Indeed the argument for the Crown leads to curious results in the construction of the sections of the Supreme Court of Judicature Act, 1925, dealing with settlements and variation of settlements. They are s. 191, sub-s. 1, and s. 192. A settlement made under the powers conferred by s. 191, sub-s. 1, is compulsory and therefore, if the contention of the Crown is correct, is not a settlement at all within the meaning of the Finance Act, 1936, s. 21, sub-s. 1. Similarly, under s. 192, an original settlement might be within the section, whereas, if it had variations compulsorily made in favour of children of the settlor, other than the acceleration of their interests, the parts of the settlements introduced by such variation would not be within the section.

In my opinion the words "settlor" and "settlement" are in their context, without straining their meaning, even though coupled with the examples given in the interpretation section, wide enough to cover transactions entered into under compulsion, and this result is reached without recourse to the words "directly "or indirectly" relied upon by the judge below. I think that the appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; James Turner & Son.*

B. A. B.

In re BLAND-SUTTON'S WILL TRUSTS. NATIONAL PROVINCIAL BANK LD. *v.* THE MIDDLESEX HOSPITAL.

[1949 B. 3659.]

C. A.

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Jan. 12,
15, 16;
Feb. 2.

Evershed, M.R.,
Jenkins and
Hodson, L.JJ.

Varied. ROYAL COLLEGE OF SURGEONS OF ENGLAND *v.* NATIONAL PROVINCIAL BANK [1952] A.C. 631

Will—Construction—Gift to hospital for department of medical school—Effect of nationalization—If hospital "nationalized" then to Royal College of Surgeons of England—Whether charitable institution—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 8, *sub-s.* 1 *and s.* 15, *sub-s.* 1.

A testatrix by her will, dated January 13, 1943, directed her trustee to pay the income of her residuary estate in each year to the treasurer or other proper officer of the Middlesex hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology. The will provided that if the institute should cease to be carried on as a pathological research institution, if its name should be changed, if the "Middlesex hospital" should become "nationalized . . . or pass into public ownership", or if at any time the income could not be applied for "the purposes aforesaid", the fund should be transferred both as to capital and income to the Royal College of Surgeons absolutely "for the general purposes "of the said college". At the date of the will, the Bland-Sutton Institute formed part of the Middlesex hospital medical school. On July 5, 1948, as a result of the coming into force of the National Health Service Act, 1946, the premises of the Middlesex hospital, which was designated a teaching hospital for the purposes of the Act, vested in the Minister of Health and the endowments of the hospital vested in a board of governors appointed by him and therefore subject to his control. The medical school was excepted from these provisions and its property, including the buildings comprising the Bland-Sutton Institute, vested in a governing body set up and incorporated under s. 15 of the Act, pursuant to a scheme submitted by the former governors of the school to the university of London.

Danckwerts, J., held that the Royal College of Surgeons was a charity and therefore capable of setting up and taking under the gift over, but held further that none of the events specified in the will upon which the gift over was to take effect had occurred.

The Royal College of Surgeons appealed against that part of the order that the clause of defeasance had not taken effect, and the council of the Middlesex hospital cross-appealed against the decision that the gift over was valid.

Held, that (1.) the defeasance clause in the will had operated. "The Middlesex hospital" had become "nationalized" and had "passed into public ownership" for the purposes of that clause, (2.) the gift over to the Royal College of Surgeons was void for the college were not a charity, and (3.) applying the rule in *Lassence* v.

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

Tierney (1849) 1 Mac. & G. 551, the trusts declared in the will for the maintenance of the Bland-Sutton Institute continued in operation.

In re Royal College of Surgeons of England [1899] 1 Q. B. 871 followed.

Decision of Danckwerts, J. (p. 70, ante), affirmed in the result.

APPEAL from Danckwerts, J.

A testatrix who died on February 10, 1943, by her will, dated January 13, 1943, appointed the National Provincial Bank Ld. to be her executor and trustee. By cl. 10 she directed her trustee to hold her residuary estate on trusts of the usual character for sale and conversion and to stand possessed of the net proceeds and investments (which she termed the "endowment fund") upon "the following charitable trusts for so long as the law shall permit"; first, to provide out of the income for a research scholarship and, secondly, "to pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connexion with the said hospital . . .".

By cl. 11 she provided that: "if the institute ceased to be carried on as a pathological research institution, if its name should be changed, if 'the Middlesex hospital' should become 'nationalized or . . . pass into public ownership', or if the bank should at any time become unable lawfully to apply the income for the 'purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund both as to capital and the income thereof to the 'Royal College of Surgeons absolutely for the general purposes of the said college'".

The Bland-Sutton Institute of Pathology was part of a medical school which, until July 5, 1948, was a department of the Middlesex hospital.

The hospital came into existence early in the eighteenth century and teaching in the wards began in 1745. In 1835 the medical school was founded. The hospital was incorporated in 1836 but the school remained an unincorporated body working with the hospital but having a separate existence until 1896. On July 28, 1896, it was amalgamated with and became part of the hospital under a scheme adopted by the weekly board of governors of the hospital.

Under that scheme the hospital took over the property and liabilities of the school and the school became (and until the National Health Service Act, 1946, came into force, remained) a department of the hospital. In practice the school enjoyed a considerable degree of autonomy in the management of its affairs. It had a separate council of governors and the accounts of the school were kept separate from the accounts of the hospital. In 1900, on the reconstitution of the university of London, the Middlesex hospital medical school became a school of the university. This did not affect the legal position of the school as a department of the hospital, but involved recognition of the school by the university as one where university students might take their training, and the university became the examining body of the school and made grants to it.

Until 1914, the school possessed no pathological department, but in 1913 Sir John Bland-Sutton (who had been associated with the hospital or the school since 1886) provided a sum of money to build an institute of pathology which was opened in 1914. The institute and the other buildings devoted to the purposes of the school are not physically distinct from the hospital buildings but are on the same site and are intermixed with them.

By s. 6 of the National Health Service Act, 1946 (1), the Middlesex hospital together with all liabilities and assets, other

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(1) National Health Service Act, 1946, s. 6, sub-s. 1: "Subject to the "provisions of this Act, there shall, "on the appointed day, be transferred to and vest in the Minister "by virtue of this Act all interests "in or attaching to premises forming "part of a voluntary hospital or used "for the purposes of a voluntary hospital . . . being interests held "immediately before the appointed "day by the governing body of the "hospital . . . and all rights and "liabilities to which any such "governing body . . ." was "entitled or subject . . . but not "including any endowment".

Section 7, sub-s. 1: "Where any "voluntary hospital to which the "last foregoing section applies is, "before the appointed day, designated "by the Minister . . . as a teaching "hospital . . . all endowments of the "hospital held immediately before the "appointed day shall on that day . . . "be transferred to and vest in the "board of governors constituted under "the following provisions of this Part "of this Act for the teaching "hospital".

Sub-section 8: "All rights and "liabilities acquired or incurred, "whether by the governing body or "by trustees, solely for the purposes "of managing any endowment of a "voluntary hospital to which the last "foregoing section of this Act applies, "being rights or liabilities to which "they were entitled or subject "immediately before the appointed "day, shall (*a*) if the hospital has "before that day been designated as "a teaching hospital . . . be transferred to and vest in the board of "governors of the teaching hospital "on that day . . .".

Sub-section 10: " . . . the expression 'endowment', in relation to a "voluntary hospital, means property "held by the governing body of the than endowments (as defined in s. 7, sub-s. 10, with s. 79, sub-s. 2) were transferred to and vested on the appointed day, July 5, 1948, in the Minister of Health. As the hospital had been designated a teaching hospital under s. 11, sub-s. 8, the endowments held for the purposes of the hospital, as defined in s. 79, sub-s. 2, vested by s. 7 in a board of governors wholly under the control of the Minister, as provided by s. 12, sub-s. 3. These provisions did not, however, apply to the medical school, for, by s. 8, sub-s. 2, it was provided that the property and liabilities held by the hospital on July 5, 1948, solely for the purposes of the medical school were to be

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" hospital or by trustees solely for the " purposes of that hospital, being . . . " (*a*) interests in or attaching to " land . . . and in equipment, furniture or other movable property " used on or in connexion with such " land . . . ".

Section 8, sub-s. 2 (*a*): " All property . . . held . . . solely for " the purposes of any such school, not " being property already vested in the " bodies hereafter in this section mentioned . . . shall, on the appointed " day, be transferred by virtue of this " Act—(*a*) in the case of a general " medical school of the university of " London . . . to the governing body " of that school; . . . and shall vest " in the said governing body by " virtue of this Act ".

Section 11, sub-s. 8: " The " Minister may . . . by order " designate as a teaching hospital " any hospital . . . which appears to " him to provide for any university " facilities for undergraduate or postgraduate clinical teaching, and the " Minister shall, . . . by order constitute, in accordance with Part III " of the Third Schedule to this Act, " a board of governors for the purpose of exercising functions with " respect to the administration of " that hospital . . . ".

Section 12, sub-s. 3: " It shall be " the duty of the board of governors " of every teaching hospital, as from " the appointed day, in accordance " with regulations and such directions as may be given by the Minister, generally to manage and " control the hospital on behalf of " the Minister, and in particular (*a*) " to provide for the university with " which the hospital is associated " such facilities as appear to the " Minister to be required for clinical " teaching and research . . . (*c*) to " maintain any premises forming " part of or used in connexion with " the hospital ".

Section 15, sub-s. 1: " If any " general medical school of the " university of London . . . is not " incorporated at the passing of this " Act, the governing body of the " school shall, within a period of six " months from the passing of this " Act, prepare and submit to the " governing body of the said university a scheme, to take effect on the " appointed day, for constituting a " new governing body of the school, " which shall be a body corporate " with power to hold land without " licence in mortmain and for conferring powers and imposing duties " on that body and otherwise for the " future management and control of " the school; and any such scheme " shall make provision for including " among the members of the new " governing body persons representing . . . the board of governors of " the teaching hospital with which " the school is associated . . . ".

Section 79, sub-s. 2: " References " in this Act to the purposes of " a hospital shall be construed as " referring both to the general purposes of the hospital and to any " specific purpose of the hospital ".

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transferred to the governing body of the school. As the school was not incorporated on July 5, 1948, s. 15 of the Act applied. In accordance with that section a scheme was prepared and approved and as from July 5, 1948, the assets and liabilities of the school were transferred to and vested in the new incorporated body constituted by the joint effect of s. 15 and that scheme.

The National Provincial Bank Ld., as executor and trustee of the will, took out a summons to have determined, first, how the endowment fund should be applied as from July 5, 1948, having regard to the effect of the National Health Service Act, 1946, on the Middlesex hospital, and, secondly, whether the executory gift over in favour of the Royal College of Surgeons of England was valid.

[The history, constitution and activities of the college are summarized in the statement of facts in the report of the hearing before Danckwerts, J. (2), and were not stated at length in the judgments in this court.]

Danckwerts, J., held that none of the events upon which the gift to the Bland-Sutton Institute was to fail had occurred and therefore that the endowment fund should continue to be applied for the benefit of the institute. He further declared that the gift over to the Royal College of Surgeons did not offend against the rule against perpetuities for the college was a charity and consequently the gift over would have been valid if the first gift to the institute had failed.

The Royal College of Surgeons appealed against the declaration in the order that none of the events mentioned in cl. 11 of the will had occurred and asked that the Bank should be directed to transfer the endowment fund to the college in accordance with cl. 11 of the will.

The Middlesex hospital cross-appealed against the declaration in the order that the gift over in cl. 11 was valid.

N. S. S. Warren for the National Provincial Bank Ld., the executor and trustee of the will.

Sir Andrew Clark, K.C., and *L. J. M. Smith* for the Royal College of Surgeons of England. One or more of the events specified in the clause of defeasance has or have occurred, and the gift over to the Royal College of Surgeons takes effect. In construing cl. 11 of the will, " the Middlesex hospital " means the hospital in the ordinary everyday sense of the institution

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(2) Ante, 70, 72.

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incorporated in 1836, which for many years has been known by that name. The medical school had at some time been a part of that institution but, although it has recently been severed, there is no doubt that the old-established Middlesex hospital continues to exist and, as a result of the National Health Service Act, 1946, has become " nationalized ". Probably it has also " passed into " public ownership ".

Further, as a matter of construction, the gift was made to the Middlesex hospital to be applied for the benefit of the institute because it was part of the hospital. The gift is intended to be effective only so long as the institute remains part of the hospital. It is not simply for the maintenance and benefit of the institute. Consequently, if payment cannot be made to the treasurer or other proper officer of the hospital as directed by the will, and it cannot, because that officer no longer exists, the gift fails.

The cause of defeasance having occurred, the gift over in favour of the Royal College of Surgeons takes effect, provided that the college are a " charity ". *In re Royal College of Surgeons of England* (3) is not a binding decision that the college are not a charity. It is a decision that the college were not entitled to exemption from income tax on the ground of the property of the college being appropriated solely for the purpose of promoting education and science. The question whether the property was appropriated for charitable purposes, entitling the college to exemption on that ground, was not before the court, possibly because exemption may have been admitted on that ground (for it is clear from the assessment that some exemption was allowed and that the appeal was brought only in respect of the matters for which exemption had been refused). Consequently, it is submitted that when Romer, L.J., said that none of the exemptions in s. 11 of the Customs and Inland Revenue Act, 1885, applied, he was referring only to those heads which were under consideration (4). But, if in fact he was referring also to the head of " any charitable purpose ", which was not raised on the appeal, it is submitted that that part of his judgment is mere dicta and, further, that it is not correct. For the purpose of construing a will, the expression "charitable "purposes" must be given a wider meaning than it bears for the purpose of income tax. [He referred to *Inland Revenue Commissioners* v. *Scott* (5).]

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(3) [1899] 1 Q. B. 871.

(4) By the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 3, the following property was exempted from duty: " Property which, or the " income or profits whereof, shall be " legally appropriated and applied for " any purpose connected with any " religious persuasion, or for any " charitable purpose, or for the promo- " tion of education, literature, science, " or the fine arts ".

The object of the college is to benefit the public by promoting and encouraging the art and science of surgery and the practice of surgery. The evidence is that it is impossible to promote the science of surgery, which is admittedly a charitable object, without promoting the practice. That vital evidence was not before the court in 1899 and it is submitted that if it had been available, the court would not in *In re Royal College of Surgeons of England* (6) have held that the college had two main objects, for it is clear that they are indissolubly linked as one.

But if it is held that the college have two objects, it is submitted that the promotion of the practice of surgery is primarily educational and therefore charitable. Admittedly practitioners derive benefit from the college but that is not a main object of the college, and in *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (7) a collateral and subsidiary benefit to the members of the institution did not prevent the court from holding that the institution was charitable. [He referred to *Inland Revenue Commissioners* v. *Forrest* (8) and *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (9), and distinguished *Miley* v. *Attorney-General* (10), *General Medical Council* v. *Inland Revenue Commissioners* (11), and *Society of Writers to the Signet* v. *Inland Revenue Commissioners* (12).]

S. Pascoe Hayward, K.C., and *R. W. Goff* for the council of the Middlesex hospital medical school. The defeasance clause in the will has not operated and the Bland-Sutton Institute is still entitled to the income of the endowment fund. "The "Middlesex hospital" in that clause means the whole of the hospital. At the critical date the school and the hospital were one entity and it is clear that the testatrix recognized this, for she directed payment to be made to the hospital for the benefit of the institute. Since the National Health Service Act, 1946, came into force, the assets of the school have been severed from the hospital and have vested in a separate governing body which

(5) [1892] 2 Q. B. 152, 165, 166.
(6) [1899] 1 Q. B. 871.
(7) [1932] 1 K. B. 149.
(8) (1890) 15 App. Cas. 334.
(9) [1928] 1 K. B. 611.
(10) [1918] 1 I. R. 455.
(11) (1928) 13 T. C. 819.
(12) (1886) 2 T. C. 257.

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is not subject to the Minister's control. Consequently the school, and therefore "the Middlesex hospital", have not been nationalized or passed into public ownership.

[Evershed, M.R. "Nationalized" means "subject to a "national scheme of control". A national pattern is laid down by the Act of 1946 for clinical and academic medicine.]

It is submitted that as the Minister has no right to intervene in the affairs of the school, the school cannot be said to be "nationalized". The Act of 1946 is a nationalizing Act only in so far as it puts certain assets under public control and the school assets are expressly excluded. Further, it is submitted that as this is a defeasance clause it must be construed strictly.

The gift over to the Royal College of Surgeons of England on failure of the gift to the Middlesex hospital medical school is prima facie void for perpetuity because the college are not a "charity". *In re Royal College of Surgeons of England* (13) has decided that the college have two main objects: the first is to promote the science of surgery; that is a valid charitable object. [Counsel referred to *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (14).] The second object is the promotion of the practice of surgery, and in *In re Royal College of Surgeons of England* (13) the court held impliedly that the promotion of the practice of surgery is a non-charitable object. The promotion of the practice of surgery necessarily involves benefits to practitioners. It must be distinguished from encouraging improvements in the technique of surgery. The gift to the college has not been appropriated by the will to either of these two objects: it is for the general purposes of the college and that leaves the college free to devote all the fund to the non-charitable object if they so choose. It is true that *In re Royal College of Surgeons of England* (13) may not be a binding decision as to the meaning of "charitable purpose" in the ordinary chancery case as it is a decision for the purposes of a particular statute, the Customs and Inland Revenue Act, 1885, but the finding of the court that the college have two main objects is binding; and the second object, as defined in the bye-laws of the college, is a professional rather than a charitable object. *In re Royal College of Surgeons of England* (13) has been followed in relation to the Royal College of Surgeons of

(13) [1899] 1 Q. B. 871.

(14) [1932] 1 K. B. 149.

Ireland, in *Miley* v. *Attorney-General* (15). [Counsel referred also to *Inland Revenue Commissioners* v. *Scott* (16) and *General Medical Council* v. *Inland Revenue Commissioners* (17).]

Denys Buckley for the Treasury Solicitor and the Attorney-General.

Cur. adv. vult.

February 2. EVERSHED, M.R. [reading his judgment, referred to the will, read cl. 11, and continued:] It is clear from the language which I have quoted that the happening of one or other of the events specified which would operate to determine the trust in favour of the Bland-Sutton Institute (in cl. 10, para. 2, of the will) might occur at any time, however remote: and from this it follows that the gift over would be void as offending against the rule against perpetuities unless the Royal College of Surgeons can escape the effect of the rule by establishing that they are a " charity ", as understood by our law.

On July 5, 1948, as is well known, the position of all the English hospitals was substantially changed by the coming into operation, as regards them, of the National Health Service Act, 1946. The Royal College of Surgeons said, and say, accordingly, that on July 5, 1948, one of the events specified in cl. 11 of the will occurred, i.e., that the Middlesex hospital became nationalized and passed into public ownership. The college further said and say that they are in truth a " charity " and that therefore the gift over in cl. 11 took effect in their favour. On the other hand, it was and is alleged by the council of the Middlesex hospital medical school (which, having since 1896 been a part of the Middlesex hospital, became by virtue of the Act of 1946 a separate body corporate, part of London university, and of which in turn the Bland-Sutton Institute of Pathology at all material times was and is a part) that the defeasance provisions of cl. 11 have never on their true construction taken effect. The council further contended and contend that in any event the Royal College of Surgeons are not a " charity ", so that the gift over in cl. 11 is wholly void: with the further result that even if one or other of the events specified in the clause should be held to have occurred, nevertheless, by the application of the rule in *Lassence* v. *Tierney* (18), the original and unlimited gift of income in cl. 10, para. 2, of the will—to the

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(15) [1918] 1 I. R. 455.
(16) [1892] 2 Q. B. 152.
(17) (1928) 13 T. C. 819.
(18) (1849) 1 Mac. & G. 551.

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giving effect of which there is in any case no difficulty or obstacle —persists.

In the circumstances it is clear that on the appointed day under the Act of 1946 (namely, on July 5, 1948) two questions arose for determination under Lady Bland-Sutton's will, namely, (1.) had one or other of the events specified in cl. 11 occurred, and (2.) are the Royal College of Surgeons a "charity" and therefore capable of asserting in their favour the validity of the gift over in the same clause?

The bank, as trustee, instituted the present proceedings for the determination of those two questions. They joined as defendants the council of the Middlesex hospital medical school and the Royal College of Surgeons, and also, as third and fourth defendants, the Treasury Solicitor and the Attorney-General. Mr. Denys Buckley has appeared for both these last defendants. The reason for the joinder of the third defendant was because, as appears from the evidence, it had not been possible to trace any person entitled to claim under the Administration of Estates Act, 1925, in the event that the testatrix died as to any part of her property intestate. Mr. Buckley, however, in his capacity as counsel for the Treasury Solicitor, conceded that if one or other of the specified events had occurred but the gift over was void, then (as contended by the first defendant) the rule in *Lassence* v. *Tierney* (18) would preserve the gift in cl. 10, para. 2, of the will so that no claim could be made on the basis of an intestacy.

Danckwerts, J., before whom the matter came to be argued, proceeded to a consideration of these two questions. He dealt with them in the reverse order to that in which I have stated them. He held, first, that the Royal College of Surgeons were a "charity" within the meaning and intendment of the Statute of Elizabeth, 1601, capable therefore of setting up and taking under the gift over in cl. 11 of the will, and holding himself not bound to a contrary view by the judgment of this court in *In re Royal College of Surgeons of England* (19). But the learned judge, second, decided that, upon the true construction of cl. 11 of the will, none of the specified events had occurred, so that, in the result, his decision, first stated, was academic.

The Royal College of Surgeons have appealed against the second part of the judgment of Danckwerts, J., and we have heard their appeal first. The council of the Middlesex hospital medical school served a notice of cross-appeal against the learned

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(18) 1 Mac. & G. 551.

(19) [1899] 1 Q. B. 871.

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judge's decision in favour of the validity of the gift over, and we heard the arguments upon the cross-appeal immediately after the arguments on the appeal. This judgment is upon both appeal and cross-appeal; but I deal with the two questions in that order. As will appear, I have upon both of them differed from the opinion of Danckwerts, J., though, for the reasons already indicated, I arrive in the end at the same conclusion, namely, that the trusts in favour of the Bland-Sutton Institute of Pathology still subsist.

[His Lordship referred to the statement of facts in the judgment of Danckwerts, J. (20), and in the judgment of Jenkins, L.J. (substantially as set out above), summarized the effect of the National Health Service Act, 1946, on the Middlesex hospital, and continued:] These results were in accordance with the scheme of the Act, described in its title as an Act to provide for the establishment of a comprehensive health service for England and Wales. Thereby all the hospitals in England and Wales, both voluntary and of the local authorities (subject only to exceptions immaterial for present purposes), and all their property rights and liabilities vested on July 5, 1948, in the Minister of Health with the exception that in the case of hospitals designated as teaching hospitals (of which the Middlesex hospital was one), their endowments then vested not in the Minister but in new boards of governors for such hospitals, wholly subject to the Minister's control. It was further part of the scheme of the Act that there should be a complete severance from the hospitals themselves (regarded as places or institutions for the care of the sick or injured or those requiring medical attention) of the medical schools which had formerly been part of the hospitals. All such schools had (as I assume from the reading of the Act) constituted medical schools of one or other of the universities in England or Wales; and it was the scheme or pattern of the Act that the schools should thenceforth be part of the universities instead of part of the hospitals, their property and liabilities vesting either in the governing bodies of the appropriate universities or (as, for example, in the case of the medical school of the Middlesex hospital and the medical schools of other London hospitals which had been schools of London university) in bodies corporate independent of the Minister.

The result in such a case as that of the Middlesex hospital is in some respects artificial: for the school and the Bland-Sutton

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(20) Ante, 70.

Institute of Pathology continue to occupy a part of the buildings and premises of the hospital properly so called: and no doubt patients at the hospital continue to be sent for examination, as hitherto, to the institute as part of their treatment. Nevertheless, the two things are legally and administratively quite distinct and the medical school (including the institute) has in this sense been completely severed from the hospital itself.

In these circumstances, it was contended on behalf of the Royal College of Surgeons that the last event specified in cl. 11 of the will had occurred in that the respondent Bank could no longer lawfully apply the income of the endowment fund by paying it " to the treasurer or other proper officer of the Middlesex " hospital for the maintenance and benefit of the Bland-Sutton " Institute of Pathology " or otherwise " for the purpose afore- " said ". In my view Danckwerts, J., was clearly right in rejecting this argument. It is not open to doubt that the income of the fund can, in existing circumstances, still be applied without difficulty or question " for the maintenance and benefit of " the Bland-Sutton Institute of Pathology ". It could not, in my judgment, have been contemplated by the testatrix that in any circumstances the " treasurer or other proper officer of the " Middlesex hospital " would himself have determined the exact method of application of the income: but even had it been so, the disappearance or disability for such purposes of the " treasurer " or other proper officer " would not defeat the trust. I find it unnecessary to add anything further to what was said upon the point by Danckwerts, J.

There remains, however, the question whether the Middlesex hospital has become nationalized or otherwise by any means passed into public ownership. In a popular sense there can, I think, be no doubt that the hospital in common with other hospitals has been " nationalized "—in a popular sense that had been the intention and was the effect of the Act of 1946. But Danckwerts, J., was of opinion that, notwithstanding " the " popular view ", the event specified in the will has not occurred according to its true construction, on the ground that the *whole* of the institution has neither been nationalized nor passed into public ownership. " Part of its property ", he said, " and the " most relevant part for the purposes of the trusts of the will— " that of the medical school—has been transferred to and is in a " corporate body which is not nationalized and is not in public " ownership ".

It is true, as observed by Danckwerts, J., that we are here considering a defeasance clause and that such clauses must be strictly construed. But that is not to say that such a phrase as that with which we are here concerned should be given an artificial precision foreign to its context. It is to be noted that the testatrix has distinguished between nationalization on the one hand and passing into public ownership on the other. According to the Shorter Oxford English Dictionary, the first meaning of the word "nationalize" is "to render national in character", and it may, I think, not unreasonably be contended that the effect of the Act of 1946 was to impose such a uniform and national pattern on all the hospital services of the country, including the medical schools, that the testatrix's condition should be treated as satisfied without regard to the distinction in treatment under the Act accorded to the hospital (properly so called) on the one hand and the medical school (including the Bland-Sutton Institute) on the other. But it is, in my judgment, unnecessary to pursue the argument: for I have come to the conclusion that the effect of the Act was both to "nationalize" and to bring under public ownership the Middlesex hospital, within the contemplation of the testatrix, notwithstanding that the medical school and the institute remained free from national ownership or control. It is true that the whole entity that was formerly described as the Middlesex hospital was neither nationalized nor publicly acquired, and that part of the entity, which has not been nationalized or publicly acquired, has been severed from the hospital, legally and administratively, and has ceased to be, in truth, a part of it. On the other hand, that which remains and is the Middlesex hospital and which has continuously been the Middlesex hospital since its first foundation over two hundred years ago, has according to the ordinary and proper usage of the language been both nationalized and passed into public ownership.

I add, though I do not desire to attach undue significance to it, that the testatrix seems from the language she has used to have been fully conscious of the distinction between the hospital as such and the Institute of Pathology associated with her husband's name: for in cl. 10, para. 2, she refers to the latter as "now carried on in connexion with the Middlesex hospital". And though, as Danckwerts, J., observed, the institute may fairly be referred to as "the most relevant part" of the old hospital for the purposes of the trusts of the will, still the name of Sir John Bland-Sutton is closely associated with the Middlesex hospital to the service of which he devoted no small part of his skill and reputation.

The question is, as the learned counsel on both sides conceded, a short one, incapable of great elaboration and perhaps largely one of first impression. For the reasons I have given I have felt compelled to a conclusion upon it different from that entertained by Danckwerts, J., and I think accordingly that the appeal ought to succeed.

It becomes, then, necessary to determine the subject-matter of the cross-appeal, namely, whether the Royal College of Surgeons are a body established and carried on for charitable purposes only within the meaning of the Statute of Elizabeth, 1601.

Again, the relevant facts have been fully stated by Danckwerts, J., and, on the view which I have formed, I find it unnecessary to recapitulate or add to them. For, sympathizing, as I am strongly inclined to do, with Danckwerts, J.'s opinion of the nature of the purposes of the college, I am unable to escape the conclusion that, in conformity with the principles recently expounded in *Young* v. *Bristol Aeroplane Company Ld.* (20), the court is bound by the decision of the Court of Appeal in *In re Royal College of Surgeons of England* (21) to conclude that the college fail to qualify as a charity.

In the last-mentioned case, it is true, as Sir Andrew Clark argued, that the question and the only question presented to and debated before the Court of Appeal was of a strictly limited character: namely, whether certain of the college property—excluding such property as, for example, the museum—housing, amongst other things, the well known Hunterian collection, was "legally appropriated and applied . . . for the promotion of . . . "science" within the meaning of s. 11 of the Customs and Inland Revenue Act, 1885, so as to be exempt from the duty thereby imposed. According to the report of the case in the Reports of Tax Cases (22), it had been alternatively argued in the court below that the college property was legally appropriated and applied for the promotion of education; but this ground does not appear to have been pursued on behalf of the college before this court; and certainly no argument was presented to the general effect that the purposes of the college were exclusively charitable—the citation of the material part of s. 11 of the Act in the Law Reports omits therefrom the words which occur in it, " for any charitable purpose " (23).

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(20) [1944] K. B. 718.
(21) [1899] 1 Q. B. 871.
(22) 4 T. C. 344.

Sir Andrew was therefore entitled to contend that, since their purposes plainly tended to improve and encourage the supply of qualified surgeons and therefore to the relief of the sick and injured, the college as an institution were within the scope and intendment of the Statute of Elizabeth, 1601; and that *In re Royal College of Surgeons of England* (23) had not directly decided that point against him.

But the Court of Appeal's decision proceeded essentially, in my judgment, on the basis of the view taken by the court of the dual character of the purposes of the college, derived from a close examination of the charters of the college and other material facts, including the Medical Acts of 1858 and 1886. The second paragraph of the reserved judgment of the court read by Sir Robert Romer is as follows (24): " It was finally determined by " the House of Lords in the case of *Inland Revenue Commissioners* " v. *Forrest* (25) that if the main purpose or object of an institu- " tion be the promotion of science, though there may be some " subsidiary purposes or objects, then its property, having to be " applied and being applied for the purposes of the institution, " is legally appropriated and applied for the promotion of science " within the meaning of these words as used in the Act, and is " accordingly exempt from duty. Now the case before us differs " essentially from the case above mentioned of the Institution " of Civil Engineers before the House of Lords. That institution " had only one main object and purpose. The college has two " main objects, each of great importance, in fact it would be " difficult to say which of the two main functions imposed on and " discharged by the college is the more important. Neither can " be considered as merely subsidiary to the other. The one may " be shortly described as the promotion of the science of surgery. " The other is the promotion and encouragement of the practice " of surgery, including the promotion of the interests of those " practising, or about to practise, surgery as a profession, and " also including the examination of students and others to qualify " for practice or honours in surgery or kindred subjects ".

Romer, L.J., then passed, for the purpose of establishing the statement which he had made and which I have quoted, to the terms of the charters and other material evidence. And, after referring (26) to the fact that removal from being a fellow or member of the college would "have very serious results on the "person removed in his practice" and to some other matters affecting the regulation of the profession, he stated: "We think "that the above facts amply show the dual nature of the object "and purpose of the college as above stated by us. Now, so far "as concerns property which may be legally appropriated and "applied to what we have called the second main function of the "college, as distinguished from their other function of the promotion of the science of surgery, it appears to us clear that "such property would not come within any of the exemptions "from duty mentioned in s. 11 of the Customs and Inland "Revenue Act, 1885".

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(23) [1899] 1 Q. B. 871, 872.
(24) Ibid. 877.
(25) (1890) 15 App. Cas. 334.

I will assume Sir Andrew Clark is right in saying that the reference to "any of the exemptions . . . mentioned in" the Act of 1885 in the passage last cited ought not to be considered as intended in the circumstances as a direct decision that none of the relevant property of the college was "legally appropriated or "applied for any charitable purpose". Even so I am unable to resist the conclusion that, on the material then before them, the court came to a clear conclusion that (unlike the Institution of Civil Engineers) the college had two main and distinct purposes or functions and that the promotion of the professional interests of surgeons was an essential and not merely a subsidiary part of one of them. It is true that, at the end of the first passage from the judgment which I have quoted (27), Romer, L.J., describes the second function or purpose as "the promotion or encouragement "of the practice" (as distinct from the "science") "of surgery "*including* the promotion of the interests of those practising . . . "surgery". But having regard to the opening sentence of the same paragraph, it seems to me impossible to treat Romer, L.J., as meaning that the promotion of the professional interests of surgeons was merely subsidiary to a wider purpose, the promotion of the practice of surgery, not as a profession but as a scientific purpose no less than the promotion of the *science* of surgery. And I observe that my reading in this respect of Romer, L.J.'s judgment was that adopted by the Irish Court of Appeal when that court had to consider the claim to rank as a charity of the Royal College of Surgeons in Ireland in *Miley* v. *Attorney-General* (28). See, for example, the language of the Lord

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(26) [1899] 1 Q. B. 871, 882.

(27) Ibid. 877.

(28) [1918] 1 I. R. 455.

Chancellor, Sir Ignatius O'Brien (29): "*In re Royal College* "*of Surgeons of England* (30) is, however, of considerable value "in the present case by reason of the manner in which the Court "of Appeal approached the question there involved. The "charters of the English college of surgeons are of a somewhat "different character from those of the Irish college, but those of "the two countries unite on this common ground, that they deal "with the establishment of the new colleges as being of great "consequence to the commonwealth of the kingdom by the promotion of the art and science of surgery. An examination of "the charters, however, in their essential particulars satisfied "the court in that case that there were two main objects contemplated by the charters, one being the promotion of the art "and science of surgery and the instruction of candidates to "qualify them for the efficient practice of their profession; the "other a different object, namely, the due regulation of the profession of surgeons and the promotion of the interests and the "discipline of the members of that profession after they had been "educated in their art. One object begins where the other "ends; one is essentially and purely a charitable object; the "other is prima facie not a charitable object".

The view taken by the Court of Appeal in 1899 of the construction of the charters of the college and of its corporate purposes was, as I have said, fundamental to the decision then reached by the court, albeit a decision on a question not the same as that which is now presented for this court's determination. In my judgment we cannot now, without an altogether unjustifiable refinement, and ought not to reach a conclusion based on a determination of the nature of the college's purposes at variance with that contained in and fundamental to Romer, L.J.'s judgment: unless it can be shown that in the present case new material was before us and evidence which was not considered by the court in 1899.

During the course of the argument before us, full and careful consideration was given to the various charters and to the earlier Act (31), by reference to which the powers and purposes of the college are defined in the charter of 1800. But all these matters, as well as the Medical Acts of 1858 and 1885, were before the court in 1899. It is therefore in substance upon the last five paragraphs of Lord Webb-Johnson's affidavit in the present proceedings that Sir Andrew has relied as supplying the necessary new evidence, and especially the statement in para. 24 that "surgery—the art or practice of treating injuries, deformities "and other disorders by manual operation or instrumental "appliances—is essentially practical. The art and science of "surgery cannot be promoted without actual practice and experi-"ence which involve necessarily an adequate and competent "body of practitioners".

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(29) [1918] 1 I. R. 455, 461.
(30) [1899] 1 Q. B. 871.
(31) 18 Geo. 2, c. 15.

The paragraph properly emphasizes the point that the art of surgery is a practical art: but I cannot think that the truth of that proposition was unknown to or unrealized by the court in 1899—flowing as it does essentially from the word "surgery" itself, the Oxford English Dictionary definition of which is substantially reproduced by Lord Webb-Johnson in the opening lines of this paragraph of his evidence. In the preceding para. 23 Lord Webb-Johnson draws attention to the disciplinary powers over surgeons which are vested (for the most part) in the General Medical Council rather than in the college. But that appears to have been the position ever since the Medical Acts which were considered by the court in 1899.

The burden of the court's decision in 1899 was that one of the main purposes of the college was the promotion of what may be called the selfish interests of the profession as distinct from the other public or charitable purpose: and, for the reasons I have given, I am unable to find anything in the evidence of Lord Webb-Johnson which would justify us—without untenable refinements—in holding, as a necessary premise to a conclusion in favour of the college, that the main or only purpose of the college is of a public and charitable character and that any selfish professional purpose is only ancillary or subsidiary to the former.

Danckwerts, J., was able to avoid this conclusion. He referred to the two cases relating to the Institution of Civil Engineers, namely, *Inland Revenue Commissioners* v. *Forrest* (32) and *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (33), and thought that the conclusions in those cases of the House of Lords and of this court respectively were no less applicable in the case of the Royal College of Surgeons. He was of opinion that the case in 1899 was a decision solely upon the application to the college of particular words in s. 11 of the Customs and Inland Revenue Act, 1885, and did not therefore constrain him to hold otherwise than that "the real object of the

(32) 15 App. Cas. 334.

(33) [1932] 1 K. B. 149.

" college is the promotion and encouragement of the study and " practice of the art and science of surgery and not the interests " of surgical practitioners " (34).

Agreeing with the learned judge that the case of *In re Royal College of Surgeons of England* (35) was a decision upon a particular statutory provision, I cannot, I regret, agree that it has in consequence so restricted and negative an effect as regards the present question. For reasons which I have already stated and which I do not wish to repeat, I think that it was not open to the learned judge to regard the present case as being in pari materia with that of the Institution of Civil Engineers, the single purpose of which was contrasted by Romer, L.J. (who referred expressly to *Inland Revenue Commissioners* v. *Forrest* (36)), with the dual purpose of the college in the passage from the judgment of this court which I have already read. In defining as he did the purpose of the college, Danckwerts, J., was in fact quoting the language of the charter of 1800, and the words " and not in the " interests of surgical practitioners " seem to me inconsistent with the construction put by this court upon that charter in the light of the other evidence before it. It does not appear that the case of *In re Royal College of Surgeons of England* (35) has ever been questioned or adversely criticized, and I gather that, during the half century since it was decided, the college have consistently been treated as a non-charitable corporation. In my judgment this court cannot and ought not now to declare the contrary.

The result is—for I agree with Danckwerts, J., that the testatrix's general direction that her residuary estate should be held upon trusts described as " charitable trusts " cannot affect the matter—that, in my opinion, the gift over in favour of the Royal College of Surgeons is void. But since, as indicated at the beginning of this judgment, the result is that, by the operation of the *Lassence* v. *Tierney* (37) rule, the original disposition for the maintenance and benefit of the Bland-Sutton Institute of Pathology remains unimpaired by the later defeasance clause and gift over, the substantial result is the same as that arrived at by Danckwerts, J. Nevertheless, the appeal and cross-appeal must be allowed and the order made by the judge discharged.

JENKINS, L.J. [read the relevant clauses of the testatrix's will, summarized the questions before the court, and continued:] As

(34) Ante, 82.
(35) [1899] 1 Q. B. 871.
(36) 15 App. Cas. 334.
(37) 1 Mac. & G. 551.

to the validity of the gift over, it is common ground that a provision of this character if framed to take effect at any distance of time is void for remoteness unless the objects both of the original gift and of the gift over are charitable objects: see *In re Bowen* (38) and *Christ's Hospital* v. *Grainger* (39). The charitable character of the original gift in the present case (that is, the trust in favour of the Bland-Sutton Institute of Pathology contained in cl. 10, para. 2, of the will) is not in dispute. It is, however, contended on the part of the council of the Middlesex hospital medical school that Danckwerts, J., was wrong in holding that the gift over "to the Royal College of Surgeons "absolutely for the general purposes of the said college" is also a gift for charitable purposes and therefore valid, notwithstanding the rule against perpetuities, as a gift over from one charitable object to another: *Christ's Hospital* v. *Grainger* (39). That contention, which is the subject of the council's cross-appeal, would, if successful, admittedly have the effect (in accordance with the principle stated in *Hancock* v. *Watson* (40)) of leaving the trust in favour of the Bland-Sutton Institute of Pathology on foot as an indefinite gift of income discharged from the (on this view) invalid gift over, whether the Middlesex hospital had or had not become nationalized or passed into public ownership within the meaning of cl. 11. No relative of the testatrix within the degrees entitled to participate in any property of hers undisposed of by her will under the Administration of Estates Act, 1925, has so far been traced, and it seems probable on the evidence at present available that none survived her. But Mr. Buckley, for the Treasury Solicitor, as representing those interested under any intestacy, expressed himself satisfied that, in the event of the gift over being held invalid, the result must be as stated above, to the exclusion of any question of intestacy.

Inasmuch as a decision against the validity of the gift over would, as appears above, make it unnecessary to decide the question whether the Middlesex hospital had become nationalized or passed into public ownership within the meaning of cl. 11, it might appear the more logical course to deal first with the question of validity, as was done before Danckwerts, J. But as both questions were fully argued before us, I think it only right in any event to give my views on both of them; and as the appeal of the Royal College of Surgeons, which was opened first in this court, was directed to the question whether the gift over, on the footing that it was rightly held valid by Danckwerts, J., had taken effect, I propose in this judgment to consider that question first.

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(38) [1893] 2 Ch. 491.
(39) (1849) 1 Mac. & G. 460.
(40) [1902] A. C. 14.

[His lordship stated the facts relating to the history of the Middlesex hospital, substantially as set out above, and continued:] The argument against the operation, in the events which have happened, of the gift over (if valid) to the Royal College of Surgeons is in effect founded upon the contention that the testatrix's reference to the Middlesex hospital in cl. 11 means nothing less than the totality of the undertaking above described, that is, the hospital including its medical school, the relevance of which contention will appear from a consideration of the special provisions of the Act of 1946 with respect to " teaching hospitals " as therein defined.

[His lordship then read the relevant provisions of the National Health Service Act, 1946, set out above, and continued:] It is not seriously disputed that the effect of the relevant provisions of the Act, in their application to the Middlesex hospital, was to " nationalize " in the ordinary sense of that expression and within the meaning of cl. 11 of the will the hospital, divested (by virtue of s. 8) of the assets and liabilities of the school. This I think is quite clear from the vesting provisions in ss. 6, 7 and 8, and from s. 12, sub-s. 3, which imposes on the board of governors the duty to manage and control the hospital on behalf of the Minister. I do not pause to consider whether what took place also amounted to a " passing into public ownership ", the conception underlying which phrase seems to me to differ little from " nationalization ". It was perhaps added by the testatrix to cover the possibility of legislation under which the hospitals were transferred to local authorities, thus passing into public, but not necessarily national, ownership.

On the other hand, it seems to me reasonably plain that the school neither became nationalized nor passed into public ownership. Its assets and liabilities were transferred to and vested in, and it was thenceforth to be carried on by, a new corporate governing body, but that governing body is an autonomous and independent entity free of governmental or other public control. In these circumstances, did the Middlesex hospital on July 5, 1948, become nationalized within the meaning of cl. 11 of the will? According to the argument for the council of the medical school, this question should be answered in the negative, because the testatrix in referring to " the Middlesex hospital " meant the totality of the undertaking above described, that is, the hospital including the school, while what was nationalized under the Act of 1946 was the hospital minus the school, that is to say, a part only of what the testatrix meant by "the Middlesex hospital". Therefore, it is argued, the relevant condition for the operation of the gift over was not fulfilled. Divesting provisions such as these should be strictly construed, and a gift over expressed to take effect on the nationalization of a given hospital should be construed as operating only on the nationalization of the whole, and not a part only, of the institution in question.

This argument commended itself to Danckwerts, J., who seems to have felt a doubt, which I confess I do not share, on the question whether even the hospital less the school had been nationalized or passed into public ownership. His conclusion on this part of the case is expressed in the following passage from his judgment (41): "It may be that the new Board of Governors "of the Middlesex hospital are to be regarded as so much the "creature of the Minister of Health that in substance it is "nationalized, and the property of the hospital (other than that "held for the medical school) has become nationalized or has "passed into public ownership. But it seems to me that the "old Middlesex hospital has not as a whole been nationalized "or passed into public ownership; part of its property, and the "most relevant part for the purposes of the trusts of the will of "the testatrix, that of the medical school, has been transferred "to and is in a corporate body, which is not nationalized and is "not in public ownership. For the purposes, therefore, of this "clause of defeasance (and my decision goes no further than that) "I hold that the Middlesex hospital has not become nationalized "and has not passed into public ownership".

I find myself unable to agree with that conclusion. There is, in my view, no sufficient ground for holding that the testatrix in referring to "the Middlesex hospital" used that expression otherwise than in its natural and ordinary meaning as denoting the well-known and old-established institution of that name which had existed as a corporate body since 1836 and previously as an unincorporated association since before 1745. The identity of that institution as "the Middlesex hospital" cannot, in my view, properly be regarded as having depended upon the continued inclusion amongst its assets and liabilities of the assets and liabilities of the medical school carried on in association with it.

(41) Ante, 84.

I ask myself whether the Middlesex hospital as it existed after taking over the assets and liabilities of the medical school in 1896 was a different institution from the Middlesex hospital as it had existed from 1835 to 1896, during which period the school though associated with did not belong to the hospital, or indeed from 1745 to 1835, during which period there was no school at all. I think the answer to this question must clearly be in the negative. Conversely, if, on some date after 1896, the hospital had decided to reorganize the school as a separate entity associated with but no longer owned by the hospital, it clearly could not be maintained that the hospital as it stood after such reorganization had thereby lost its identity as " the Middlesex hospital ". Supposing that, between the testatrix's death and the appointed day, the hospital had voluntarily reorganized the school in the way above indicated and the hospital, thus already divested of the school, had been nationalized by virtue of the Act on the appointed day, it would follow from the argument which has so far prevailed that the Middlesex hospital would not have become nationalized within the meaning of the will. That seems to me to be clearly wrong, yet I think it fairly illustrates the implications of the argument. For the argument really comes to this, that nothing short of the nationalization, lock, stock and barrel, of the whole—or substantially the whole—of the assets, liabilities and activities of the hospital, as they stood at the date of the will, or, perhaps I should say, at the date of the death, could amount to a " nationalization " of the hospital within the meaning of the will. I think that is a forced and unreasonable construction of cl. 11, a construction which would, moreover, have been capable of producing the greatest difficulty and uncertainty. What changes in the assets between the date of the will or death and the date of nationalization, or what exclusions from the scope of the nationalization would suffice to prevent the operation of the gift over? In the summary of the argument, as I have just stated it, I have perforce included the qualifying words " or substantially " the whole ". That qualification is admittedly necessary, for no one would contend that any minor change in or exclusion of assets would have sufficed to prevent " nationalization " within the meaning of the will. The matter thus on the argument which prevailed before Danckwerts, J., becomes one of degree, with all the difficulties and uncertainties which questions of degree entail.

It is to be observed that the argument becomes still more difficult to maintain if nationalization within the meaning of cl. 11 is made to depend on the complete nationalization of all or substantially all the assets and liabilities of the hospital as existing at the date of the event claimed to amount to nationalization within the meaning of that clause, which seems to me, if anything, the more natural date to select. On this footing, the argument would have involved the conclusion that if, as I have supposed above, the hospital had voluntarily reorganized the school as a separate entity before the appointed day, the nationalization of the hospital less the school on the appointed day would have been nationalization of " the hospital " within the meaning of cl. 11, whereas the contemporaneous separation of the school from the hospital and nationalization of the hospital less the school, which actually took place on the appointed day, did not amount to nationalization of " the hospital " within the meaning of cl. 11. This seems to me a wholly unreasonable result. Danckwerts, J., says (42): " . . . it seems to me that " the old Middlesex hospital has not as a whole been nationalized " or passed into public ownership ". I think it must follow as a corollary to that view, that, by reason of the separation of the school from the hospital effected by the Act, the old Middlesex hospital ceased to exist. The school in its new guise certainly cannot be regarded as a continuation of the old Middlesex hospital. The hospital less the school is either the old Middlesex hospital or it is not. If it is, then the conclusion follows, so far as I can see, that the Middlesex hospital has become nationalized within the meaning of the will. If it is not, then the old Middlesex hospital has wholly ceased to exist, or, in other words, the existence and identity of the old Middlesex hospital is made to depend on the continuance of the school as part of its undertaking, a proposition of which I have already expressed my rejection earlier in this judgment.

It is argued that the view of Danckwerts, J., accords with the probable intention of the testatrix, inasmuch as the Bland-Sutton Institute itself, as part of the school, was not affected by the Act in any relevant respect. But as against this, if the legislation had taken a different form so as to nationalize school and hospital with the exception of some branch or department of the hospital's undertaking other than the school, the same argument might have led to the conclusion that the gift over had not taken effect because the hospital as a whole had not been nationalized, and the intention imputed to the testatrix by those who argue against the operation of the gift over in the events which actually happened would thus have been palpably defeated.

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(42) Ante, 84.

Apart from the natural meaning of the testatrix's reference to "the Middlesex hospital" there are indications in cl. 10, para. 2, and cl. 11, which seem to me on the whole to support the conclusion to which I have come. She refers, in cl. 10, para. 2, to "the Bland-Sutton Institute of Pathology now carried on in "connexion with" the Middlesex hospital. That form of words seems to me to suggest that she regarded the institute as connected with but distinct from the hospital itself; and I think the word "now" in the phrase "now carried on" also holds a suggestion that the institution referred to as "the Middlesex "hospital" had existed and might continue to exist as such without the Bland-Sutton Institute—and inferentially without the school of which the institute formed part. Further, cl. 11 contains no reference to the nationalization of the institute. The relevant event contemplated is the nationalization of the hospital. If the testatrix's concept of nationalization of the hospital had been such as Danckwerts, J., has held it to be, it would surely have been more natural for her to refer to nationalization of the institute itself. As it is, the language she has used seems to contemplate the possibility of the hospital becoming nationalized in the sense in which she uses that expression without nationalization of the institute "carried on in connexion" with it, or inferentially of the school of which the institute formed part.

I am accordingly of opinion that the Middlesex hospital did, in the events which happened, "become nationalized" within the meaning of cl. 11 of the will, with the result that the gift over, if valid, took effect.

I should add that, had I agreed with Danckwerts, J., on the question whether the Middlesex hospital became nationalized within the meaning of cl. 11, I would certainly also have agreed with him that nothing had happened to make it unlawful for the bank to apply the income of the endowment fund for the maintenance and benefit of the Bland-Sutton Institute of Pathology and would have found myself quite unable to regard the circumstance that under cl. 10, para. 2, such income, instead of being directly applicable by the bank for these purposes, was to be paid to the treasurer or other proper officer of the hospital for the maintenance and benefit of the institute, as having any material bearing on the result.

It remains to consider whether the gift over is valid or is void for remoteness. As appears above, the answer to this question depends entirely on the further question, whether the object of the gift over is a charitable object in the legal sense of that expression.

Certain preliminary observations are appropriate on this part of the case. First, the gift over can be valid only if the purposes for which it is made are necessarily and exclusively charitable. Secondly, the gift over is to the Royal College of Surgeons, not upon any trust, but simply " for the general purposes of the said " college ". I cannot regard the reference to " the following " charitable trusts " in the opening paragraph of cl. 10 as qualifying or restricting the purposes of the gift over in cl. 11. Thirdly, it follows that the gift over can be valid only if, but not unless, the general purposes for which the college can lawfully apply their funds are exclusively charitable.

The history, constitution and activities of the Royal College of Surgeons were reviewed at some length in the judgment of Danckwerts, J., and are set out in the report (43). I do not propose to enlarge upon them here, because the question for this court as I see it is not whether, had the matter been res integra, the decision of Danckwerts, J., to the effect that the college are a charity, could have been supported, but whether it was open to the judge so to hold in view of the decision of this court in *In re Royal College of Surgeons of England* (44), concerning the nature of the college's objects, which was of course binding on the judge, as it is upon us, as regards all matters fairly within its scope.

In *In re Royal College of Surgeons of England* (44) this court, consisting of A. L. Smith, Collins, and (Sir Robert) Romer, L.JJ., had to consider a claim by the college to exemption from the duty imposed by s. 11 of the Customs and Inland Revenue Act, 1885. [His lordship read s. 11, sub-s. 3, and continued:] It should be noted that exemption under the head of " any " charitable purpose " was not claimed, the head in effect exclusively relied on being " the promotion of science ". It was held that the claim to exemption failed, the judgment of the court being delivered by Romer, L.J., who said (45): " It was " finally determined by the House of Lords in the case of *Inland* " *Revenue Commissioners* v. *Forrest* (46), that if the main " purpose or object of an institution be the promotion of science,

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(43) Ante, 72.
(44) [1899] 1 Q. B. 871; 4 T. C. 344.
(45) [1899] 1 Q. B. 871, 877.
(46) 15 App. Cas. 334.

" though there may be some subsidiary purposes or objects, then " its property, having to be applied and being applied for the " purposes of the institution, is legally appropriated and applied " for the promotion of science within the meaning of these words " as used in the Act, and is accordingly exempt from duty. Now " the case before us differs essentially from the case above mentioned of the Institution of Civil Engineers before the House " of Lords. That institution had only one main object and " purpose. The college has two main objects, each of great " importance; in fact it would be difficult to say which of the " two main functions imposed on and discharged by the college " is the more important. Neither can be considered as merely " subsidiary to the other. The one may be shortly described as " the promotion of the science of surgery. The other is the " promotion and encouragement of the practice of surgery, " including the promotion of the interests of those practising, or " about to practise, surgery as a profession, and also including " the examination of students and others to qualify for practice " or honours in surgery or kindred subjects ".

He then proceeded to justify the above conclusion as to the nature of the college's objects by a review of their history, the effect of the relevant charters and Acts of Parliament, and the various activities which they carried on.

Danckwerts, J., after referring to *In re Royal College of Surgeons of England* (47) and citing authorities (some of which I will presently mention) for the proposition that the advancement of those practising a profession or calling is not a charitable purpose, said (48): " But, in considering whether a particular " society is a charity, for the purposes of a gift in a will at least, " it would appear that the test is whether the objects of the " society are really charitable notwithstanding that the carrying " out of the objects of the society may incidentally produce " benefits to the members of the society. Nor does it appear to " be material what are the motives of the members of the society " in joining it. Indeed, an impossible investigation into the " inner thoughts of the members would seem to be involved in " any such consideration, and such a process was rejected (in a " revenue case), where the purpose of a society is defined by " charter or statute, by Lord Hanworth, M.R., in *Institution of* " *Civil Engineers* v. *Inland Revenue Commissioners* (49) ".

(47) [1899] 1 Q. B. 871.
(48) Ante, 80.
(49) [1932] 1 K. B. 149.

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BLAND-SUTTON'S WILL TRUSTS, *In re.* NATIONAL PROVINCIAL BANK LD. *v.* THE MIDDLESEX HOSPITAL.

Jenkins, L.J.

After stating the effect of the latter case, he cited the following passage from the judgment of (Sir Mark) Romer, L.J. (50): " Where a society is instituted for a charitable purpose, it is " obvious that the membership of the society may confer upon " its holder personal advantages of considerable value to him in " his profession or in his social standing. He may, for instance, " have an exclusive right to affix to his name a certain designa- " tion, and will be known to the public as a person belonging to " the society. He may have to observe disciplinary rules laid " down with a view to ensuring that he does not bring discredit " upon other members of the society. But in such cases, " although the securing of such advantages to the members may " in a sense be regarded as one of the objects of the society, such " object is merely concomitant or incidental to the real object of " the society, and if that real object be charitable, the society is " established for charitable purposes only ".

Finally, Danckwerts, J., expressed his conclusion on this part of the case (51): " It seems to me that these observations apply " to the present case, and that unless I am constrained by the " decision of the Court of Appeal in *In re Royal College of* " *Surgeons* (52) to hold otherwise, the real object of the college " is the promotion and encouragement of the study and practice " of the art and science of surgery, and not the interests of " surgical practitioners. As has been already observed, that " decision of the Court of Appeal was upon a particular statute " and was directed to different considerations; and I think that " I am at liberty to hold, for the purposes of the present case, " that the Royal College of Surgeons is a charity, and I do so " hold ".

Having regard to the decision of this court in *In re Royal College of Surgeons* (52) as to the nature of the college's objects. I do not think it was open to Danckwerts, J., or is now open to this court, to deal with the matter in that way.

The case of *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (53), on which Danckwerts, J., relied, really did no more than apply in relation to the question whether that institution was a charity, the decision of the House of Lords in *Inland Revenue Commissioners* v. *Forrest* (54) to the effect that the same institution was entitled to exemption from the duty

(50) [1932] 1 K. B. 149, 172.
(51) Ante, 82.
(52) [1899] 1 Q. B. 871.
(53) [1932] 1 K. B. 149.
(54) 15 App. Cas. 334.

imposed by s. 11 of the Customs and Inland Revenue Act, 1885, on the ground that its property was "legally appro-" priated and applied . . . for the promotion of . . . science . . .", within the meaning of sub-s. 3, the basis of that decision being that the real or substantial purpose of that particular institution was the promotion of science, the advantages accruing to members from the activities of the institution being merely incidental to or consequential on its pursuit of that purpose.

It is important to note that the passage I have already quoted from the judgment in *In re Royal College of Surgeons* (55) begins by distinguishing *Inland Revenue Commissioners* v. *Forrest* (56), with respect to which Romer, L.J., says: "Now the case before " us differs essentially from the case above mentioned. . . . That " institution had only one main object and purpose. The college " has two main objects . . .".

It is, of course, true that *In re Royal College of Surgeons* (57) was not in terms concerned with the question whether the college were a charity, but with the question whether they were entitled to exemption from the duty imposed by s. 11 of the Customs and Inland Revenue Act, 1885, under the head of "promotion of " science". The absence of any suggestion of a claim to exemption under the head of "any charitable purpose" is, at first sight, significant, but it is possibly accounted for by the restricted (yet undefined) meaning placed on this expression in the somewhat obscure decision of *Inland Revenue Commissioners* v. *Scott* (59). Be that as it may, I am content to assume for the present purpose that when Romer, L.J., said in *In re Royal College of Surgeons* (58) that "such property would not come " within *any* of the exemptions from duty mentioned in s. 11 of " the Customs and Inland Revenue Act, 1885", he was not directing himself to the head of "any charitable purpose".

Danckwerts, J., seems to have regarded the fact that *In re Royal College of Surgeons* (57) was concerned with the particular question of exemption from duty under s. 11 of the Act of 1885 coupled with the omission of any claim under the charitable head of exemption, and the restricted meaning placed on the words "any charitable purpose" in this section by *Inland Revenue Commissioners* v. *Scott* (59), as affording sufficient grounds for distinguishing *In re Royal College of Surgeons* (60) from the

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(55) [1899] 1 Q. B. 871, 877.
(56) 15 App. Cas. 334.
(57) [1899] 1 Q. B. 871.
(58) Ibid. 882.
(59) [1892] 2 Q. B. 152.
(60) [1899] 1 Q. B. 871.

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present case, and Sir Andrew Clark in his argument for the college placed strong reliance on these considerations. But, given the fullest possible weight, they can only go to show that there is nothing in *In re Royal College of Surgeons* (60), which as a matter of direct decision precludes the college from arguing that they are a charity, and in no way detracts from the effect of that case as an authority binding Danckwerts, J., and this court so far as the nature of the college's objects is concerned. The decision in *In re Royal College of Surgeons* (60) on that question in no way depended on the purpose for which it was necessary to decide what the nature of the college's objects was. If the matter in issue had in terms been whether the purposes of the college were charitable, precisely the same inquiry into the nature of the college's objects would have had to be pursued, and there is no justification for assuming that any different result would have been reached.

Accordingly, while I am prepared to assume that *In re Royal College of Surgeons* (60) leaves open to argument the question whether the college are a charity, I think it demands, at all events so far as this court is concerned, that the argument should proceed on the basis that the college have two main objects of the respective kinds stated by Romer, L.J.

Sir Andrew Clark sought to escape this conclusion on the ground that the evidence now before the court includes new matter, which if it had been before the court in *In re Royal College of Surgeons* (60) would, or might, have led to a different conclusion. There is, in my view, no substance in that contention.

Sir Andrew further contended that surgery being an essentially practical science, the objects of the college, even as defined in *In re Royal College of Surgeons* (60), were charitable because they were (1.) for the promotion of the science of surgery; and (2.) for the promotion of that science in its practical application, and thus wholly for the promotion of science, "the "promotion of the interests of those practising or about to "practise surgery as a profession", included by Romer, L.J., in his statement of the second main object, being merely incidental or consequential, as the advantages accruing to members were held to be in *Inland Revenue Commissioners* v. *Forrest* (61).

I cannot place this construction on *In re Royal College of Surgeons* (60) and I think it is inconsistent with the clear distinction drawn by Romer, L.J., between that case and *Inland Revenue Commissioners* v. *Forrest* (61). It seems to me really quite plain that Romer, L.J.'s statement of the first object is intended to embrace the whole of the scientific purposes of the college, whether theoretical or practical, while the second object as defined by him is directed to professional, as opposed to scientific matters, the " practice of surgery " there meant being the practice of surgery as a profession, and not " the science of " surgery in its practical application ".

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(60) [1899] 1 Q. B. 871.

(61) 15 App. Cas. 334.

Sir Andrew also contended, if I understood him rightly, that, even on the construction I have just placed on the second object as stated in *In re Royal College of Surgeons* (62), the college should be held to be a charity because (i) it is in the public interest that there should be an adequate supply of skilled surgeons (without whom hospitals could not effectively function); (ii) any association promoting the professional advantage of persons practising surgery tends to encourage people to embark on that profession and thus to keep up the supply of skilled surgeons; and therefore (iii) the college are a charity notwithstanding the character of their second object, because they tend to maintain the supply of persons competent to heal the sick, just as a hospital not carried on for profit is a charity, as fulfilling a purpose analogous to " the relief of aged impotent and poor " people " mentioned in the preamble to the Statute of Elizabeth, 1601. This argument seems to me to enlarge to a wholly unprecedented degree the ambit of legal charity, and I find it impossible to accept.

As it seems to me, holding as I do that this court is bound by the statement of the objects of the college contained in *In re Royal College of Surgeons* (62), the question whether the college are a charity really admits of only one answer. The second of their two main objects as defined by Romer, L.J., is clearly not charitable. If authority for this proposition is needed, it is to be found (for example) in the decision of this court in *General Medical Council* v. *Inland Revenue Commissioners* (63), to which may be added the Irish case of *Miley* v. *Attorney-General* (64). The last-mentioned case concerned the Royal College of Surgeons in Ireland, a bequest to which institution was held not to be for charitable uses, and is of particular assistance here, not because the Irish college were necessarily comparable in all material respects with the English one—there were in fact considerable

(61) 15 App. Cas. 334.
(62) [1899] 1 Q. B. 871.
(63) 13 T. C. 819.
(64) [1918] 1 I. R. 455.

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differences, but because the Irish Court of Appeal in that case, having placed the same construction on the decision in *In re Royal College of Surgeons* (65) as I have placed upon it above, held that the Irish college's objects were of a similar twofold character, and concluded upon that ground that the Irish college were not a charity.

In the result, I am of opinion that the appeal in substance fails, as, although the Middlesex hospital did, in the view I take, become nationalized within the meaning of cl. 11 of the will, the gift over must be held invalid, and therefore incapable of taking effect on the happening of that or any other of the events specified in cl. 11. Conversely, I hold that the cross-appeal should succeed. I would, therefore, discharge the order of Danckwerts, J. (except as to costs) and substitute a declaration to the effect that the gift over is invalid.

HODSON, L.J. I have arrived at conclusions different from those reached by Danckwerts, J., on both questions which arise on these appeals.

The first question argued was whether on the true construction of this will the gift for the maintenance and benefit of the Bland-Sutton Institute is effective notwithstanding the language of cl. 10, para. 2, and cl. 11.

[His lordship then read the material words of the clauses and continued:] I agree with Danckwerts, J., that as regards the last alternative event, " the purposes aforesaid " are the maintenance and benefit of the Bland-Sutton Institute of Pathology and not necessarily the payment of the residue of the income of the endowment fund to the treasurer or other proper officer of the Middlesex hospital for that purpose.

The second alternative in the events which have happened does not in my opinion add anything to the first alternative, which is the one which requires consideration.

The effect of the National Health Service Act, 1946, s. 6, sub-s. 1, is to transfer all the premises (that is land, buildings) of the hospital, and all the equipment, furniture or other movable property used in connexion with such premises were transferred to and vested in the Minister of Health free of any trust. By s. 7 the endowments of the Middlesex hospital, being a teaching hospital, were transferred to a board of governors to be constituted under the Act. By s. 12, sub-s. 3, a duty is imposed on the board to manage and control the hospital on behalf of the Minister. In popular language the effect of these provisions is certainly nationalization, even though the word nationalization does not appear in the Act itself.

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(65) [1899] 1 Q. B. 871.

It is argued, however, that the clause, being a defeasance clause, must be strictly construed before its terms can be said to be satisfied, and accordingly, since the medical school of which the Bland-Sutton Institute forms part was not nationalized (see s. 8 of the Act), on the strict construction of the clause, the Middlesex hospital has not been nationalized. The clause, it is said, cannot be satisfied unless and until the Middlesex hospital as a whole has been nationalized. This construction would be an artificial one and would tend to the conclusion, for example, that, in construing a defeasance clause containing a reference to the nationalization of the railways, the fact that the surplus lands have not been nationalized would compel the court to hold for this purpose that the railways had not been nationalized. This seems to me to be carrying the rule as to the strict construction of defeasance clauses to an absurdity.

Putting oneself in the position of the testatrix, the widow of a distinguished surgeon long associated with the Middlesex hospital, with the knowledge that the work of the school, including the institute, is closely bound up with what is properly regarded as " the hospital ", one asks oneself what else the testatrix could possibly have meant by the words "should the Middlesex " hospital become nationalized " except the popular meaning.

By cl. 10 of the will, the Bland-Sutton Institute is treated separately from the hospital and is specifically referred to as *now* carried on in connexion with the hospital. The word " now " is apposite to the past, since until 1914 there was no such institute, whereas the hospital itself began its life in or about the year 1748. Clause 11, which contains the words " should the " Middlesex hospital become nationalized ", immediately follows cl. 10, and read with it refers expressly, therefore, to the hospital apart from the institute.

The work of the hospital and the work of the institute are closely interlocked, the one providing material for the other, and the testatrix must, in her position, have been well acquainted with the position. In her will, in their context and in the surrounding circumstances, the words under consideration in my opinion refer to the hospital in the popular sense of the word, which, incidentally, is the sense in which the hospital is defined in s. 79 of the Act of 1946.

In my opinion, therefore, there is a defeasance provided the gift to the Royal College of Surgeons in cl. 11 of the will is valid.

It therefore becomes necessary to consider the question whether or not the Royal College of Surgeons are a charity, since it is conceded that otherwise, on the principle of *In re Bowen* (66), the gift over fails.

The question has arisen in a different form in the case of *In re Royal College of Surgeons of England* (67), a decision of the Court of Appeal and therefore binding unless distinguishable for the purpose of this case. There the court had to consider whether the Royal College of Surgeons were exempt from duty under s. 11 of the Customs and Inland Revenue Act, 1885. The college claimed exemption, not on the ground that its income or property were legally appropriated and applied for charitable purposes, but on the ground that the sums were applied for the promotion of science.

In deciding this question the court had before it evidence fully set out in the report (68), which referred to the charters governing the college, the by-laws, rules and regulations made thereunder, as well as the statutes affecting and the duties discharged by the college.

The judgment of the court, consisting of A. L. Smith, Collins and Romer, L.JJ., was given, after time had been taken for consideration, by Romer, L.J., who found that the college had two main objects, neither of which could be considered merely subsidiary to the other. He said: "the one may be shortly "described as the promotion of the science of surgery. The other "is the promotion and encouragement of the practice of surgery, "including the promotion of the interests of those practising, or "about to practise, surgery as a profession, and also including "the examination of students and others to qualify for practice "or honours in surgery or kindred subjects".

He had previously referred to the case of *Inland Revenue Commissioners* v. *Forrest* (69), given on the same section of the Customs and Inland Revenue Act, 1885. He pointed out that the Institution of Civil Engineers, the society whose objects were there discussed, was held to be exempt from duty on the ground that its main object and purpose was the promotion of science and that this institution had only one object and purpose.

Sir Andrew Clark, on behalf of the college, sought to escape from the difficulty presented by *In re Royal College of Surgeons* (70) in several ways.

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(66) [1893] 2 Ch. 491.

(67) [1899] 1 Q. B. 871.

(68) 4 T. C. 344.

(69) 15 App. Cas. 334.

First, he said that the word "charity" was not mentioned in that case, which was decided on the narrow ground only that the sole object of the college was not the promotion of science; in short, that the court had construed the charters with a different purpose in mind.

Secondly, he said even if the charitable purpose mentioned in s. 11 must be taken to have been considered, yet "any charitable "purpose" there has a narrower meaning than "charitable "purposes" in the ordinary legal sense: see *Inland Revenue Commissioners* v. *Scott* (71).

Thirdly, he said that the evidence in this case enabled the court to arrive at a conclusion different from that reached by the Court of Appeal in 1899 on the evidence then before it.

In the fourth place, he said that even accepting the construction placed upon the charters of the college in *In re Royal College of Surgeons* (72), it was open to the court to hold that the practice of surgery was not a private or selfish object such as to be necessarily excluded from the scope of charity.

As to the first contention, s. 11 as a whole must be taken to have been considered by the court. Romer, L.J., said (73): "It "appears to us clear that such property" (that is to say, property of the college) "would not come within any of the exemptions "from duty mentioned in s. 11 of the Customs and Inland "Revenue Act, 1885". This language covers "any charitable "purpose" in s. 11, sub-s. 2. Even if this passage could be regarded as mere obiter dictum, the difficulty clearly remains that, in the judgment of the court, the two main objects were defined in such a way that one was found to be clearly non-charitable in the legal sense, and in so far as the question depends on the construction of the charters and other matters considered in *In re Royal College of Surgeons* (72), the judgment must be taken as authoritative for the construction given.

The same answer can be given to the second contention, for the language in which the charters were construed is clearly wide enough to exclude the second main object of the college from the ambit of charitable purposes in the legal sense. In addition, I share the difficulty felt by the judge in understanding the distinction drawn in *Inland Revenue Commissioners* v. *Scott* (74) between "any charitable purpose" and charitable purposes generally. Consideration of the other matters referred to in conjunction with "any charitable purpose" and the order in which the exemptions are set out in s. 11 do not give me any assistance.

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(70) [1899] 1 Q. B. 871.
(71) [1892] 2 Q. B. 152, 165.
(72) [1899] 1 Q. B. 871.
(73) Ibid. 882.

As to the third ground, namely, the effect of the evidence, the college relies upon the evidence of Lord Webb-Johnson, particularly para. 24 of his affidavit, already read by the Master of the Rolls.

I am bound to say that I find nothing in later charters, by-laws or affidavit evidence to which the attention of the court has been drawn to enable a different conclusion to be reached from that of the Court of Appeal in 1899.

The fourth argument must, I think, be rejected since the language of the definition of the second object in the judgment given in 1899 necessarily takes the object out of the scope of charity. Being of opinion that the court ought to consider itself bound in the circumstances of this case by the opinion expressed by the court in *In re Royal College of Surgeons of England* (75), I do not propose to examine in detail the arguments put forward to the effect that the objects of the college are solely charitable. Such an argument was successfully put forward in the case of the *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (76), and it is said that a fortiori the college, which has as its main and sole object the relief of sickness, should come within the scope of the definition of a charity.

This case was relied upon by Danckwerts, J., but, in my opinion, for the reasons given, the distinction between the two societies as found by the court in *In re Royal College of Surgeons* (75) cannot be overlooked. In my judgment the questions should be answered as indicated by the Master of the Rolls, with the result that, as conceded, the gift over fails and the prior gift takes effect.

Appeal and cross-appeal allowed.

Solicitors: *Wilde, Sapte & Co.; Peake & Co.; Withers & Co.; The Treasury Solicitor.*

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(74) [1892] 2 Q. B. 152.
(75) [1899] 1 Q. B. 871.
(76) [1932] 1 K. B. 149.

INLAND REVENUE COMMISSIONERS *v.* SILVERTS LD.

C. A.

1951
Feb. 5, 6, 7;
March 5.

Evershed, M.R., Jenkins and Hodson, L.JJ.

Revenue—Profits tax—"Controlling interest"—Shares registered in name of custodian trustee under trust—Managing trustees directors of company—Powers of custodian trustee in relation to managing trustees—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 4*—Finance Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV*, *para.* 11.

At all material times four persons were directors of the appellant company. All the B shares which carried half the voting rights were vested in one of the directors. The A shares, which carried the other half of the voting rights, were the subject of a settlement, and were vested in a bank as the custodian trustee of the settlement within the meaning of s. 4 of the Public Trustee Act, 1906. Two of the directors were the managing trustees of the settlement. Romer, J., held, reversing the Special Commissioners, that the directors had a controlling interest in the company within para. 11 of Sch. IV to the Finance Act, 1937. On appeal:—

Held, that the bank as the registered holder of all the A shares was not merely a nominee or bare trustee; that therefore the controlling interest in the shares must be treated as being in the bank, and it was not possible to investigate the character in which the bank exercised its voting rights as shareholder by reference to the terms of the settlement or of s. 4 of the Public Trustee Act, 1906, or otherwise; and that the directors accordingly had not a controlling interest in the company.

J. Bibby & Sons Ld. v. *Inland Revenue Commissioners* (1945) 29 Tax Cas. 167 followed.

British American Tobacco Co. Ld. v. *Inland Revenue Commissioners* [1943] A. C. 335 considered.

Decision of Romer, J., [1950] W. N. 371, reversed.

APPEAL from a decision of Romer, J. (1), given on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

In 1940 the directors of Silverts Ld., the appellants, were four men called S. J. Silvert, S. J. B. Lancashire, W. F. Lewis and A. H. Silvert. The share capital (in shares of 1*l*.) was held as to 6,000 "B" shares by S. J. Silvert, and as to 3,500 and 2,500 "A" shares by Lancashire and Lewis respectively, as trustees for one Ross. There were also 2,000 "C" shares without voting rights. By a deed dated June 27, 1940, made between Ross as settlor, the National Provincial Bank Ld. as custodian trustee, and S. J. B. Lancashire and W. F. Lewis as managing trustees, the "A" shares were all transferred into the name of the bank as custodian trustee with such functions and powers as were given

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(1) [1950] W. N. 371.

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by s. 4 of the Public Trustee Act, 1906; and it was further provided that the trustees should stand possessed of the shares in trust for the settlor's infant son, David Ross.

The special commissioners held that the directors did not have a controlling interest within the meaning of the Finance Act, 1937, Sch. IV, para. 11, and that, accordingly, the company was not subject to the restrictions imposed by that paragraph on the treating of the remuneration of the directors as a deduction for the purpose of arriving at its taxable profits.

Romer, J., held, reversing the special commissioners, that S. J. B. Lancashire and W. F. Lewis as managing trustees had control of the "A" shares, the bank being, in effect, a bare trustee. Accordingly, the company was one of which the directors had a controlling interest for the purposes of the Finance Act, 1937, Sch. IV, para. 11.

The company appealed.

Pennycuick, K.C., and *Honeyman* for the company. The company contends that this case falls within the decision in *J. Bibby & Sons Ld.* v. *Inland Revenue Commissioners* (2) and that one must not look beyond the bank, the registered holder, to see who controls these shares. The Crown contends that this case is governed by *British American Tobacco Co. Ld.* v. *Inland Revenue Commissioners* (3); that to find the control one must look to the character in which the bank is on the register; and that since the bank is merely a custodian trustee bound by s. 4 of the Public Trustee Act, 1906 (4), to give effect to the directions of the managing trustees, it must be regarded as being in the position of a bare trustee. That is not the correct way of looking at the position of the bank. Under s. 4 the bank is bound, when it receives any directions from the managing trustees, to see that they are within its scope and powers. The relation of custodian trustee to managing trustee differs substantially from the relationship of a bare trustee and his cestui que trust. In the latter case, the bare trustee must give effect to the directions he receives. The meaning of control was considered in *F. A. Clark & Son Ld.* v. *Inland Revenue Commissioners* (5) and in *John Shields & Co. (Perth) Ld.* v. *Inland Revenue Commissioners* (6). In the latter case, the question was whether directors had a controlling interest for the purposes of s. 13 of the Finance Act, 1939. It is submitted that the same construction should be put on "controlling "interest" in the Act of 1937 as was put on it by the court when construing s. 13 of the Act of 1939.

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(2) (1945) 29 Tax Cas. 167.

(3) [1943] A. C. 335.

(4) Public Trustee Act, 1906, s. 4, sub-s. 2 (*d*): "The custodian trustee "shall concur in and perform all acts "necessary to enable the managing "trustees to exercise their powers of "management or any other power or "discretion vested in them (including "the power to pay money or securities "into court), unless the matter in "which he is requested to concur "is a breach of trust, or involves a "personal liability upon him in respect of calls or otherwise, but, "unless he so concurs, the custodian "trustee shall not be liable for any "act or default on the part of the "managing trustees or any of them".

The observations of Jessel, M.R., in *Pulbrook* v. *Richmond Consolidated Mining Co.* (7), which were quoted by Lord Macmillan in the *Bibby* case (8), show that the company is not entitled to look behind the share register. *British American Tobacco Co. Ld.* v. *Inland Revenue Commissioners* (9) is distinguishable as involving control by a corporation.

[They referred to *John Shields & Co. (Perth) Ld.* v. *Inland Revenue Commissioners* (10).]

Heyworth Talbot, K.C., J. H. Stamp and *R. P. Hills* for the Crown. The question in the *Bibby* case (8) was entirely different from that arising here. The power to control votes here is either in the custodian trustee or in the managing trustees. It is submitted that it cannot be doubted that the power is in the managing trustees. The company is wrong in its contention that it is not permissible to look behind the register to see where is the actual control. It would be odd if one were bound to look behind the share register to discover if a man is a director of a company, but it were not permissible to look behind the register to see what are the beneficial rights. In the *Bibby* case (8) the contrast was between beneficial and legal interests. It is implied in that decision that ordinarily the voting power will be with the trustees and not with the beneficiaries. In the Court of Appeal Lord Greene, M.R. (11), expressed the opinion that the case of a bare trustee was an exception to that principle. A custodian trustee is, in effect, in the same position as a bare trustee. In the House of Lords the decision of the Court of Appeal was affirmed but the position of a bare trustee was expressly reserved for further consideration. It is submitted that the crucial test is who has the will and ordering of the voting power. It is necessary to look behind the façade of the register to see who controls that power. That power here is in the managing trustees. It is submitted, first, that it appears from the observations of Lord Simon in the *British American Tobacco* case (12) that the ratio decidendi in that case is not limited to the case where the registered shareholder is a company; secondly, that the question is who has the will and ordering of the voting power, for that person can decide how the business is to be carried on; thirdly, that the will and ordering of the voting power in respect of the A shares are in the managing trustees; and fourthly, that the *Bibby* decision (13) has not displaced the will and ordering test.

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(5) [1941] 2 K. B. 270.

(6) (1950) Excess Profits Tax Leaflet No. 96.

(7) (1878) 9 Ch. D. 610, 615.

(8) 29 Tax Cas. 167, 182.

(9) [1943] A. C. 335.

(10) (1950) Excess Profits Tax Leaflet No. 96.

(11) 29 Tax Cas. 167, 173, 181.

J. H. Stamp following. This case does not necessarily involve the question of the position of a nominee shareholder, for the *British American Tobacco* case (12) shows that there may be two controlling interests, one direct and the other indirect. The case where shares are in the names of ordinary trustees is covered by the *Bibby* case (13). The *British American Tobacco* case (12) decides that a controlling interest need not be direct. The Act of 1906 is very precise. It states that the management of a trust and the exercise of any power " shall " remain in the managing trustees, and this includes the equitable voting power on shares. The formal voting power only is in the custodian trustees.

Pennycuick, K.C., in reply. The Crown is asking the court not to follow the *Bibby* case (13). That case establishes that it is not possible to look behind the share register except possibly in the case of a bare trustee. The *British American Tobacco* case (12) can be reconciled with the *Bibby* case (13) on the ground that there the registered holder was a company, and it is permissible to look behind the dead hand of a company to find the live hand which actually controls.

Cur. adv. vult.

March 5. EVERSHED, M.R., read the following judgment of the court:—The question raised in this appeal is whether, for the purpose of computing profits tax in respect of the year which ended on December 31, 1947, the directors of Silverts Ld. had a controlling interest therein. The tax was first imposed under the name of National Defence Contribution by s. 19 of the Finance Act, 1937. Section 20 of the same Act provided that the tax should be computed on income tax principles subject to the terms of Sch. IV to the Act; and para. 11 of that schedule imposed limits in the case of a company "the directors whereof have a "controlling interest therein" upon the deductions which might be made in respect of directors' remuneration. It is therefore in the interest of the company, Silverts Ld., in the present case to show that during the material year its directors did not have a controlling interest therein. This the company succeeded in doing before the special commissioners, but Romer, J., came to a contrary conclusion. The company has appealed from Romer, J.'s decision.

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(12) [1943] A. C. 335.

(13) 29 Tax Cas. 167.

The facts are that, at the relevant date, the issued share capital of the company consisted of 6,000 "A" shares, 6,000 "B" shares and 2,000 "C" shares, all respectively of 1*l*. each. The "C" shares conferred no voting rights in any circumstances and they may be wholly disregarded. The "A" and "B" shares conferred equal voting rights on their holders and there was in the company's regulations no provision for a casting vote. In the event of a deadlock, the articles provided for a method of arbitration.

The directors, at the material time, were four in number, S. J. Silvert, S. J. B. Lancashire, W. F. Lewis and A. H. Silvert. S. J. Silvert was the registered holder of all the "B" shares. None of the other directors was the registered holder of any "A" or "B" shares. The "A" shares were all the subject of a settlement made on June 27, 1940, by one Sydney Ross in favour of his infant son David. By the settlement, National Provincial Bank Ld. was appointed custodian trustee within the meaning of the Public Trustee Act, 1906. The managing trustees were the two directors, Lancashire and Lewis, the settlor reserving to himself a power at any time to remove these persons or either of them and to appoint others or another instead. The sole beneficiary under the settlement was the infant, David Ross.

On these facts, it would not at first sight appear that the question presented to the court should be one of great difficulty; nor would it have been so, had it not been for the introduction under the settlement of the bank as custodian trustee. But two decisions of the House of Lords appear to provide a difficult problem of reconciliation. The cases are, first, *British American Tobacco Co. Ld.* v. *Inland Revenue Commissioners* (14), and, secondly, *J. Bibby & Sons Ld.* v. *Inland Revenue Commissioners* (15). When the *British American Tobacco Co.'s* case (14)

(14) [1943] A. C. 335.

(15) (1945) 29 Tax Cas. 167.

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was in the Court of Appeal, there was also heard with it a third case of *F. A. Clark & Son Ld.* v. *Inland Revenue Commissioners* (16). This last case did not go to the House of Lords, but, as in certain respects it has a close bearing on the facts of the present case, it will be necessary to refer to it later.

The solution of the present question depends on the proper method of reconciling the *British American Tobacco* (17) and *Bibby* cases (18), or, perhaps more accurately, on the correct appreciation of the scope of those decisions. If the office of custodian trustee had not been interposed and the "A" shares had, by the 1940 settlement, been vested, according to the more usual practice, in Lancashire and Lewis, as trustees in the ordinary course, it is not open to doubt that (without regard to any beneficial interests) the *Bibby* case (18) would have concluded the matter in favour of the Crown. If, again, a custodian trustee could be properly described as a bare trustee (in the sense in which that phrase was used by their lordships in the *Bibby* case (18)) it would have been necessary to decide the precise point reserved in the *Bibby* case (18) for further consideration.

The rights and obligations of a custodian trustee are set out in s. 4, sub-s. 2, of the Public Trustee Act, 1906. By para. (*b*) of that sub-section, all "powers and discretions" are stated to "remain vested in the" managing trustees; but, by para. (*d*), the custodian trustee is not (like a bare trustee) bound to give effect, for example by voting, in all cases (not involving criminal liability) to the wishes or directions of the managing trustees. Thus he is not so bound if the directed exercise involves a breach of trust. The distinction (between a custodian and bare trustee) is, for practical purposes, perhaps a fine one; but it is a real one. Indeed, it has not been seriously contended before us on the part of the Crown that the bank in the present case can be properly regarded as a bare trustee in the sense intended by the House of Lords in the *Bibby* case (18). But one argument for the Crown did, in effect, invite us to hold that, in the relevant matter of voting power, the position of a custodian trustee vis-à-vis the managing trustees is so closely analogous to that of a bare trustee vis-à-vis his principal as to bring the case within the spirit, albeit not within the letter, of the exception made by Lord Greene, M.R., and the reservation made by the House of Lords in the *Bibby* case (18).

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(16) [1941] 2 K. B. 270.

(17) [1943] A. C. 335.

(18) 29 Tax Cas. 167.

It is convenient to turn at once to the *British American Tobacco* (17) and *Bibby* cases (18). In the *British American Tobacco* case (18) the question before the court arose under para. 7 of Sch. IV to the Act of 1937, which provides that in the case of a business carried on by a corporate body there shall, for the purposes of computing the tax, be included in its profits the profits of other corporate bodies (not themselves liable to be assessed to the tax) " in which the first-mentioned body corporate " has a controlling interest ". The question was as to the inclusion in the profits of the British American Tobacco Company of the profits of bodies corporate in which it held no interest itself but in which (admittedly) the controlling interest was held by other companies in which in turn the British American Tobacco Company itself held (admittedly) a controlling interest. Though the precise problem differed from that in the present case, it equally involved the scope and meaning of the formula " controlling interest "; and it has been agreed before us that the formula ought to be treated as having the same sense in all places where it is used in Sch. IV to the Act of 1937 and where it is used in the relevant provisions of the Finance (No. 2) Act, 1939, which was the material Act in the *Bibby* case (18).

In the *British American Tobacco* case (17) the House of Lords, affirming the decision of this court, held that the controlling interest was none the less in the British American Tobacco Company because it was held, as it were, at a remove. " I find it " impossible ", said Viscount Simon (19), with whom all the other noble Lords concurred, " to adopt the view that a person " who (by having the requisite voting power in a company subject " to his will and ordering) can make the ultimate decision as to " where and how the business of the company shall be carried on, " and who thus has in fact control of the company's affairs, is a " person of whom it can be said that he has not in this connexion " a controlling interest in the company."

In the *Bibby* case (20) the question was, as in the present case, whether the directors of the company held a controlling interest therein. The question arose in fact under s. 13, sub-s. 9, of the Act of 1939, whereby, for the purpose of excess profits tax, the profits of the company increase or decrease by a statutory percentage in relation to the capital employed in the business, and in that case it was in the interest of the company to show

(17) [1943] A. C. 335.
(18) 29 Tax Cas. 167.
(19) [1943] A. C. 335, 339.
(20) 29 Tax Cas. 167.

that its directors did hold a controlling interest therein. The answer to the problem depended upon whether there should be included as part of the " controlling interest " shares held by directors not in their own right but as trustees under a settlement of the ordinary kind. The House of Lords (again affirming the decision of this court) answered the question affirmatively. Lord Greene, M.R., who had read the judgment of the Court of Appeal, indicated that the result would have been different had the trustees been bare trustees only; that in such case the " controlling interest " would be in the beneficial owner. But the noble Lords in the House of Lords took so strongly the view that the question of control was to be determined by reference to the situation of the voting power under the company's regulations that they preferred rather to reserve than to affirm even the exception of a bare trustee.

It is unnecessary to multiply citation. I take, therefore, two passages from the speech of Lord Russell of Killowen and one from that of Lord Simonds. Lord Russell said (21): " My Lords, " I agree with the view of the Court of Appeal. When the section " speaks of directors having a controlling interest in a company, " what it is immediately concerned with in using the words " ' controlling interest ' is not the extent to which the individuals " are beneficially interested in the profits of the company as a " going concern or in the surplus assets in a winding up, but the " extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in " the shape of resolutions passed by the shareholders in general " meeting. In other words, the test which is to exclude a company's business from sub-s. 9 (*a*) and include it in 9 (*b*) is the " voting power of its directors, not their beneficial interest in the " company ".

And again (22): " As at present advised, I agree with the " Court of Appeal in the view that there is no half-way house " between a construction which restricts the controlling interest " to shares which are in the absolute beneficial ownership of the " trustees and a construction which includes all shares of which " the directors are registered holders. It is true that the Court " of Appeal except the case of what they describe as a bare " trustee, but express a view that the control would reside in the " beneficial owner of the shares. The case envisaged is, no " doubt, the case of the director who puts shares into the name

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(21) 29 Tax Cas. 167, 179.

(22) Ibid. 180, 181.

"of a nominee, taking probably a blank transfer executed by "the nominee. I prefer to express no definite opinion in relation "to this question, but to keep it as an open question to be "debated when the necessity for a decision thereon in fact "arises".

Lord Simonds said (23): "My Lords, in my opinion the "Crown's contention cannot be sustained. Those who by their "votes can control the company do not the less control it because "they may themselves be amenable to some external control. "Theirs is the control, though in the exercise of it they may be "guilty of some breach of obligation, whether of conscience or "of law. It is impossible (an impossibility long recognized in "company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial "owner. A clean cut there must be. It is for this reason that, "while respectfully concurring in every other line of the judgment "of the Master of the Rolls, I would reserve further consideration "of that part of it which deals with the case of the so-called bare "trustee. His case is not yet before your Lordships and perhaps "never will be. If and when it is, the validity of the distinction "made by the Master of the Rolls will have to be considered, "and I should myself require a more satisfactory explanation than "has yet been given of a term which, though it has statutory "sanction, has never, I believe, received statutory definition".

Mr. Pennycuick, pinning himself to the *Bibby* decision (24), says that (save for the possible case of a bare trustee) the matter is concluded by reference to the share register, subject only to this (and he claims so to "reconcile" the *British American Tobacco* (25) and *Bibby* cases (24)) that where the registered shareholder is a body corporate, you may, at any rate for certain purposes, look beyond the register and seek the individuals who themselves control that body corporate. For the Crown, on the other hand, it is contended that the basis of the *Bibby* decision (24) is that trustees have the requisite "controlling "interest" because theirs is the power and discretion to vote, theirs the will and ordering of the votes, without regard to the beneficial interest on whose behalf it is their duty to exercise their powers, and that the decision in *British American Tobacco Co. Ld.* v. *Inland Revenue Commissioners* (25), when applied to the case of a trust holding, merely adds the rider that the result is

(23) 29 Tax Cas. 167, 184, 185.
(24) Ibid. 167.
(25) [1943] A. C. 335.

the same, though the trustees who have the power and discretion exercise it at one remove, for example (as here), through the instrumentality of a custodian trustee.

Counsel for the Crown point out with force that a trust with custodian and managing trustees is in a class by itself, since it involves a statutory severance, with no counterpart elsewhere, of the functions normally combined in the office of trustee; so that the legal right to the trust property, including the legal right to exercise voting power in respect of shares subject to the trust, is vested in the custodian, whereas all powers of management, including the direction of any exercise of such voting power, are reserved to the managing trustees. Thus, it is argued, the power of voting which, vis-à-vis the company, the custodian trustee as registered holder of the shares alone can exercise, is in truth and by force of the Act the power of the managing trustees exercisable through him.

They say, further, that the general principle is not qualified by the fact that in certain limited circumstances the custodian trustee would not conform to the directions given by the managing trustees, since it is not legitimate to test the matter save by assuming that the latter act properly in the exercise of their powers; and they say finally that any other view involves a denial of common sense; if (as Lord Simonds said) the line must be drawn, then let it be so drawn that all cases which should, by ordinary reasonable standards, be found on one side of it or the other are in fact found to be there.

We confess that we feel strongly, as did Romer, J., the weight of the argument based on common sense; and where the registered shareholder is a bare trustee in the sense of being a mere name or " dummy " for the true owner, we should feel strongly inclined to answer the question reserved by the House in the *Bibby* case (26) in the same way as Lord Greene, M.R. In the present case, however—perhaps fortunately—the answer would not, on an appeal to common sense, appear so clearly. It does not, of course, follow that because the settlor under the 1940 settlement could remove Lancashire and Lewis at will, that the latter can therefore be regarded as mere nominees, for voting purposes, of the settlor. Still, when regard is had to all the circumstances, including the position of the bank as custodian trustee, the answer that the controlling interest in the company lies with its directors is not, we think, entirely obvious; and at

(26) 29 Tax Cas. 167.

all events it seems true to say that departure from the test of registered title involves embarking on an inquiry of the very kind which, on the grounds of difficulty and uncertainty, their Lordships in the *Bibby* case (26) declined to pursue. But, however that may be, the language of the speeches in the *Bibby* case (26) is, in our opinion, too strong for the Crown's argument.

In our judgment, the ratio decidendi in *Bibby's* case (26) is that, in accordance with well-established principles relating to limited companies, a question of the rights of members vis-à-vis the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save possibly in the case of mere " nominee " shareholders) permissible to look; and not that, in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise. Thus, if (because the shares were registered in the names of " nominees " or " bare " trustees " or otherwise) it were in any circumstances permissible to look beyond the share register, we do not think the speeches in the *Bibby* case (26) would prevent inquiry being made whether those individuals to whom the nominee shareholders were answerable were themselves obliged by contract or otherwise to give directions in accordance with instructions received from some third party.

In the present case, National Provincial Bank Ld. is the registered holder of all the " A " shares, and is not merely a nominee or bare trustee. It follows, therefore, in our view, from the *Bibby* case (26) that the controlling interest in the shares must, for the purposes of the present case, be treated as being in the bank, and that it is not permissible to investigate the character in which the bank exercises its voting rights as shareholder by reference to the terms of the 1940 settlement or of s. 4 of the Public Trustee Act, 1906, or otherwise.

It is no doubt true to say that their Lordships in the *Bibby* case (26) had not before them the special case of a trust with custodian and managing trustees, but we see no distinction in principle between that case and the case (say) of an ordinary settlement of shares containing a stipulation that the trustees (as registered holders of the settled shares) should at all times vote in accordance with the directions of the tenant for life. A

(26) 29 Tax Cas. 167.

stipulation of that kind clearly falls to be disregarded under the *Bibby* decision (26), and the statutory control accorded to the managing trustees over their custodian trustee is equally res inter alios so far as the company is concerned.

In our opinion, this result involves no conflict with the *British American Tobacco* case (27). Although (as already stated) the formula "controlling interest" ought to be treated as being used in the same sense in both the Act of 1937 and of 1939, namely, in the ordinary sense of the English language, yet (as observed by Romer, J.) the questions posed in the *British American Tobacco* case (27) and in the *Bibby* case (28) were different. In neither case was the question the general one "who controls the company?" In the *British American Tobacco* case (27) the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision "Has company B "a controlling interest in company C?", an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case (27). So in the *Bibby* case (28) and in the present case, the question "Have the directors a controlling interest in the "company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company.

Agreeing, therefore, with Romer, J., that the questions in the two cases are different, we disagree with him in that, in our view, the question in the present case is essentially the same as that in the *Bibby* case (28) and that the answer to the question is to be found accordingly by reference to the *Bibby* case (28) rather than to the *British American Tobacco* case (27).

We referred earlier in this judgment to the case of *F. A. Clark & Son Ld.* v. *Inland Revenue Commissioners* (29). Although *Clark's* case (29) was heard and decided in the Court of Appeal with the *British American Tobacco* case (27), the question to be determined was (as in the present case) whether the directors of the company held a controlling interest therein within the meaning of para. 11 of Sch. IV to the Act of 1937, and not (as in the *British American Tobacco* case (27)) whether, under para. 7 of the same Schedule, a body corporate held a controlling interest in another body corporate not itself subject to the tax imposed by the Act.

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(26) 29 Tax Cas. 167.
(27) [1943] A. C. 335.
(28) 29 Tax Cas. 167.
(29) [1941] 2 K. B. 270.

The facts were that certain shares which were at all material times registered in the names of two directors of the company had been held in fact upon trust for one of the directors for life and subject thereto for the other of them absolutely. The two directors had then sold their respective interests in the shares to another company (the " Phoenix " company) so that the Phoenix company became absolutely entitled to the shares. The two directors between them held (admittedly) a controlling interest in the Phoenix company. As part of the sale agreement, the two directors undertook to execute such transfers of the shares as the Phoenix company might require so as to vest in the Phoenix company the legal estate in the shares. But the shares in fact (as already stated) remained at all material times registered in the names of the two directors, who may accordingly be said to have been bare trustees thereof for the Phoenix company.

The Clark company sought to maintain (as do Silverts Ld. in the present case) that the directors did not have a controlling interest in the company; and the argument for the company rested on the assertion that, in the circumstances of the case, the control was in the Phoenix company and that no regard should be paid to the fact that the Phoenix company was itself controlled by the two directors. This court rejected that argument, holding (as in the *British American Tobacco* case) that the control in fact lay with the directors. According to the judgment of Scott, L.J., the phrase (30) " controlling interest " " contemplates . . . such a relationship as brings about a control " in fact—by whatever machinery or means that result is " effected ". But the Phoenix company was not on the register. The directors were. No point appears to have been made in the argument of that essential fact. Had the point been made, the result would indeed have been, in our judgment, the same. In the circumstances, the case can bring no comfort or support to either side in the present case.

In the result, and for the reasons which we have attempted to state, we think the appeal should be allowed. We add that our attention was also drawn to the case in Scotland of *John Shields & Co. (Perth) Ld.* v. *Inland Revenue Commissioners* (31),

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(30) [1941] 2 K. B. 270, 281.

(31) Excess Profits Tax Leaflet No. 96.

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which had been published since this matter was before Romer, J. In that case, the question was (as in the *Bibby* case (32)) whether the directors had a controlling interest in the company for the purposes of s. 13 of the Act of 1939. More than half the share capital of the company was registered in the names of certain persons, being trustees of the will of the former governing director. The right of voting was in the trustee first upon the register (who was not a director). In accordance with their powers under the articles of association of the company, the trustees appointed one of themselves, Farquharson, to be governing director, and he was in a position accordingly to arrange at any time for his own name to appear first on the register in respect of the shareholding. He had not, however, in fact exercised that power. The Court of Session held that, in the circumstances, the directors of the company had not a controlling interest therein.

In our judgment, the decision of the Scottish Court is in accordance with the interpretation we give to the two House of Lords cases and should, therefore, be followed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Clifford-Turner & Co.; Solicitor of Inland Revenue.*

B. A. B.

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(32) 29 Tax Cas. 167.

HARMAN, J.

1951
Jan. 25, 26, 30.

In re MEYERS.
LONDON LIFE ASSOCIATION *v.* ST. GEORGE'S HOSPITAL.

[1949 M. 4287.]

Will—Legacies to hospitals—Nationalization before death of testator—Legacies "to be added to the invested funds of the respective "charities to which they are given"—How distributable—National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81).

Will—Residue—Gift for benefit of officers of navy, army and air force or their families—Validity.

A testator by his will dated August 4, 1942, gave legacies of 500*l.* each to a large number of hospitals, of which some were unincorporated, others incorporated, and declared "that all the above "legacies given by this clause are to be added to the invested funds "of the respective charities to which they are given and are not to "be treated as income and I further declare that the receipts of . . . "the treasurer or other proper officer for the time being of the "above-named charities respectively shall be a sufficient discharge "for the legacies given by this clause". These hospitals came within the National Health Service Act, 1946, which came into operation on July 5, 1948. The testator died on January 20, 1949.

A summons was taken out by the executors to have determined whether, by reason of the coming into force of the Act, the legacies lapsed, or how they ought to be distributed.

Held, (1.) that there was no lapse merely because the hospitals which could take had no endowment fund, for it was not intended to be a condition precedent to the validity of the gift that the charity should have invested funds earmarked for its own purpose and to be used only as endowments, and the fact that at the relevant time there was no officer enabled to give a receipt could never cause a lapse:

(2.) that as regards the gifts to the unincorporated hospitals the appropriate management committee or board were the proper recipients of the gifts to be held by them on trust, not for the purpose of the whole group in which the hospital was included by virtue of the Act, but for the purposes of the particular hospital which was the object of the testator's bounty: *In re Morgan's Will Trusts* [1950] Ch. 637, and *In re Glass* [1950] Ch. 643 n. followed:

(3.) that the same result followed in the case of the gifts to the incorporated hospitals, whether named by their correct name or the name by which the testator knew them, even if not the precise name under which they were incorporated—though they might be said still to be in existence on the authority of *In re Kellner's Will Trusts* [1950] Ch. 46, 57—for there was no rule of law that a corporation answering the description in the will could alone receive the gift, no matter what other circumstances might arise. Observations of Lord Loreburn in *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children* [1915] A. C. 207, 212 applied.

The testator gave his residue to his executors on trust to divide it into three parts, and to hold each part "for such charitable or "benevolent institutions fund or funds having as its or their object "the welfare benefit or assistance of members of His Majesty's "[Navy, Army and Air Force respectively] (whether past present "or future) or their wives or children and if more than one in such "proportions as my executors shall in their absolute discretion select "and think proper".

Held, that the gift failed for uncertainty and that the residue devolved as on an intestacy.

In re Good [1905] 2 Ch. 60 applied.

ADJOURNED SUMMONS.

By cl. 6 of his will dated August 4, 1942, the testator, after giving certain pecuniary legacies, gave "the following charitable "legacies, namely:" 500*l.* "to the vicar and churchwardens for "the time being of the Parish Church of Ashtead . . .". He then gave "500*l.* to each of the following" [then followed a list of names of institutions, some incorporated and others not, including a large number of hospitals]. He then declared "that all the "above legacies given by this clause are to be added to the invested "funds of the respective charities to which they are given and "are not to be treated as income, and I further declare that the "receipts of the respective persons who profess to be the vicar "and churchwardens of the Parish Church of Ashtead and the "treasurer or other proper officer for the time being of the above "named charities respectively shall be a sufficient discharge for "the legacies given by this clause". The testator died on January 20, 1949, after the National Health Service Act, 1946, had come into operation.

This summons was taken out to have determined whether there had been a lapse by reason of the coming into force of the vesting provisions of the Act before the death of the testator and, secondly, if there had been no lapse, to whom the respective legacies were payable.

Peter Foster for the plaintiff executors.

Denys Buckley for various hospitals and the Attorney-General. There is a substantial continuity between a hospital as now nationalized under the statute and that hospital at the time when the will was made. The question is whether the testator meant, for example, to benefit a body described in the will as "King's "College Hospital" or to benefit a hospital now being carried on by someone else. This is a point of construction on the will, and it will be necessary for the court to determine it by looking at the will as a whole. The court may have to consider the position of each body and, with that information, to consider what is the true construction of the will. [Counsel referred to *In re Morgan* (1) and *In re Glass* (2).] The evidence shows that the hospitals carried on by the respective statutory bodies are the same as those which were carried on before the Act came into force.

J. A. Brightman for the Metropolitan Hospital. This legacy is payable only to this particular hospital. The money should be paid to the management committee, because that is the body which carries on the day-to-day administration of the hospital.

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(1) [1950] Ch. 637.

(2) [1950] Ch. 643n.

[Counsel referred to Hawkins on Wills (3rd ed.), p. 1.] The gift must not be read as a gift to the Metropolitan Hospital, but as being a gift " for the activities carried on in the building known " as the Metropolitan Hospital ". [He referred to *In re Kellner* (3) and *In re Morgan* (4).]

Cross, K.C., and *J. Monckton* for the next of kin. By cl. 6 the testator declared that the legacies are to be added to the invested funds of the charities. Only one of the numerous defendants has an invested fund. Apart from that declaration, it would be clear that the Metropolitan Hospital would be entitled to the gift. As against the contention on behalf of that hospital and the other hospitals the declaration is conclusive. [Counsel referred to Theobald on Wills (10th ed.), pp. 98, 202.] The hospitals cannot take, because they have no trust funds. In the case, for example, of the defendants the Ventnor Hospital, who have been dissolved and do not appear, there is no one who could give a discharge for the legacy; unless it can be successfully contended that gifts of this kind are gifts for the purposes of the work carried on at the respective addresses of the hospitals.

It cannot be held that, where there is a gift to a corporation under its proper name, it is a gift for the purposes of the corporation.

Lodge (*Megarry* with him) for several hospitals. The declaration in cl. 6 is purely administrative. The real purpose of the first part of the declaration is not so much that the legacy should be added to the invested funds as that the money should not be treated as income. However attenuated the form of a charity may be, it is still a charity. [Counsel referred to *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children* (5) and *In re Waring* (6).]

V. M. C. Pennington and *H. E. Francis* for other hospitals.

Buckley in reply. Where the testator is giving a succession of legacies to charities, they must be legacies for the charitable purposes of those charities. The testator has not been careful to use correct corporate names. Only in four cases has he succeeded in using the correct name. If he was really intending the gifts for corporate bodies, he was intending something which had geographical position. These hospitals are authorized to give receipts for gifts.

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(3) [1950] Ch. 46.
(4) [1950] Ch. 637.
(5) [1915] A. C. 207.
(6) [1907] 1 Ch. 166.

HARMAN, J. [after referring to cl. 6 of the will:] A number of the recipients of the testator's bounty under cl. 6 were hospitals which came within the scope of the National Health Service Act, 1946. The appointed day under that Act arrived on July 5, 1948, the testator being still alive. He died on January 20, 1949, and in consequence the questions which are now put to me arise.

There are a formidable number of defendants to this summons. First, there are the boards of governors of a number of teaching hospitals. Secondly, there are three regional hospital boards. Thirdly, there are the management committees of a number of hospital groups. Fourthly, there are corporations, which formerly carried on the activities of the hospitals in question, corporations which, according to the view that is at present taken of the Act of 1946, are still in existence, notwithstanding that, in some cases, at any rate, there has been complete destruction of their functions and there is a complete absence of any property in them. Then there are persons who, or some of whom, are the next of kin of the testator; and lastly, His Majesty's Attorney-General.

Two questions arise on this clause. The first is whether there has been a lapse by reason of the coming into force of the vesting provisions of the National Health Service Act before the testator's death. Secondly, if there has been no lapse so far as the incorporated associations are concerned, do the gifts go to those corporations which would have been the recipients of them before the appointed day, or do they go to the new corporations created by ss. 6 and 7 of the Act of 1946?

The argument for lapse was based largely on the proviso which I have read at the end of cl. 6 providing that the legacies "are to be added to the invested funds of the recipient charities "to which they are given". It is said that the boards of governors of the teaching hospitals and the management committees of the non-teaching hospitals are not bodies having invested funds, even if they are charities; as for the purposes of this case it is admitted that they are. It is said that they have no invested funds, nor any board to hold an invested fund for the purpose of any of these respective charities which were the object of the testator's bounty. It is argued, moreover, that the hospitals, having regard to the grouping under the Act of 1946, no longer have the same individual existence as they had before, and it is argued that the testator showed quite clearly that he did not mean his bounty to go to any body of charities who did not have invested funds earmarked for their own purposes and to be used only as endowments. I cannot take that view of this declaration. It seems to me that it was not intended to be a condition precedent to the validity of these gifts that any of these societies should have invested funds or have the power to treat the bounties given to them as capital and not as income. These are merely directions that the testator gives that the capital, if he can prevent it, is not to be spent. It seems to me, therefore, that there is no lapse for that reason. There is also the further direction that the proper officer can give a good receipt and that those who profess to be and call themselves the vicar and churchwardens of the Parish Church of Ashtead can do likewise.

There is another reason why it is said that there is a lapse, because some of the so-called corporations, although, having regard to the observations of the Master of the Rolls in *In re Kellner's Will Trusts* (7), they have some shadowy existence, have no officer, proper or otherwise, no board of governors, no management committee—no one in effect, who can give a good receipt on behalf of those bodies. I do not think that that reason in the case of a charity could possibly cause the lapse of a gift. The chance that there is no officer at the moment in question enabled to give a receipt could not, I think, ever be held to cause a lapse.

Supposing that there is no lapse, then, in so far as some of these bodies are unincorporated charities, for instance, the Leatherhead Cottage Hospital, the case seems to come within the decision of Roxburgh, J., in *In re Morgan's Will Trusts* (8). That was a gift for the benefit of a body called the Liskeard Cottage Hospital. The identity of the institution was clear, although its name was not clear: it was a hospital at Liskeard known as the Passmore Edwards Cottage Hospital. The judge held that the gift was not a gift to anything but the furtherance of the work in that institution, which was being carried on when the testator made his will. In other words, where there is a gift to an unincorporated body of that sort it is not given to the mere bricks and mortar or to the beds or the carpets but for the purpose for which the work is carried on. The judge held that the new body, namely, the hospital management committee appropriate to that locality, were carrying on that work and were therefore the proper recipients of the legacy involved in that case. In that connexion I may point out that the gift was for the benefit of the "Hospital"; and that, no doubt, made it easier for the judge so to decide.

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(7) [1950] Ch. 46, 57.

(8) [1950] Ch. 637.

But in a case decided a few days later, *In re Glass* (9), Vaisey, J., followed that decision, although the gift there was a gift direct to the hospital in question. The words there were "to "the King Edward VII Memorial Hospital, Ealing". There was a hospital identifiable under that name being carried on up to the appointed day as a voluntary hospital. Vaisey, J., referred to *In re Morgan's Will Trusts* (10) and said that he could not distinguish between the effect of the words used in that case and the gift "to" the King Edward VII Memorial Hospital, Ealing. Accordingly, he held that the gift to the hospital should be paid to the South-West Hospital Management Committee.

Therefore, unless I am going to depart from those decisions, I must come to a like conclusion here in respect of the unincorporated hospitals in favour of which the testator has made these gifts.

There are, however, a number of hospitals to which he gave gifts, all of which are identifiable, but which were incorporated. In some cases, most notably in that of the North London or University College Hospital, the testator gave the gift by the correct corporate title of the hospital in question. It is said that, that being so, the gift was a gift to a corporation which still exists, and that there is no power in the court by way of speculation or for any other reason to give the bounty of the testator to any other corporation than the corporation which exactly answers the description that the testator has given. That seems to me to be a formidable argument.

Counsel referred to *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children* (11). There Lord Loreburn said: "When Mr. Younger opened his argument he laid down as "a general proposition that when once a person is accurately "named in a will, then the rigid rule descends which forbids "under any circumstances any further inquiry or consideration "in regard to the person who is to take the benefit. My Lords, I "am not prepared to affirm so wide a statement. I do not enter "upon it now; if I did so the discussion would be academic, and "it is not necessary for the decision of this case. I will only "take leave to observe that an extreme danger is apt to lurk in

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(9) [1950] Ch. 643n.

(10) [1950] Ch. 637.

(11) [1915] A. C. 207, 212.

"general rules like that. Some unforeseen circumstances may "arise. No one can prophesy all the events of the future, and "the court may find itself confronted by a rule which, applied in "unexpected conditions, might lead to something quite shocking "to its sense of justice. . . . I think the true ground upon which "to base a decision in this case is that the accurate use of a name "in a will creates a strong presumption against any rival who is "not the possessor of the name mentioned in the will. It is a "very strong presumption and one which cannot be overcome "except in exceptional circumstances".

So that there is no absolute rule that once you find the right words used to name a given person, whether juridical or natural, that must necessarily exclude all other considerations. Therefore I am not bound, as I understand it, if I should find it contrary to common sense or to common justice, to hold myself rigidly constrained by a rule which says that if I find a corporation answering the description in the will, that corporation must have the bounty, whatever other considerations may arise. Some of the gifts here are to hospitals named by the name by which the public knew them and by which the testator knew them, but which were incorporated under slightly different names. Some gifts are to hospitals (which are incorporated) by their correct corporate name. Some gifts are to unincorporated hospitals. It seems to me that it would be contrary to common sense not to give a like construction to all the gifts in this clause and not to give the like kind of effect to them. Feeling as I do, and holding as I do, in the case of the unincorporated hospitals, that the gift must be construed as a gift for the work of the hospitals in question, and finding as I do find that in the case of the incorporated hospitals that work is to be carried on in every case by the governors or the hospital management committee appropriate to the locality, I must in this case find that the gifts are to the new body so constituted under the Act.

It seems to me that it would be a most extraordinary result if, in the few cases in which the testator has rightly named the corporate body, these shadows of their former selves should be the only persons who could give a good receipt or be entitled to these gifts. It would be, as it seems to me, equally extraordinary if some of the gifts should go, as it were, to the old corporations, some of which are so ancient as to include among their powers ordinary eleemosynary purposes, which are admirable purposes, but not hospital purposes. Some of the shadows which are postulated by the decision of the Court of Appeal frankly say that they would hand over the fund, if they could, if it goes to them, to the new body. I do not think it right to produce an effect so confusing and so contrary to common sense. If some of these gifts go to the new bodies, it is only sensible to suppose that they all do. In my judgment, I am doing no violence to the language which the testator has used, in the context in which he has used it, in saying that in every case when he gave money to a hospital he did not regard the fact whether it was corporate or not, but he gave to the work that that hospital was carrying on.

The evidence is not questioned. It comes to this, that the work of the hospital to which he gave his money was identifiable in these days as being carried on in every case by the appropriate board or committee. Therefore, I shall hold that they are gifts in each case to that board or committee, and, having regard to the circumstances of the case, that they can be held on trust to apply the money, not for the purposes of the whole group, but for the purposes of the particular hospital which was the object of the testator's bounty.

Declaration accordingly.

A further question was raised by the summons as to the effect of the bequest of the residue set out in cl. 10 of the will, which was as follows: "I give the residue of my real and personal "estate to my executors upon trust to divide the same into three "equal parts and to hold one of such parts for such charitable or "benevolent institution or institutions fund or funds having as "its or their object the welfare benefit or assistance of members "of His Majesty's Navy (whether past present or future) or their "wives or children and if more than one in such proportions as "my executors shall in their absolute discretion select and think "proper". There was an exactly parallel bequest of the other two parts in favour of members of the Army and Air Force.

Cross, *K.C.*, and *J. Monckton* for the next of kin. This gift to the executors is void for uncertainty. They are given a very wide discretion. The words "charitable or benevolent" must be read disjunctively: see *In re Diplock* (12). In *In re Good* (13) a gift for the benefit of ex-officers was held void for uncertainty as being too indirect to be beneficial to the public.

(12) [1948] Ch. 465.

(13) [1905] 2 Ch. 60.

That case was followed by *In re Gray* (14). [Counsel also referred to *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (15).]

Denys Buckley for the Attorney-General. This is a valid charitable trust to increase the efficiency of the armed forces. It is admitted that the gift is wide; but it must be considered in the light of its being likely to promote efficiency, by, for example, encouraging enlistment, because it holds out the prospect of better conditions for the dependants of those who serve in the forces.

HARMAN, J. It now falls to me to construe the residuary bequest in this testator's will, which is in cl. 10. [His Lordship read it, and continued:] It is familiar to every lawyer by this time that a gift for charitable or benevolent institutions is bad. There has been a bitter experience of that, which is known not only to lawyers but to some extent outside the law, in the case of Caleb Diplock and his money: see *In re Diplock* (16).

But, in my judgment, this case does not turn on that point, because the bequest does not stop there. It does not matter whether an institution or a fund be called a benevolent institution or a benevolent fund if it is obvious that it is in fact charitable. In that event it will rank as a charity. Many associations are called benevolent which have undoubtedly charitable objects. Is, then, an institution having as its object " the welfare benefit or " assistance of members of His Majesty's Navy (whether past " present or future) or their wives or children ", an institution which is one which has charitable objects? First of all I am asked to say that an institution having any one of those objects would be one to which the executors could decide to distribute a portion of the one-third available for the navy. I think that is right. I think " or " in this part of the will must be read throughout as a disjunctive word. It may be a question whether a fund which caters only for the widows of ex-members of the navy or children of former members of the navy would be within the objects of the bounty to which I am giving consideration. Whether that be so or not, even supposing that the institution or fund must have all the objects enumerated, that is to say, must include in those objects not only ex-sailors but present sailors and those who hereafter will be sailors and the wives and families of each class, it is urged that it is not a good charitable bequest.

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(14) [1925] Ch. 362.

(15) [1946] Ch. 86, 194.

(16) [1948] Ch. 465; (H. L.) *sub nom. Ministry of Health* v. *Simpson* [1951] A. C. 251.

I have the guidance here of Farwell, J., in *In re Good* (17), where there was a gift of residue "to maintain a library to "purchase plate for the officers' mess". The judge there found no difficulty in deciding that that was a good charitable object, not because the officers who lived in the mess were the objects of charity or in need of books or plate, but because it was for the benefit of the public that the servants of the King, and therefore the public, should be better equipped to perform the important duties which devolved on them. Therefore the judge held—I think that this is what it comes to—that anything that improves the efficiency of the army is charitable within the meaning of the Act, because it is for a public purpose, a purpose in which the public is interested. He also went into a second ground under the Statute of Elizabeth, or by analogy to it, but he preferred the first ground, and, if I may say so with deference to him, so do I.

Therefore it is said in this case that this gift is one which improves the efficiency of the navy and is therefore charitable. It must improve the efficiency of the navy (and the other forces) if those who join them know that there is a fund available which can be used for them either when they are serving or after they have ceased to serve, or for their wives or their children. That, it is argued, will make the service more attractive, and will attract a better type of recruit, and therefore it will benefit a public whose interest it is that they should have the best services of that sort.

That is an attractive argument which receives, I think, some countenance from the cases to which Mr. Buckley, on behalf of the Attorney-General, referred under the Companies Act, where boards of directors have been held not to go beyond their powers in giving donations or gratuities to past servants on the ground that that will in fact increase the efficiency of the company's present servants and will be an attraction to the company's service for its future servants. In that way, indirectly, no doubt, one can see some advantages accruing to the public.

Mr. Cross urges that one must draw the line somewhere. The question is how wide the benefit may be. It seems to me that I am not without aid in answering that question, because Farwell, J., decided a second point in *In re Good* (17), which is not so well known. There the testator used these words: " my " two houses at Ryde for use of old officers of the regiment at a " small rent during there (sic) life ". It was urged, first, that that meant officers who were aged and therefore within the statute. Secondly, it was urged that it was a gift to personæ designatæ, namely, a class representing the former officers of the regiment. The judge rejected both those contentions. Apart from this, Mr. Parker, on behalf of the Attorney-General in that case, admitted that, if " old " meant former officers of the regiment, the gift was bad. Therefore, that was tantamount to the Crown's admitting that a gift to persons not in the army or to anybody who had formerly been but had ceased to be in it was a bad gift. It is quite true that there was no argument about that, but Mr. Buckley asked me to take the view that that was because it was not a very attractive argument and the representative of the Attorney-General there did not think it worth while arguing it. Therefore, he said, the judge really should not have considered the matter, and I am free to take my own course. I do not take that view: it seems to me that this is a decision that a gift confined to ex-members of the forces for their benefit is not a good charity. I cannot help thinking that this gift here could be applied exactly in that way, namely, to maintain two houses for ex-naval officers. If that is so, it seems to me that it would offend just as the second gift in *In re Good* (17) offended.

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(17) [1905] 2 Ch. 60.

On that view of the ambit of this bequest, it seems to me that no question of perpetuity is involved here because there is no attempt to tie up the capital for ever. It fails because it is too uncertain. Unless a man gives his property to charity, he may not delegate his testamentary power to his trustees beyond a quite definite and identifiable limit. If he tries to delegate that testamentary power in favour of an unidentifiable class of persons, then he has not deprived his next of kin of the right which they have in cases where the testator does not dispose of his property. I therefore hold that the gift of residue fails for uncertainty.

Declaration accordingly.

Solicitors: *Druces & Attlee; Hanbury, Whitting & Ingle; Merrimans; Raymond-Barker, Nix & Co.; Richard Newton; Treasury Solicitor.*

J. L. D.

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(17) [1905] 2 Ch. 60.

ROX-
BURGH, J.

1951
Feb. 21, 22.

In re LANDER, DECD. LANDER *v.* LANDER.

[1950 L. 2811.]

Will—Estate duty—Option to purchase freehold property—Purchase price lower than value for purposes of estate duty—Option exercised —Incidence of duty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 8, 9—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 16, *sub-ss.* 1, 5—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 1, 36, *sub-s.* 9.

A testator appointed A and two other persons executors and trustees of his will and, after making various dispositions, gave the residue of his estate to his daughter absolutely. He then directed that A should be entitled to purchase certain freehold property for 14,000*l.* on giving notice in writing to his trustees within two months from the date of his death. The testator having died, A duly exercised the option and the property was conveyed to him for 14,000*l.* The value of the property for estate duty purposes was 21,645*l.*

On a summons taken out to have determined how that estate duty should be borne:—

Held, (1.) that, at the date of the testator's death, there was a beneficial interest in A, as he had the right to acquire for 14,000*l.* a freehold estate in property afterwards ascertained to have been worth 21,645*l.* at that date; and that the estate duty was apportionable between him and the residue, so that he would bear 7,645/21,645ths and the residue 14,000/21,645ths of the duty; and (2.) that there was no context in the will exonerating A, although he was a trustee, from a rateable proportion of the duty; and that there were no considerations which ought to deter the court from reaching the conclusion that it ought to be borne in the above-mentioned proportions.

Berry v. *Gaukroger* [1903] 2 Ch. 116 and *London and South Western Railway* v. *Gomm* (1881) 20 Ch. D. 562 applied.

In re Jolley (1901) 17 T. L. R. 244 questioned.

In re Cockerill [1929] 2 Ch. 131 distinguished.

ADJOURNED SUMMONS.

The testator, Vernon Lander, who died on December 22, 1948, by his will, dated June 22, 1943, after appointing his wife, a son-in-law, and a nephew, William Heath Sharrod Lander, executors and trustees, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to them on certain trusts and, subject thereto, he gave the whole of his residuary estate to his daughter absolutely. He then directed that his nephew should be "entitled to purchase my freeholds at "or near Tibberton and Charrington in the county of Salop for "the sum of fourteen thousand pounds upon giving notice in "writing to my trustees within two calendar months from the "date of my death such property to be conveyed to him by my "trustees notwithstanding that the said William Heath Sharrod "Lander is himself a trustee and that the said purchase shall be "completed within six months from the expiry of the before "mentioned two months' notice". The nephew duly exercised the option and the property was conveyed to him on June 10, 1949, for 14,000*l.*, paid by him to the trustees. The value of the property for the purposes of estate duty was ascertained to have been 21,645*l.* at the date of the death of the testator.

The testator's widow and son-in-law took out a summons to have determined whether the incidence of the estate duty payable in respect of the property was apportionable between the testator's residuary estate and the nephew in the proportion which the sum of 14,000*l.* bore to the value for estate duty purposes of the property or in some other and in what proportions, or whether the whole of that estate duty ought to be borne by the testator's residuary estate, or how otherwise it ought to be borne.

Pennycuick, K.C., and *J. F. Bowyer* for the plaintiff executors. The testator's nephew (the defendant), having the right to call for the conveyance of the estate, has an equitable interest in the land. Where property does not pass to the executors as such, the estate duty is apportionable between the beneficiaries. [Counsel referred to the Finance Act, 1894, s. 8, and to *Berry* v. *Gaukroger* (1); *London and South Western Ry.* v. *Gomm* (2); and *In re Armstrong* (3).] It follows that the estate duty on this property is apportionable rateably between the residuary legatees and the defendant in the same proportion as the option bears to the interest of the residuary legatees. If, for example, there were an option to purchase for 10,000*l.* an estate worth 20,000*l.*, the person exercising the option and the residuary legatees would each bear half the estate duty payable on that estate. [Counsel referred to *In re Cockerill* (4) and to Dymond on Death Duties (11th ed.), p. 349.]

C. R. D. Richmount for the defendant, the testator's nephew. Having regard to s. 16, sub-s. 1, of the Law of Property Act, 1925, the defendant is not accountable for estate duty unless a context is found in the will which makes him accountable. Otherwise he is exonerated from that liability: see *In re Morris* (5). The legal personal representatives are the devisees at law and the estate duty is borne by them. When they sell the property they can sell as trustees.

(1) [1903] 2 Ch. 116.
(2) (1882) 20 Ch. D. 562, 581.
(3) [1943] Ch. 400, 405.
(4) [1929] 2 Ch. 131.
(5) [1927] W. N. 146.

Secondly, it may be that this property has been undervalued for the purposes of the option, but, as soon as the purchase price has been fixed, the property is exonerated by s. 36, sub-s. 9, of the Administration of Estates Act, 1925, from any charge in respect of duty.

Although the defendant may, under the option, have some interest in the land, the executors are accountable for duty under s. 16 of the Law of Property Act, 1925. They have to pay estate duty and, if the defendant were a devisee, he would have to repay the duty to them. A purchaser, however, is not a devisee and is under no liability to indemnify or pay back to the legal personal representatives any sum thus paid by them. As soon as the defendant purchased the property he became a "purchaser", and it cannot be said that he ought to be treated as a beneficiary. This is not a trust in his favour, but an option.

As regards his position as a trustee of the will, he cannot, in any event, be said to have committed a breach of trust. It is clear from the will that the testator has treated him for the purposes of the option as not being in the position of a trustee.

For what estate duty, if any, is the defendant liable? He is not liable and never has been liable in law for any estate duty. He is also not liable, having regard to the terms of the will itself; and there are clear indications in the will that it was never intended that he should be liable.

No purchase money is due for the property while the option remains unexercised and an equitable interest in the option holder arises only when the option has been exercised.

Pennycuick, K.C., in reply. An option is an equitable interest in property: see per Jessel, M.R., in *London and South Western Ry.* v. *Gomm* (6). The defendant had an equitable interest in the land as soon as the testator died. Therefore he had a beneficial interest in possession of this property from the moment of the testator's death. It is clear, on the principle of *Berry* v. *Gaukroger* (7), that the defendant is liable to contribute estate duty rateably on the property.

The observations of Eve, J., on the question of options in *In re Cockerill* (8) were obiter. The defendant cannot take advantage of his position as an executor to be absolved from his liability to pay duty. [Counsel referred to *In re Jolley* (9).]

ROXBURGH, J. [after stating the facts and the question raised by the summons]: In *Berry* v. *Gaukroger* (10) Vaughan Williams, L.J., said: "It seems to me the whole scheme of the

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(6) 20 Ch. D. 562, 581.
(7) [1903] 2 Ch. 116.
(8) [1929] 2 Ch. 131, 134.
(9) (1901) 17 T. L. R. 244.
(10) [1903] 2 Ch. 116, 131.

"Finance Act"—that, of course, is the Finance Act of 1894—"so far as it relates to property passing on the death of the "deceased in respect of which his executor is not responsible for "estate duty, is to tax the property itself so passing, and to "make the estate duty a first charge. The decision of North, J., "in *In re Countess of Orford* (11) seems to me to be a distinct "authority on the construction of the Finance Act, 1894, that "in all cases where the duty becomes payable for which the "executor is not made accountable by s. 6, sub-s. 1, the duty "must be paid ultimately by the persons beneficially entitled in "proportion to their shares, and it follows that the duty cannot "be thrown wholly on the residue". Of course, freehold land is not within s. 6, sub-s. 1, of the Finance Act, 1894, and, so far as that Act was concerned, the executors were not accountable for estate duty on freehold land.

Cozens-Hardy, L.J., said (12): "It is true that the Crown, "having the right to demand the duty from other persons—"namely, the trustees—has not proceeded against the legatees; "but that, I think, can make no difference. It is an old and "well-established principle of equity that, when several persons "are liable in respect of one and the same obligation, the rights "of the parties inter se are not affected by the circumstance that "one of those persons has been called upon to discharge and has "discharged the obligation. This right of contribution must, I "think, prevail here".

So the position under the Finance Act, 1894, was that the executors were not responsible for the estate duty; that the duty had to be paid ultimately by the persons beneficially entitled in proportion to their shares; and that, if the executors did pay the duty, then the rights of the parties inter se would not be affected by that circumstance by reason of rights of contribution.

Section 16 of the Law of Property Act, 1925, made an important change. It provided by sub-s. 1: "A personal repre-"sentative shall be accountable for all death duties which may "become leviable or payable on the death of the deceased in "respect of land (including settled land) which devolves upon him "by virtue of any statute or otherwise". But sub-s. 5 provides: "Notwithstanding that any duties are by this section made pay-"able by the personal representative or other person aforesaid, "nothing in this Part of this Act shall affect the liability of the "persons beneficially interested or their respective interests in "respect of any duty and they shall accordingly account for or "repay the same and any interest and costs attributable thereto "to the said Commissioners or to the personal representative "or other person accountable as aforesaid, as the case may

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(11) [1896] 1 Ch. 257.

(12) [1903] 2 Ch. 116, 134.

"require". Accordingly, the important change was that personal representatives became accountable for the duty; but that Act made no change in the incidence of the duty or in the rights of contribution between the parties liable for the duty.

I must now endeavour to apply these general principles, which are clearly established, to the case before me, which, strangely enough, is free from satisfactory direct authority. What, of course, the defendant had under the will was an option, and a valuable one, for it enabled him to acquire for 14,000*l*. something worth 21,645*l*.

What is the equitable nature of such an option? *London and South Western Ry.* v. *Gomm* (13) supplies the answer. Jessel, M.R., in his judgment, said: "The right to call for a "conveyance of the land is an equitable interest or equitable "estate. In the ordinary case of a contract for purchase there "is no doubt about this, and an option for repurchase is not "different in its nature. A person exercising the option has to "do two things, he has to give notice of his intention to purchase, "and to pay the purchase-money; but as far as the man who is "liable to convey is concerned, his estate or interest is taken "away from him without his consent, and the right to take it "away being vested in another, the covenant giving the option "must give that other an interest in the land".

What then was the position under this will at the moment of the testator's death? The whole of these freehold properties passed on his death, and beneficial interests in them were created by the will which were in possession as from the death of the testator. First of all, there was the beneficial interest of the option holder. This was the right to acquire a freehold estate in property, afterwards ascertained to have been at the date of the testator's death worth 21,645*l*., for 14,000*l*. That was a beneficial interest in land worth 7,645*l*. The beneficial interest of those entitled to residue was the freehold interest in the properties subject to that burden. It was not certain at the date of the testator's death what the value of that interest was. The option holder might not have exercised his option, in which case it would have been worth 21,645*l*. But there was every probability that the option would be exercised, as in fact it was; and the value of the beneficial interest in residue was in due course ascertained to be 14,000*l*. Therefore, unless there are other considerations which ought to be taken into account, the duty ought to be borne between the option holder and residue so that the option holder bears 7,645/21,645ths of the duty, and residue bears 14,000/21,645ths of the duty.

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(13) 20 Ch. D. 562, 581.

Are there any other considerations which ought to be taken into account? First of all, is there any context in the will? It is true that one or two legacies are given free of all duties; but, with that exception, there is no reference in the will to the incidence of duties and no reference to estate duty eo nomine at all. It is true that the testator directs that his nephew, the defendant, shall be entitled to purchase his freeholds; and it is not usual to think of a purchaser as having to bear estate duty. I do not think that that, which is the only context, is enough to alter the incidence of the estate duty on these properties. I cannot be sure that the question of estate duty ever entered the testator's mind in this connexion, and, after all, the defendant, though a purchaser, was not an ordinary purchaser: he was a favoured purchaser, favoured by and to the extent of the benefit conferred by the will. I cannot agree, as Mr. Richmount suggested, that the exercise of the option destroyed his beneficial interest; though he, no doubt, had some contractual rights as well. The essence of his situation still was, as it had been ever since the testator's death, that he had the right to acquire property worth 21,645*l.* for 14,000*l.* He certainly differs from the purchaser to whom the property might have been sold under the trust for sale at a much higher price if he had not exercised his option.

Mr. Richmount submits that, even if the defendant would otherwise have to bear a rateable proportion of the estate duty, he is absolved from that by the circumstance that no reservation was made in the conveyance to him of these properties; and undoubtedly no reservation was made. Accordingly, Mr. Richmount relies on s. 36 of the Administration of Estates Act, 1925, sub-s. 1 of which provides: "A personal "representative may assent to the vesting, in any person who ". . . may be entitled thereto . . . of any estate or interest "in real estate to which the testator . . . was entitled". By sub-s. 2: "The assent shall operate to vest in that person the "estate or interest to which the assent relates". Sub-s. 9 provides: "An assent or conveyance given or made by a personal "representative shall not, except in favour of a purchaser of a "legal estate, prejudice the right of the personal representative "or any other person to recover the estate or interest to which "the assent or conveyance relates, or to be indemnified out of "such estate or interest against any duties, debt, or liability to "which such estate or interest would have been subject if there "had not been any assent or conveyance". Sub-s. 11 defines "purchaser" as a purchaser for money or money's worth.

It well may be that that section does exonerate these properties from any charge in respect of the duty in question; but that cannot, in my judgment, avail the defendant, the testator's nephew, for two reasons: first, it seems to me that the right of contribution which residue has against the defendant, as appears from *Berry* v. *Gaukroger* (14), is carefully preserved by sub-s. 5 of s. 16 of the Law of Property Act, 1925, and is a right quite distinct from any charge that there might otherwise have been on the properties in themselves. Secondly, as, in my judgment, the will did not exonerate the defendant from a rateable proportion of the estate duty, he cannot rely on the terms of the will as a justification for being, as a trustee, party to a conveyance to himself which has the effect of exonerating the property from estate duty. If, therefore, that is the effect of the conveyance, as it may well be, he ought not to have been a party to it in that form, and therefore he cannot put it forward as a justification for himself. On those two grounds, I think Mr. Richmount's most ingenious point fails.

There are therefore, in my judgment, no considerations which ought to deter me from reaching the conclusion at which I have already tentatively arrived, namely, that the duty ought to be borne in the proportions which I have already stated.

I must add a few observations about two cases. In *In re Jolley* (15), Joyce, J., treated the option holders as devisees, and reached the conclusion that they ought to bear the whole of the duty. Mr. Pennycuick has expressly disclaimed any reliance on that authority, and accordingly, I need say no more about it, except that it is undoubtedly difficult to reconcile with some other cases which have since been decided. It will have been observed that I have nowhere suggested, and I do not intend to suggest, that the defendant was a devisee.

The other case is *In re Cockerill* (16), which comes tantalizingly near to the present case. The headnote states: "A "testator, by his will, devised land to P. subject to the "payment of certain annuities, of road-making charges for "which the testator was liable, and of estate and other "death duties, and subject also to the proviso that if within "twenty years of the testator's death P. should desire to sell "the land, he was to give the Governors of the N. Grammar "School the option of purchasing the land at the price of 300*l*. "an acre, such offer to be subject to the payment by the "Governors of the said annuities and road charges, and "acceptance to be notified within three months. The land, of "about twenty-two acres in area, was in fact worth 670*l*. an acre "at the date of the testator's death. In accordance with the "condition P. offered it to the School Governors at 300*l*. an acre "and the offer was duly accepted, and the land sold and conveyed

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(14) [1903] 2 Ch. 116.
(15) 17 T. L. 244.
(16) [1929] 2 Ch. 131, 134.

" to the Governors. . . . *Held*, that the Governors having " acquired the land, not under any disposition by the testator, " but by the voluntary act of P. in selling instead of retaining " the property, took no benefit under the testator's will ".

Eve, J., said: " In the first place, they "—that is the Governors—" take nothing under the testator's will. They have " not acquired the land at the price they paid for it by reason of " any option given to them by the testator, but by the voluntary " act of the devisee in electing to dispose of the land instead of " retaining it, and I see no ground for charging them as beneficiaries under the will with a proportion of the duties ".

It would be quite wrong to say that Eve, J., has decided that, in the case with which I am concerned, the option holder would be properly chargeable as a beneficiary under the will with a proportion of the duty; he certainly did not so decide, but it is true to say that, if Mr. Pennycuick had been arguing the present case before that learned judge, his argument would probably not have been heard with disfavour.

In my judgment, the question raised by the summons ought to be answered by declaring that the defendant ought to bear 7,645/21,645 parts of the duty and the residue should bear the remainder.

Declaration accordingly.

Solicitors: *Church, Adams, Tatham & Co., for Lee-Barber, Goodrich & Co., Torquay; Sole, Sawbridge & Co., for Cooper, Woolley & Co., Bridgnorth.*

J. L. D.

In re NOAD, DECD. NOAD *v.* NOAD AND OTHERS.

[1950 N. 2355.]

Will—Construction—Life interest to wife—Ultimate gift equally between " issue of our marriage "—Meaning.

A testator by his will made in 1914 provided " I give devise and " bequeath all my real and personal estate unto my wife [naming " her] for life and upon her death to be equally divided between the " issue of our marriage . . . ". The testator had one child only, a son, who married in 1928 and had three children. In 1947 the son's marriage was dissolved, and he married again. In 1950 the testator died, and a summons was taken out to have determined how his real and personal estate devolved on his widow's death.

At the date of the summons there were no children of the son's second marriage.

Held, that, as the expression "issue of our marriage" was a compound phrase and had to be construed as such, it meant children of the person using the expression, i.e., the testator, and of the other person to whom he was referring, i.e., his wife, with the result that his real and personal estate, after the widow's death, belonged to the son absolutely.

Reed v. *Braithwaite* (1870) L. R. 11 Eq. 514 followed.

Walsh v. *Johnston* [1899] 1 I. R. 501 not followed.

ADJOURNED SUMMONS.

A testator by his will dated March 1, 1914, provided "I give "devise and bequeath all my real and personal estate unto my "wife [naming her] for life and upon her death to be equally "divided between the issue of our marriage . . .". At the date of the will the testator had had one child only, a son. In 1928 the son married and at the date of this summons had had three children, born respectively in 1928, 1930 and 1935. In 1947 the marriage was dissolved and in the same year the son married again. At the date of this summons there were no children of the second marriage.

On May 4, 1950, the testator died. Uncertainty having arisen as to the meaning of the expression "issue of our marriage" in the will, the widow, to whom, with the son, letters of administration with the will annexed had been granted, took out on November 30, 1950, this summons, to which the son and his children were defendants, to have it determined whether, on the true construction of the will, the testator's real and personal estate, after the widow's death, belonged to the son absolutely, or was divisible equally between the son and his three children, or was divisible equally between such of them the son and his three children as were then living, or was divisible equally between such of the children, grandchildren and greatgrandchildren of the testator as should then be living, or how otherwise the same was disposed of.

J. Bradburn for the widow.

T. C. A. Burgess for the son's children. Prima facie, "issue" means issue to all degrees. Only a restraining context can alter that, and here there is no such context. "Issue" here includes the children of the son's marriage. Whether the testator did or did not so intend is immaterial, and, accordingly, on the widow's death, the testator's real and personal estate is divisible equally between such of the testator's children, grandchildren and greatgrandchildren as shall then be living.

G. T. Hesketh for the son. The meaning suggested is too wide a meaning of " issue " as used in this will. True, " issue " by itself prima facie means issue to all degrees. Here, however, it is not by itself, but is part of the expression " issue of our " marriage "; and it is that expression, and not just the word " issue ", that has to be construed. In *Reed* v. *Braithwaite* (1) Malins, V.-C., held that " legal issue by marriage " meant " children ". There, too, was a compound phrase, and it was that phrase as a whole, and not just the word " issue ", that Malins, V.-C., said meant " children ". The proper course for the court is to hold the same in the present case and to declare, accordingly, that, on the widow's death, the testator's real and personal estate belongs to the son absolutely.

T. C. A. Burgess for the son's children. *Reed* v. *Braithwaite* (1) was cited to the court (but not referred to in the judgment) in *Walsh* v. *Johnston* (2), an Irish case, in which Chatterton, V.-C., came to exactly the opposite conclusion. " ' Issue ' ", he said, " necessarily implies lineal descent, and " the addition of the words ' and the issue of a particular " ' marriage ' merely confines the descendants to those of a " specified husband and wife ". That is directly in point. The case is nearly thirty years later than *Reed* v. *Braithwaite* (3), which the court ought not to follow.

ROXBURGH, J. It is extremely improbable that the testator intended his son and his son's children to take per capita. It would have not been at all surprising had he intended a distribution among issue of all degrees per stirpes; but a distribution among issue of all degrees per capita in which parent and children compete with one another is most improbable.

Mr. Burgess, for the son's children, contended that " issue " meant issue to all degrees, unless there was a context restraining its meaning, and that as, in the present case, there was not, it must mean issue to all degrees, whether the testator was or was not likely so to have intended. Mr. Hesketh, for the son, parried this argument with *Reed* v. *Braithwaite* (3), the headnote to which states: " A testator gave his residuary estate to his wife " for life, and afterwards to his cousin H. for her sole use; and

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(1) (1870) L. R. 11 Eq. 514.

(2) [1899] 1 I. R. 501.

(3) L. R. 11 Eq. 514.

"should she have any legal issue by marriage, to be divided "amongst them equally at twenty-one. 'Should the said H. "'not survive my wife, and die without the said legal issue by "'marriage', he gave his residuary estate to M.".

Clearly, so far as the report shows, no argument was addressed to the court on the meaning of "legal issue by marriage", but Malins, V.-C., began his judgment, the substance of which concerns quite different matters, by stating that in his opinion "legal "issue by marriage" clearly meant "children". He continued: "The meaning of the clause creating the gift over is, 'Should "'Maria Ann Halse die in the lifetime of my wife, and without "'such issue'; that is, 'children who should attain twenty-"'one'".

That decision has stood unquestioned in England or in any standard English textbook ever since. On the other hand, the industry of Mr. Burgess, by which he sought to counter Mr. Hesketh, has discovered the Irish case of *Walsh* v. *Johnston* (4), where one of the gifts was "to my wife and the issue of our "marriage". Chatterton, V.-C., though *Reed* v. *Braithwaite* (5) was cited to him, did not refer to it in his judgment. He said (6): "In dispositions by will the rule of construction is, that issue "must be held to include all lineal descendants, and therefore it "gives an estate in tail, or quasi-tail to the first taker, unless "there are words in the context to cut down such a gift to "children. The words 'of our marriage' are relied on as having "that effect here. But a gift to the issue of an existing marriage "does not, in my opinion, take the gift out of the general rule. "'Issue' necessarily implies lineal descent, and the addition of "the words 'and the issue of a particular marriage' merely "confines the descendants to those of a specified husband and "wife".

There is, I think, a plain conflict between the English decision and the Irish. It is not correct to start, as the Irish court started, by first considering the meaning of "issue" simpliciter and then seeing whether it is affected by the context. "Issue" means "issue to all degrees" unless that meaning be restrained by the context. "Issue of our marriage", however, is a different, composite phrase and ought to be construed, not as "issue" with a context, but as a wholly different expression. The words "of our marriage" qualify the word "issue". The question is not one of context. The phrase is a compound one, and must be construed as such.

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(4) [1899] 1 I. R. 501.

(5) L. R. 11 Eq. 514.

(6) [1899] 1 I. R. 501, 503, 504.

Certainly, if the court starts from the supposition that "issue" means "issue to all degrees", the words "of our "marriage" can be so construed as not to restrain that meaning: and that is what the Irish court did; but what really has to be determined is the proper construction of the compound phrase "issue of our marriage" in a will. As I have said, it is most improbable that the testator intended his son and his grandchildren to compete in a per capita distribution. Also the phrase "issue of our marriage" could not appear in such a document as a settlement—"issue of 'the' marriage" might; but "issue "of 'our' marriage" could appear only in a will—and it has no technical legal meaning, whereas "issue" certainly has.

"Issue of our marriage" ought to mean to the court, as it undoubtedly would mean to any layman, the children of the person using the words and of the other person to whom he was referring, i.e., of himself and his wife: because, although the grandchildren are, in a sense, issue of the marriage between himself and his wife, since there could have been no grandchildren had there been no children, the grandchildren are really issue of the marriage, not of the grandfather and his wife but of the son and his wife or of the daughter and her husband, who have been able to have issue because of the circumstance, among others, that the grandfather had issue. My own interpretation of that compound phrase accords with the decision of Malins, V.-C., long ago. Why should I not follow it? Follow it I shall; and, accordingly, I shall declare that the testator's real and personal estate, after the widow's death, belongs to the son absolutely.

Order accordingly.

Solicitors: *Ernest Bevir & Son, for Pinniger, Finch & Co., Westbury; Woodcock, Ryland & Co., for Vicary & Knight, Warminster.*

K. R. A. H.

C. A.

1951
Mar. 8.

Cohen and Singleton, L.JJ., and Danckwerts, J.

In re BATLEY, DECD. PUBLIC TRUSTEE AND ANOTHER *v.* HERT AND OTHERS.

[1950 B. 2801.]

Will—Annuity—Free from income tax—Intention of testator.

A testator by his will, which was made shortly after his divorce and remarriage, bequeathed "free of duty" to his former wife "an annuity of four hundred and sixteen pounds for her "life . . . such annuity to be considered as a continuance of the "alimony which I am paying her during my lifetime, and to be "paid to her at the rate of thirty-two pounds every four weeks, in "this way thus continuing after my death the payments of alimony "which I am making to her during my lifetime". During his lifetime the testator had always paid the alimony without deduction of income tax. The will further provided that if at any time during the lifetime of the lady whom the testator had married after his divorce "such annuity of four hundred and sixteen pounds should "exceed the amount of one-third of the total income of my estate "after payment of income tax, then and in such case the amount to "be paid . . . by way of such annuity shall be such one-third of the "total income of my estate after payment of income tax".

Held, that the intention of the testator was made reasonably clear by the wording of the will, in conjunction with other documents or information to which attention was directed by the testator, and that the annuity was payable free of income tax, but without prejudice to the question whether the annuitant was liable to account for income tax relief in accordance with the rule in *In re Pettit* [1922] 2 Ch. 765.

Observations of Uthwatt, J., in *In re Hooper*; *Phillips* v. *Steel* [1944] Ch. 171, 172, applied.

Decision of Vaisey, J., reversed.

APPEAL from Vaisey, J.

The testator, Charles Gurson Batley, a solicitor, married as his first wife the defendant Dorothy Hert, who divorced him on December 21, 1936, and was awarded by the court 7*l*. a week as alimony. The testator married on January 27, 1937, a lady who since his death had remarried and was now Mrs. Grace Lucy Smith. By his second wife he had two children. During his lifetime he paid to his ex-wife Dorothy alimony to the amount of 8*l*. a week (being 1*l*. a week more than the sum ordered by the court), free of income tax. The testator died on May 4, 1947. By his will, dated January 27, 1937, after revoking former wills, he bequeathed "free of duty to my former wife Dorothy "Batley an annuity of four hundred and sixteen pounds for her

" life without power of anticipation during any coverture, such " annuity to be considered as a continuance of the alimony which " I am paying her during my lifetime and to be paid to her at " the rate of thirty-two pounds every four weeks, in this way " thus continuing after my death the payments of alimony which " I am making to her during my lifetime. But if at any time " during the lifetime of my wife the said Grace Lucy Batley " such annuity of four hundred and sixteen pounds should exceed " the amount of one-third of the total income of my estate after " payment of income tax then and in such case the amount to " be paid to the said Dorothy Batley by way of such annuity " shall be such one-third of the total income of my estate after " payment of income tax accordingly to be paid in similar manner " by equal four-weekly payments and I declare that the decision " of my trustees as to what is the amount of such income in any " year shall be final ".

The testator then directed that the income of his residuary estate was to be payable, subject to the annuity to Mrs. Hert, to his widow for life; and after her death, should there be any child or children surviving her, he directed his trustees " to set aside " a sufficient portion of the capital of my said estate to continue " the payment of the said annuity of four hundred and sixteen " pounds to the said Dorothy Batley, or if at such time such " annuity of four hundred and sixteen pounds should exceed the " amount of one-third of the total income of my estate after " payment of income tax then and in such case the amount to " be thus set aside shall be a sufficient portion of the capital of " my said estate to pay as an annuity to the said Dorothy Batley " an annual sum equal to such one-third of the total income of " my said estate after payment of income tax accordingly and to " pay the said annuity to the said Dorothy Batley for her life " accordingly ".

Further, the testator directed his trustees, in the event of there being no children surviving at the time of the death of Mrs. Grace Lucy Batley, to set aside a sufficient portion of his estate to pay the annuity to his former wife in full, notwithstanding that it might be more than one-third of the total income of his estate.

On November 22, 1950, application by summons was made to Vaisey, J., to determine whether on the true construction of the will the annuity bequeathed to the defendant Dorothy Hert was payable to her free of or subject to income tax. The judge decided that the annuity was subject to income tax, and Mrs. Hert appealed.

J. F. Bowyer for Mrs. Hert.

R. Jennings, K.C., and *C. F. Fletcher-Cooke* for the widow and remaindermen.

D. H. McMullen for the Public Trustee.

COHEN, L.J., having stated the facts and read the material provisions of the will, continued:—On that will the question arises whether the annuity of 416*l.*, or the substituted annuity in the event of one-third of the total income of the estate after paying income tax being less than 416*l.*, is payable free of tax or subject to tax. A subsidiary question developed in the course of the argument, whether, if it were free of tax, that meant free of tax at the current standard rate or free of tax at the rate appropriate having regard to the allowances, etc., to which the individual, Mrs. Hert, might be entitled. The parties agreed that that question was not raised in the summons, and it was thought possible that further admissible evidence might be available which would have a bearing on it. It was therefore agreed by the parties that we should deal with the matter by deciding whether or not the annuity was free of tax, without prejudice to the question whether the principle of the decision in *In re Pettit* (1) applies on the facts of this case.

That being the position, the first matter I propose to discuss is the principles which should govern our approach to this case. Mr. Bowyer referred us to some observations of Uthwatt, J., in *In re Hooper; Phillips* v. *Steel* (2), and I think I cannot do better than adopt what the judge said on that matter. Mr. Jennings referred us to other cases, which no doubt have greater authority in that they are decisions of the House of Lords, but I do not think there is anything in them which in any way modifies the principles laid down by Uthwatt, J., as follows: "Testators frequently provide that an annuity of an amount "specified by them is to be free of income tax, or is to be paid "without deduction of income tax. These words do not fit in "at all comfortably with the provisions of the Income Tax Acts, "for it is beyond the competence of testators to free an annuity "from income tax. The income tax withheld on payment of an "instalment of an annuity is not a deduction from the annuity;

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(1) [1922] 2 Ch. 765.

(2) [1944] Ch. 171, 172.

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"and, where part of the annuity is not payable out of profits and "gains brought into charge, the withholding of the income tax "appropriate to that part is obligatory on the payer. But the "Income Tax Acts are not read as controlling the expressed "intention of testators: see *Festing* v. *Taylor* (3). The intention "disclosed by the use of these phrases (which are construed as "identical in meaning) or phrases of similar import disclosing an "intention to relieve the annuitant of the burden of income tax, "is carried out by an appropriate increase in the money amount "specified for the annuity, the increase being such as to enable "the annuitant to receive the specified amount after the tax "incident to the increased annuity in the hands of the annuitant "has been satisfied in manner required by the Act. The annuity "as specified by the testator in money is increased: the increased "annuity is not free of income tax and tax is deducted on payment made to the annuitant. But the testator's intention has "been carried out. The question which gives rise to difficulty "is whether in any particular will there is, on its proper con"struction, shown an intention to make the annuity or the "annual sum expressed to be payable a net sum after income "tax has been accounted for. To achieve that object it is not "necessary that income tax should in terms be referred to. The "purpose sought to be achieved, for instance, a direction to pay "the rates incident to devised property, or the use of an artless "phrase—I hazard the example of a 'life annuity of 1*l.* a week "'spending money payable every Saturday'—may well show an "intention that the sums are to be net sums after tax has been "accounted for. The only thing necessary is an adequate "expression of the testator's intention. In this case the words "used are 'to be paid free of all deductions whatsoever', and "they have to be construed, not in any general sense, but as part "of the will in which they find a place".

That citation makes it plain that we have to find in the will a clear expression of an intention to give an annuity free of tax. I think that there is only one further authority to which I need refer, and I refer to it, not because I think it really modifies what I have already read, but because Mr. Fletcher-Cooke told us it was the decision which he cited to the learned judge and which caused him to decide the case in favour of the second defendants, the widow and remaindermen. That case is *In re Skinner; Milbourne* v. *Skinner* (4), a decision of Morton, J. The words

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(3) (1862) 11 W. R. 70.

(4) [1942] Ch. 82.

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in the will under consideration in that case were entirely different from anything we have to consider, but the learned judge lays down some principles which he thought might be of assistance to testators who might wish in future to give an annuity free of tax. He said: " (1.) The first rule is that, if a testator directs payment of an annuity out of the income of his estate, the annuity " is not payable free of income tax unless there is a direction in " the will to that effect. If there is no such direction, income " tax is payable by the annuitant: see, for instance, *In re* " *Sharp* (5).

" (2.) It makes no difference to the application of that rule " if, in fact, the annuity is paid out of income from which income " tax has been deducted at the source before it reaches the " trustees. As Warrington, L.J., said in *In re Cain's Settlement* (6), ' payment at the source is nothing more, under the " ' Income Tax Acts, than the machinery by which the revenue " ' collects the tax from the person ultimately liable to pay. In " ' the case of a company it pays income tax on its own gains " ' and profits, and under the provisions of the Income Tax Acts " ' it collects from the individual shareholders the amount of the " ' income tax on their shares. It is nothing more than that. " ' But the income tax is the tax on the income of the person " ' who is the ultimate recipient of the gains and profits, and not " ' upon the person who, although liable to the tax, has to pass " ' on those gains and profits to somebody else '.

" (3.) It is not a sufficient direction to use words ' a clear " ' annuity ': *In re Loveless* (7).

" (4.) It is not a sufficient direction to give an annuity ' free " ' of all deductions ' ".

After laying down that rule, the judge made a citation from a decision of Simonds, J., in *In re Wells' Will Trusts* (8), and then proceeded to say: " In view of the line of authorities " referred to in that case, it is to be hoped that, in future, if a " testator desires to free an annuitant from the payment of " income tax, he will use the words ' free of income tax ', and, " if he does not desire the words ' income tax ' to include surtax, will add the words ' but not free of surtax ' ". Now that is the ideal, but I do not think Morton, J., intended to lay down that if his formula were not adopted it necessarily followed that the annuity could not by the use of other words be read as being given free of tax.

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(5) [1906] 1 Ch. 793.
(6) [1919] 2 Ch. 364, 370.
(7) [1918] 2 Ch. 1.
(8) [1940] Ch. 411.

Vaisey, J., said that very clear words are necessary to give an annuity free of income tax. He came to the conclusion that in the testator's will the words were not sufficiently clear. I gather that he gave no other reason. I think that if we read the will in conjunction with the other documents or information to which we are expressly directed by the testator, it is reasonably clear that the testator did in this will give this annuity free of income tax. He says, first of all: "I bequeath free of duty "to my former wife Dorothy Batley an annuity of four hundred "and sixteen pounds for her life without power of anticipation "during any coverture such annuity to be considered as a continuance of the alimony which I am paying her during my "lifetime". Pausing there for a moment, it appears plainly from the affidavit of the representative of the Public Trustee that the alimony he was paying in his lifetime was 8*l*. a week free of income tax. Mr. Jennings, who appeared for the widow and the remaindermen, said it is not the same alimony, that it is "to be "considered" as a continuation of the alimony; and he invited us to read that as meaning that it meant "to be taken in "substitution for" the alimony. I do not think that that is the natural meaning of the words, and when I read on, it seems to me to be clearly excluded, because the testator goes on to say "and to be paid to her at the rate of thirty-two pounds every "four weeks in this way thus continuing after my death the "payments of alimony which I am making to her during my "lifetime". When we remember that the testator was paying the annuity monthly in his lifetime, and now says it is to be continued, it must, I think, necessarily follow that he is intending to pay, as he did before, 8*l*. a week in four-weekly payments. That seems to me to be the natural meaning of the words used.

But then Mr. Jennings tried to derive some comfort from the bequest of the substituted annuity which was to operate in the event of one-third of the total net income not amounting to 416*l*. That provision reads: "But if at any time during the lifetime of "my wife the said Grace Lucy Batley such annuity of four "hundred and sixteen pounds should exceed the amount of "one-third of the total income of my estate after payment of "income tax". Mr. Jennings said, first of all, "such annuity "of four hundred and sixteen pounds" means prima facie an annuity of 416*l*. gross, subject to tax. He argued that if Mr. Bowyer were right, and it were an annuity free of tax, it would not

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be an annuity free of tax at the current rate but an annuity free of tax at the appropriate rate having regard to the circumstances of the annuitant's life. I desire to abstain from saying anything which would prejudge that point, which is not raised before us now, but it does seem to me that to consider the reference in the bequest of the substituted annuity to the 416*l.* annuity as a reference to a gross annuity of 416*l.* involves comparing like with unlike. I think the natural construction of the words, having regard to what has gone before, is that it is an annuity of 416*l.* free of tax which is to be compared with " the amount of one-" third of the total income of my estate after payment of income " tax ", those last words meaning after payment of the standard rate of income tax. But if I felt any doubt, it would be removed by what follows: " then and in such case the amount to be paid " to the said Dorothy Batley by way of such annuity shall be " such one-third of the total income of my estate after payment " of income tax accordingly to be paid in similar manner by equal " four-weekly payments ". I cannot read that as meaning anything else but a direction that what is to be paid to Mrs. Dorothy Batley, if the event occurs, is one-third of the net income of the estate.

Mr. Jennings stressed that difficulties might arise if he were right that " free of tax " meant free of tax at the appropriate rate, in that the trustees would not know until the end of the period what sum to distribute. It is true that it might involve the trustees in having to make adjustments at the end of the period, but I do not think there is any more difficulty in this case than there must have been in many cases since the decision in *In re Pettit* (9) was given. Mr. Jennings said that the difficulties he indicated were accentuated by the directions as to setting aside capital to answer the annuity unless the annuity be construed as a gross annuity. There again there are difficulties, but it seems to me that the language of the first direction " to " set aside a sufficient portion of the capital of my said estate ", that is to say, in the event of the death of his widow leaving children her surviving, is so framed as to indicate the same intention as was indicated by the earlier part, namely, that the testator was dealing with net sums and not with gross sums when he was dealing with these annuities.

There is, however, one comment which might be made on the terms of that part of the will which provides what was to happen

(9) [1922] 2 Ch. 765.

in the event of the death of the widow leaving no issue who would attain a vested interest in the estate. There the direction is to set aside "a sufficient portion of the capital of my said "estate to pay as an annuity to the said Dorothy Batley an "annual sum equal to such one-third of the total income of my "said estate after payment of income tax accordingly and to pay "the said annuity to the said Dorothy Batley for her life "accordingly". It might be argued there that as the reference is not to "such annuity of four hundred and sixteen pounds" but to "an annuity", the annuity there referred to is a gross annuity. The event has not occurred and I ought not to decide a question which may never arise. Reading the will as a whole, I think that the testator may well have referred to the same annuity, particularly as he again refers to the "total income of my said "estate", though it is to be observed that he does not say "such "one-third of the total income of my said estate *after payment "of income tax*". At any rate, I do not see anything in this provision which would justify us in placing a construction on the original gift of the annuity other than that which I think it plainly bears, having regard to the direction that it is to be paid in continuance of the alimony which the testator had been paying during his lifetime, of 8*l.* a week.

For these reasons—though I always differ with hesitation from Vaisey, J., on a question of construction—I am unable to agree with the conclusion which he reached. I think his order should be varied by directing that the annuity to Mrs. Hert is payable free of tax, without prejudice to the question whether the principle of *In re Pettit* (10) applies or not.

SINGLETON, L.J. I agree, and I have nothing to add.

DANCKWERTS, J. I agree. I will add a few words as we are differing from the judgment of the judge. Unfortunately, we have not been given the benefit of the reasons which induced Vaisey, J., to reach the decision which he did. Possibly, if I had the reasons before me I should differ from his judgment with greater hesitation than I now have. The only observation which has been really transmitted to us is that you must have clear words if you are to find an intention to exonerate an annuity from the burden of income tax. With that principle, of course, I agree, but in this case I do find such clear words. It seems to me there are two alternative annuities given in this case. The first is one for 416*l.* a year, reached by reference to what the testator was paying the lady in question during his lifetime. That was not the sum which he was directed to pay by the Divorce Court, but the sum which he had paid on his own initiative, of 8*l.* a week, which was received by her and enjoyed by her, it appears from the evidence, without any deduction of income tax. It seems to me plain from the references in the will that he wished to continue the payment of that sum and to continue it in the form in which he had paid it, that is to say, payable and enjoyable without deduction of income tax. I agree with my Lord that the subsequent parts of the will, in respect of the alternative annuity, make the matter quite clear. The alternative annuity is an annuity equal to one-third of the whole of the income of the estate after income tax has been paid on the whole estate.

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(10) [1922] 2 Ch. 765.

In this case I do not find authorities of very much assistance, except that in *Brooke* v. *Price* (11) the House of Lords clearly indicated that you could give an annuity which would be free from deduction of income tax in precisely that manner. It seems to me that the latter annuity was the net amount after the whole of the estate had paid the appropriate tax on the estate, and was a proportional fraction of the income of the estate. I refrain from saying anything as to whether or not that meant that there would be no further accounting between the annuitant and the estate, because we are leaving for further discussion the question which was decided in *In re Pettit* (12).

COHEN, L.J. What would be the right order to make?

McMullen. I apprehend that if your Lordships were simply to declare, in answer to question 1 of the summons, that on the true construction of the will the annuity bequeathed to the defendant, Dorothy Hert, is payable to her free of income tax, but without prejudice to the question whether she is liable to account for income tax relief in accordance with the rule in *In re Pettit* (12), that order would work out quite definitely.

The court ordered accordingly.

Appeal allowed. Order accordingly.

Solicitors: *Chalton Hubbard & Co.; Edward F. Iwi, for Birkett, Ridley & Bartley, Ipswich; Maxwell, Batley & Co.*

A. W. G.

(11) [1917] A. C. 115.

(12) [1922] Ch. 765.

Applied. ABBEY MALVERN WELLS LD. *v.* MIN. OF LOCAL GOVT. AND PLANNING [1951] 1 Ch. 728

In re THE FRENCH PROTESTANT HOSPITAL.

DANCKWERTS, J.

1951
Apr. 5.

[1951 F. 294.]

Charity—Trustees—Charitable corporation incorporated by Royal Charter—Corporators designated as "directors"—Power to make and alter by-laws provided that the original or substituted by-law be reasonable and not contrary to law—Status and duties of directors—Proposed amendment of by-laws to enable directors to charge fees for professional work—Whether permissible.

By a Royal Charter granted in 1718 a number of persons were incorporated as "The Governor and Directors" of a hospital. By the charter power was given to the governor and directors to "make . . . so many good and wholesome by-laws . . . as they shall "think beneficial", and to "alter . . . the said by-laws . . . as to "them shall seem expedient. Provided always that the said by-laws ". . . be reasonable, and not repugnant to law".

A by-law, made under the power so conferred, provided, "no "person shall be eligible to be chosen or to continue a director . . . "who receives any emolument from the corporation; or who is "directly or indirectly interested in the supply or sale of any goods "to, or in any work done for the hospital".

In 1949 the directors purported to amend this by-law by a resolution to add the following words: "But this by-law shall not prevent "any director holding or continuing to hold office by reason of the "fact that the corporation employs in a professional capacity and "pays fees to a firm of which such director is a member . . .".

On the hearing of a summons taken out to ascertain whether the proposed amendment was permissible within the terms of the charter:—

Held, (1.) that as (a) the directors, though not technically trustees, were in the same fiduciary position as trustees in respect of the affairs of the corporation; and as (b) they were accordingly debarred by the rule of law relating to trustees from receiving payment for their services, it was improper for them of their own motion to introduce a by-law of the kind proposed, and that such a by-law was prima facie "repugnant to law"; (2.) alternatively, for the same reasons, that the proposed by-law was not "reasonable", and must therefore be declared invalid under the terms of the charter.

Observations of Lord Herschell in *Bray* v. *Ford* [1896] A. C. 44, 50 applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken substantially from the judgment:—The French Protestant Hospital is a charitable corporation incorporated by Royal Charter in 1718. The question for decision was whether the persons under the terms of the charter in control of the management and property of that charitable corporation could make an alteration to the by-laws which enabled remuneration for services to be paid to some or others of their number.

The charter incorporated a number of named persons and their successors by the name of "The Governor and Directors of the "Hospital for poor French Protestants and their descendants "residing in Great Britain". The power to hold and to acquire land was conferred, and it was provided that there should be a governor, a deputy governor, and thirty-seven or more directors, to be constituted in the manner thereinafter provided. That the persons referred to were described as "directors", a term familiar in company law, was purely accidental. The more common form would have been to describe them by some such title as governors.

Among the powers conferred on the governor, deputy governor and directors was a power, "from time to time, as they shall "think fit and necessary, to meet and assemble at the said "hospital, and there to prepare, make, ordain and constitute such "and so many good and wholesome by-laws, rules, orders and "ordinances, as they shall think beneficial for the said hospital. "And that it shall and may be lawful to and for the governor, "deputy governor and directors of the said corporation from time "to time to alter, annul or make void the said by-laws, rules, "orders and ordinances as to them shall seem expedient. Pro-"vided always that the said by-laws, rules, orders and ordinances "so as aforesaid to be made be reasonable, and not repugnant to "law".

By-law No. XI provided: "No person shall be eligible to be "chosen or to continue a director, who is an alien; or who "receives any emolument from the corporation; or who is directly "or indirectly interested in the supply or sale of any goods to, "or in any work done for the hospital". By-law XIX, which provided for alteration of the by-laws, was as follows: "None "of the by-laws hereinbefore or hereinafter contained shall be "altered, or any new by-law made, except by a general or extra-"ordinary general court, and confirmed at the next general court, "or at an extraordinary general court". Under that power the governor, deputy governor and directors of the corporation purported to alter by-law XI as stated below.

Over a number of years two men who acted respectively as honorary solicitor and as surveyor to the corporation were directors, or purported directors, although they received fees on a much diminished scale for advice and work which they did. The remuneration which they received was not equivalent to the ordinary profit which they would make in the course of their professional work. As it appeared that under by-law XI they were disqualified for the office of director under the words which refer to " any work done for the hospital ", the directors thought it desirable that persons in the position of the solicitor and the surveyor should be remunerated for work done, and accordingly in October, 1949, they passed and later confirmed a resolution for an alteration to by-law XI which consisted in the addition at the end of the words: " But this by-law shall not prevent any " director holding or continuing to hold office by reason of the fact " that the corporation employs in a professional capacity and " pays fees to a firm of which such director is a member either " as sole proprietor or a partner or otherwise ".

The validity of that alteration was questioned by one of the directors and by the Charity Commissioners, and as a result the present summons was taken out in order to ascertain whether the alteration was within the terms of the charter, that is to say, whether the alteration was reasonable and not repugnant to law.

N. S. S. Warren for the governor and directors. The directors are not trustees, as the assets and funds are vested in the corporation itself. There is no rule of law which prevents such a corporation from passing a resolution to grant reasonable remuneration to one of its corporators for services rendered. The ordinary rule, that a trustee shall not make a profit from the trust, does not apply.

It is beneficial to the corporation that it should include professional men who render services to it easily and cheaply, as was recognized by Lord Herschell in *Bray* v. *Ford* (1). The decision in that case may be distinguished, as the charity apparently was a limited company, and there was no resolution in general meeting to pay the remuneration complained of. Accordingly, a resolution to remunerate directors who are skilled professional men is " reasonable " and " wholesome " within the meaning of the language of the charter.

Denys Buckley for the Attorney-General. The amendment is repugnant to law. The corporation cannot do what it likes with its assets, but must apply them in furtherance of the objects of the charitable trust. This duty is also imposed on the corporators, who are in complete control of the corporation. The corporators as a whole cannot make a profit for themselves; it must follow that the same restriction applies to each corporator.

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(1) [1896] A. C. 44, 50.

The observations of Lord Herschell in *Bray* v. *Ford* (2) are fully applicable here. This is a charitable trust, and a charging clause of the type common in wills and individual settlements is improper: the directors are plainly in a fiduciary position, although not technically trustees.

DANCKWERTS, J. It is said by Mr. Warren for the applicants, who are the governor and directors, that it is the corporation which is trustee of the property of the charity in question, and that the governor and directors are not trustees. Technically that may be so. The property of the charity is, of course, vested in and held by the corporation. It is a perpetual person which exists, however, only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind the court is bound to look at the real situation which exists in fact. It is obvious that the corporation is completely controlled under the provisions of the charter by the governor, deputy governor and directors, and that those are the persons who in fact control the corporation and decide what shall be done. It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property. It is quite plain that it would be entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation, into their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees.

The duties of persons in such a fiduciary position were set out by Lord Herschell in *Bray* v. *Ford* (2). Having held that the memorandum of association of the charity concerned, which was a body administering an educational college, contained no power which entitled the vice-chairman to receive remuneration for his services as solicitor, Lord Herschell said: " It is not " now in controversy that if this be so the respondent "—that is, the vice-chairman—" was not warranted in making a charge for " his professional services. It is an inflexible rule of a court of

(2) [1896] A. C. 44, 50.

" equity that a person in a fiduciary position, such as the respon-
" dent's, is not, unless otherwise expressly provided, entitled to
" make a profit; he is not allowed to put himself in a position
" where his interest and duty conflict. It does not appear to me
" that this rule is, as has been said, founded upon principles of
" morality. I regard it rather as based on the consideration that,
" human nature being what it is, there is danger, in such circum-
" stances, of the person holding a fiduciary position being swayed
" by interest rather than by duty, and thus prejudicing those
" whom he was bound to protect. It has, therefore, been deemed
" expedient to lay down this positive rule. But I am satisfied
" that it might be departed from in many cases, without any
" breach of morality, without any wrong being inflicted, and
" without any consciousness of wrongdoing. Indeed, it is obvious
" that it might sometimes be to the advantage of the beneficiaries
" that their trustee should act for them professionally rather than
" a stranger, even though the trustee were paid for his services ".

It is clear, therefore, that without some provision in the constitution which controlled the governor and directors in what they did, the directors had no right whatever in the present case to make any profit or claim any remuneration out of the property of the corporation. But the question is whether, assuming that such conduct would therefore prima facie be repugnant to law, an alteration of the by-laws, which permits these men to remain directors and yet also receive payment for their services, is repugnant to law and unreasonable, so that it is not validly made under the terms of the charter. Lord Herschell clearly recognized that in some cases it may not be improper to have a provision, sometimes described as a charging clause, which enables the trustees to be paid; and clauses are often inserted in wills and settlements which do enable trustees to be paid for their services. But, while it is entirely proper for a settlor or testator to insert in his settlement or will a provision enabling the trustees of a trust constituted by him to obtain payment for their services, it seems to me a very different matter for persons who are already in the position of trustees, and therefore, so far as they exercise their powers at all, bound to exercise them in a fiduciary manner on behalf of the charitable trusts for which they act, themselves to empower the directors to be at the one time directors and persons who are making a profit.

It is plain that, in the administration of charitable trusts by this court, it has always been the practice in settling schemes to exclude the administering trustees from any power to make a

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1951

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profit or to obtain remuneration. It seems to me, therefore, that it would be a great change if it were thought proper for such a general provision to be inserted in a document regulating a charitable trust, particularly at the instance of the trustees themselves.

Mr. Warren said, no doubt with complete accuracy, that the present case concerns two entirely honourable men who would not abuse the powers which it is sought to confer on them; but it is plain that the terms of the proposed alteration to the by-laws are sufficiently wide to enable full profit costs and fees to be charged, so that the persons in question could in fact make a profit out of their office for the services rendered by them. It does not seem to me that that is a proper and reasonable provision to insert in the by-laws relative to a charitable trust at the instance of the trustees themselves or persons who are, to all intents and purposes, in the position of trustees. It seems to me that prima facie any such by-law would be repugnant to law. If it is said that it is not repugnant to law that there should be a charging clause inserted in the provisions regulating trusts, it seems to me that it is not reasonable to insert such a provision in trusts of the kind which I have to consider in the present case. Accordingly, I come to the conclusion that the proposed alteration to the by-law is invalid and ineffective, and I will so declare.

Declaration accordingly.

Solicitors: *Ouvry & Co.; Treasury Solicitor.*

F. R. D.

VAISEY, J.

1951
Mar. 15, 16.

JONES *v.* MAYNARD.

[1950 J. 1600]

Husband and wife—Joint banking account—No agreement as to mutual rights in account—Closing of account—Divorce—Rights of spouses.

In 1941 a husband, who was about to go on service overseas, authorized his wife to draw on his bank account, which was thereafter operated as a joint account in that both parties drew on it for their requirements, while both paid their earnings and income into it. The husband, whose payments in were much the larger, from time to time withdrew money to pay for investments made in his own name. There was no settled agreement between the parties as to their rights in the account.

In 1946 the wife left the husband, who shortly afterwards closed the account and drew out the balance. He obtained a decree of divorce against the wife in 1948.

In an action brought by the wife against the husband, claiming half the balance of the account and half the value of the investments, the husband contending that the balance and investments should be divided proportionately to the payments in made by the parties:—

Held, that the principle of equality ought to be applied, and that the wife was entitled to one half of the final balance and to one half of the value of the investments existing at the date when the account was closed.

Per curiam: when there is a joint account between husband and wife, it is not consistent with that conception that, in events such as those in the present case, the account should thereafter be picked apart and divided up proportionately to the respective contributions of the spouses.

In re Rogers' Question [1948] 1 All E. R. 328, applied.

ACTION.

In 1941 the defendant, who was then the husband of the plaintiff, was about to go on service overseas with the Royal Air Force, and authorized the plaintiff to draw on his banking account, which was thereafter treated as a joint account, the parties drawing on the account to meet their requirements.

The plaintiff paid into the account the dividends on certain investments held by her. The defendant paid in his service pay, an allowance received from the school at which he had been employed, and the dividends on his investments. There was also paid in the rent received from the letting of the matrimonial home, which was the joint property of the parties. The defendant, from time to time, withdrew money to pay for investments made in his own name. His contributions to the account were much larger than those of the plaintiff.

In July, 1946, the plaintiff left the defendant, who shortly afterwards closed the account and drew out the balance. He obtained a decree of divorce in 1948 against the plaintiff, who afterwards married again.

According to the evidence, the parties made no clear agreement as to their respective rights in the account. The plaintiff stated in evidence that the account was opened "so that I could "always have money at hand"; and also "the money was also "to be a pool of our resources: it was to accumulate, and when "there was a sufficient accumulation it should or might be

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1951

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"invested, and that was to be our savings". The defendant, in evidence, referred to the moneys in the account as "our joint "savings".

By this action the plaintiff claimed to be entitled to a half share in the final balance of the account and in the investments purchased by the defendant.

Lindner for the plaintiff. There is no authority which deals specifically with the question at issue here, but guidance may be had from *In re Rogers' Question* (1). The final balance and the investments should be divided equally.

F. S. Laskey for the defendant. The proper method of sharing is that the parties should receive a part proportionate to the amounts which they paid into the account.

VAISEY, J. The question for decision is, what are the rights of the parties now in the events which have happened; events which they clearly never imagined or envisaged at the time when this joint banking account was opened. Questions of this kind are matters of inference, and the court has to apply its mind to the situation as it finds it in regard to the known facts, but with grave uncertainty as to how far the arrangement made has in reality any relevance to the events which have happened. A husband and wife never contemplate divorce, at any rate if they are decent people, and I have no reason at all to suspect that the husband and wife ever thought in 1941 or subsequent years that their marriage would be broken up. What I have to decide is what are the legal consequences which flow from the dissolution of the marriage in regard to the dealings with and the final balance of this joint banking account.

The best guidance available is provided by *In re Rogers' Question* (1). The headnote reads: "In a question between "husband and wife, under s. 17 of the Married Women's Pro-"perty Act, 1882, as to the title to the matrimonial home"— which is not this case, but the same sort of point—"the judge, "after seeing and hearing the witnesses, should try to conclude "what was in their minds at the time of the purchase and then "make an order which, in the changed conditions, fairly gives "effect in law to what the parties must be taken to have intended "at the time of the transaction". I am told that there is no other authority which bears on this point, and I therefore act on such guidance as is afforded to me in the Court of Appeal's observations in the case which I have just cited.

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(1) [1948] 1 All E. R. 328.

In my judgment, when there is a joint account between husband and wife, and a common pool into which they put all their resources, it is not consistent with that conception that the account should thereafter (in this case in the event of a divorce) be picked apart, and divided up proportionately to the respective contributions of husband and wife, the husband being credited with the whole of his earnings and the wife with the whole of her dividends. I do not believe that, when once the joint pool has been formed, it ought to be, and can be, dissected in any such manner. In my view a husband's earnings or salary, when the spouses have a common purse, and pool their resources, are earnings made on behalf of both; and the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid in by the husband or the wife, is quite inconsistent with the original fundamental idea of a joint purse or a common pool.

In my view the money which goes into the pool becomes joint property. The husband, if he wants a suit of clothes, draws a cheque to pay for it. The wife, if she wants any housekeeping money, draws a cheque, and there is no disagreement about it.

That being my view, it follows that investments paid for out of the joint account, although made in the name of the husband, were in fact made by him in his own name as a trustee as to a moiety for his wife. If the investments out of the joint account had been made in the name of the wife alone, there is no doubt that the ordinary presumption of law would have applied and she would have been entitled to the investments; but as they were made in the name of the husband, it seems to me that the assumption of half and half is the one which I ought to apply.

I think that the principle which applies here is Plato's definition of equality as a "sort of justice": if you cannot find any other, equality is the proper basis. When moneys were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality, and not some proportional entitlement to be arrived at by an inquiry as to the amounts contributed respectively by the husband and wife to the common purse. Where one is searching for justice, as one must, and cannot find any other secure and sound basis, I think that equality is the best rule.

Accordingly, I propose to declare that all the investments which were at any time purchased out of the joint account (which can be identified in the order) in the name of the defendant, which were vested in him on August 15, 1946—the day upon which the account was finally closed—were held by him as to one moiety in trust for the plaintiff, and that he is liable to account to the plaintiff on that footing. Then, I suppose, there must be an inquiry as to what investments were so acquired and so held by the defendant. I hold that the plaintiff is entitled to judgment for one half of the sum which the defendant drew out of the banking account on the day when it was closed; and also that the plaintiff is entitled to recover the costs of the action down to and including this order, and if the inquiry is proceeded with the costs of doing so are reserved. Of course, any investments which have been made out of the joint account and subsequently sold and the proceeds repaid into the joint account must be excluded from consideration, because the money was returned to the joint account and was used for the purposes of wife or husband or investment, as the case may be. The inquiry will be concerned only with the investments which existed at the date of the closing of the account. If the defendant has disposed of any investments since, he will have to account for one moiety of each investment as trustee for the plaintiff.

The case is curious in this sense, that, although there are many authorities as to what is to happen to a joint account on survivorship as between husband and wife, counsel have not been able to call my attention to any relevant case which deals with the position which arises when the disruption of the marital tie is caused not by death but by divorce.

Order accordingly.

Solicitors: *Wontner & Sons; Kingsford, Dorman & Co.*

F. R. D.

HINCKLEY URBAN DISTRICT COUNCIL *v.* WEST MIDLANDS GAS BOARD.

C. A.

1951
Mar. 8, 9, 12.

Evershed, M.R., Jenkins and Hodson, L.JJ.

[1950 H. 952.]

Nationalization—Gas undertaking—Transfer to area gas board—Surplus profits of gas undertaking—Claim to recover from gas board for application for rates—Effect of Gas Act, 1948, *on Hinckley Local Board Gas Act,* 1880—*Hinckley Local Board Gas Act,* 1880 (43 *&* 44 *Vict. c. clvii, ss.* 43 *and* 44—*Hinckley Gas Order,* 1922 (*St. R. & O.* 1922, *No.* 638), *para.* 32—*Hinckley Gas Order* 1928 (*St. R. & O.* 1928, *No.* 512), *para.* 25—*Gas Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *s.* 56.

The plaintiffs, an urban district council, carried on an undertaking for the supply of gas until the defendants took it over on May 1, 1949, being the vesting date under the Gas Act, 1948. After the vesting date the plaintiffs ascertained that there had been surplus profits of the undertaking amounting to 30,000*l.* odd for the period from April 1, 1948, to April 30, 1949. They therefore claimed to recover this amount in reliance on s. 43 of the Hinckley Local Board Gas Act, 1880, as amended. Under this amended section surplus profits were applicable in a number of ways of which the only relevant one, in view of what had happened, was to carry the surplus to the district fund.

By s. 56, sub-s. 2, of the Gas Act, 1948, "all local enactments "in force at the vesting date and applicable to any statutory under"takers . . . shall from the vesting date have effect (*a*) as if for "references to the undertaker there were substituted references to "the area board . . . . Provided that any such local enactment which "provides for the regulation of charges made by the undertaker . . . "which is inconsistent with or rendered redundant by the pro"visions of this Act shall cease to have effect as from the vesting "date . . .".

By the combined effect of s. 17, sub-s. 1, and s. 18, sub-s. 1, of the Act of 1948 all property, rights, liabilities and obligations existing in a gas undertaking immediately before the vesting date, and held or incurred for the purposes of the gas undertaking, shall vest in the appropriate area board.

Held, (1.) that the sum claimed by the plaintiffs was irrecoverable in view of s. 56, sub-s. 2, and that that was so even though the surplus profits actually existed before the vesting date though not yet ascertained, for in view of ss. 19 and 37 of the Gas Act, 1948, no such accounting back could have been contemplated by the Act; (2.) that the local authority were also not entitled to the sum claimed as being a liability or obligation subject to which the assets of their gas undertaking were transferred to the area board, for the duty imposed on the undertakers by s. 43 of the local Act of 1880 did not amount to a liability or obligation within the meaning of ss. 17 and 18 of the Act of 1948 imposed on the authority as gas undertakers themselves as a local authority. The most that could be said was that had the local authority continued as gas undertakers, and

had the Act of 1948 never been passed, the surplus in question, when ascertained, might have been applied in relief of rates.

Decision of Lloyd-Jacob, J. (p. 335, ante) affirmed.

APPEAL from Lloyd-Jacob, J. (1).

The plaintiffs, Hinckley Urban District Council, carried on an undertaking for the supply of gas in their district under powers conferred by the Hinckley Local Board Gas Act, 1880, and the Hinckley Gas Orders of 1922 and 1928. On May 1, 1949, the vesting date under the Gas Act, 1948, the gas undertaking vested in the defendants, the West Midlands Gas Board. After the vesting date the council found that they had made surplus profits amounting to 30,178*l.* 12*s.* 7*d.* in respect of the undertaking for the period from April 1, 1948, to April 30, 1949. The council claimed that s. 43 of the Act of 1880 (as amended by para. 32 of the Hinckley Gas Order, 1922) and s. 44 (as amended by para. 25 of the Order of 1928) entitled them to recover that sum from the defendants. This was resisted by the defendant board in reliance on the Gas Act, 1948, which made provision in ss. 17 and 18 for the transfer to the area board of all property, rights, liabilities and obligations existing in a gas undertaking before the vesting date; and in reliance also on other sections, including in particular s. 56, sub-s. 2.

Lloyd-Jacob, J., held that the plaintiffs were not entitled to recover from the defendants the sum of 30,000*l.* odd.

The council appealed.

Capewell, K.C., and *Keen* for the urban district council.

Heald, K.C., and *J. P. Ashworth* for the defendants.

The arguments, which were only on the construction of the Acts of 1880 and 1948, are sufficiently summarized in the judgments.

EVERSHED, M.R. [after stating the facts:] I shall have to refer presently to certain sections of the Gas Act, 1948, not the least because Mr. Capewell has relied in considerable measure on the distinct treatment given by the Act to the two types of gas undertaking, the privately owned undertakings and the publicly owned undertakings in the hands of local authorities; but, when the matter is reduced to its final form, this case turns really on the one question: whether certain provisions of the legislation which affected Hinckley Urban District Council as gas undertakers survive so as to impose upon the defendants, the West Midlands Gas Board, an obligation to pay the equivalent of the surplus profit of 30,000*l*. odd to the council in relief of their rates.

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(1) Ante, 335.

It will be convenient therefore to refer first to the local legislation, so far as relevant, to see how the council's claim is formulated. I turn to the Hinckley Local Board Gas Act of 1880, ss. 43 and 44. It will make for clarity if I refer throughout to the provisions of this Private Act by the word " clauses ", as distinct from " sections " which I will use in reference to the Gas Act, 1948. Clause 43 of the Act of 1880, which is the vital clause, was later amended and modified by the Hinckley Gas Order, 1922. I will refer to the relevant parts of cl. 43, as amended by para. 32 of the Order of 1922. Clause 43 concerns the accounts of what was then called the local board and is now the council quoad their gas undertaking. It is obvious that the council may have several functions, and they perform any function exclusively under statutory powers given to them for that purpose.

Clause 43 is, in its conception, referring to the transfer from a previously existing company to the then local board, the predecessor of the council; and it provides that the council from the time of the transfer—and I am deliberately substituting " council " for " local board "—" shall keep accounts in respect " of their receipts and expenditure on capital account under this " Act and accounts in respect of their receipts and expenditure " on revenue account under this Act separate from each other, " and from all their other accounts, and shall, save as hereinafter " otherwise expressly provided, apply all moneys from time to " time received by them in respect of the undertaking "—with certain immaterial exceptions—" as follows ". There are then set out a list (ten in number, as a result of amendment) of methods of application of the money received. The first is " in " payment of the working and establishment expenses, and cost " of the maintenance of their gasworks and the undertaking "; and the next is " in payment of their costs, charges and expenses " of and incidental to the collecting and recovery of gas rents " and rates, and of the borrowing of money under this Act ". The third is " in payment of the interest on the said loans of " the company (if any) "—that is, the company of which the assets and undertaking were transferred—" which shall be outstanding at the time of the transfer . . .". Then there are a series of headings providing for payment of interest charges or other annual sums in respect of particular obligations, for example, the Hinckley Local Board Gas Debenture Stock.

There remained still three more methods of application, and it is particularly to these that the court has to direct its attention. The eighth is: " In setting apart, if the council think fit, a yearly " sum not exceeding 10*l.* per centum of the said moneys from " time to time received by them as aforesaid for the purpose of " forming a reserve fund to provide for any extraordinary expendi- " ture in connexion with the council's gas undertaking ". The ninth is: " In improving and extending the gasworks and mains, " and in payment of any charges and expenses for the time being " paid out of the general district rate in respect thereof ". Finally, it is provided: " And they may if they think fit carry " forward to the credit of the revenue account of their gas under- " taking for the next succeeding year for the purpose of providing " a working balance any sum not exceeding 5,000*l.*"—I pause to point out that that is, as I follow it, a provision enabling them to set up an additional reserve for the limited purposes mentioned. Lastly, provision is made for what may be called the residuary legatees: " and subject thereto shall either carry to the district " fund any surplus or balance remaining in any year or apply " the same in reduction of the price charged by them for the " supply of gas ". Adhering for the moment to my analogy, the class of residuary legatees between whom the council may choose is, first, the ratepayers, and, second, the gas consumers. Some persons, of course, may be in both classes, but many may be in one and not in the other.

Next, comes cl. 44, as amended by the Hinckley Gas Order, 1928. Paragraph 25 of that Order substitutes for cl. 44 this provision, concerning the case of a deficit on the working of the gas business at the end of a year. The clause now reads: " Any " deficiency in the revenues and receipts of the council on account " of the undertaking to make any of the payments or provide " any of the funds to which the moneys received by them in " respect of the undertaking are applicable under the provisions " of s. 43 of the Act of 1880 as amended . . . shall be from time " to time made good out of the general rate in such manner as " the council may from time to time determine ".

That indicates for present purposes the financial arrangements which, by statute, were imposed on and applied to the council at the time when the taking over of the gas undertaking under the Act of 1948 occurred. We are told that the financial year for the purposes of their undertaking had been from April 1 to

March 31 following, and a point has been made that, in any event, this figure of 30,000*l*. odd represented the surplus profit not for the year, but for a longer period of thirteen months. In my view that aspect does not really add very much to the case, and I shall not find it necessary to refer further to it.

The date of April 30, 1949, is significant because the vesting date under the Gas Act, 1948, was May 1, 1949. On that date, beyond any dispute, the task of supplying gas to the citizens of Hinckley and district passed from the council to the defendant board, and all the various paraphernalia, large or small, then ceased to be the property of the council and became the property of this board.

At that time, or immediately before the vesting occurred, the surplus profit of 30,000*l*. odd was not known or ascertained or certain. That is natural enough, for all the world knows that a number of gas consumers consume their gas through meters into which are inserted coins of the realm; and, until those have been emptied, it is not known for certain how much will be actually received, though it is presumably known how much gas altogether has been burned. Of the 30,000*l*. odd, 11,000*l*., approximately, represented what was ultimately received in respect of the gas consumed, the charges for which had yet to be collected from the consumers.

The council had not closed their accounts, as they would in the ordinary way, on March 31, but had carried on until the vesting date; and, when that date arrived, in addition to the other assets pertaining to the gas undertaking formerly theirs, there was known to be an unrealized profit in respect of working during the preceding thirteen months. When I say "unrealized", some part of it was, of course, in hand, but the exact total of it was not known.

That being the situation, I next turn to the Gas Act, 1948. This measure, passed, as is made clear from its opening sentences, for the purpose of securing through the various area boards the desirable object of developing and maintaining an efficient, co-ordinated and economical system of gas supply for the various areas, made provision in ss. 17 and 18 for the transfer to the area boards of the assets to be acquired. Section 17, sub-s. 1, accordingly provides: "Subject to the provisions of this "Part of this Act, all property, rights, liabilities and obligations "which, immediately before . . . the vesting date, were property, "rights, liabilities and obligations of an undertaker to whom this "Part of this Act applies, shall on the vesting date vest by virtue "of this Act and without further assurance in such Area Board "as may be determined by order of the Minister". Section 18, sub-s. 1, provides: "In a case where an undertaker to whom this "Part of this Act applies—(*a*) is a local authority . . . the "provisions of the last preceding section shall only apply to "property held or used by the undertaker wholly or mainly for "the purposes of his gas undertaking or wholly or mainly in his "capacity as a gas undertaker, and to rights, liabilities and "obligations acquired or incurred . . . in that capacity . . .". That makes it clear that as regards the council only the property, rights, liabilities and obligations properly belonging to their gas operations and gas undertaking were affected by and passed to the area board under the provisions of the Act. Section 19 is of some significance, as was thought by the judge. Its effect is that, where a local authority before the vesting date had made arrangements of a financial character for transferring sums of money or adjusting accounts between the gas undertaking of the local authority and any other account of the local authority, then provision is made for giving effect to the adjustments so far as is necessary after the Gas Act comes into force. Thus it says that, where the local authority have made arrangements for making financial adjustments of the kind that I have mentioned and those arrangements would, but for the Act, have fallen on or after the vesting date, then the area board shall, subject as is provided by the section, pay the necessary amount to the local authority in order to enable that to be effected.

I must next refer to ss. 25 to 27 of the Act, because of the point made that, in the case of a company gas undertaking, the method adopted was for the holders of the securities of the company to be paid out at a certain price. Provision was also made to the effect that up to the vesting date stockholders would get the benefit of any further earnings; and final accounting was provided for to enable this to be done.

Section 28 concerns the compensation to be paid in the case of local authorities, and it is based on quite different methods and principles. It provides that an area board in whom property and rights of a local authority are vested shall, by way of compensation and in lieu of any other compensation, make payments as provided in that section and in s. 29. There are provisions, for example, for what is to be done with regard to outstanding loans. Finally, s. 29 provides: "There shall be paid to local authorities, "by way of compensation in respect of the severance of their gas "undertakings from their other activities, the sum of 2,500,000*l.*", which was to be divided as therein specified.

The point is that there is no corresponding provision in terms for enabling the local authority, like the private stockholders, to get the benefit of any profits made up to the date of the final vesting. It is that which in part has underlain Mr. Capewell's argument, for he says that it is natural and fair and proper to read these later sections so as to get as near as may be to a comparative treatment for the privately owned undertaking and the local authority's undertaking.

Section 37, which may also be of some significance, provides: "(1) Where at any time after February 10, 1948"—the date of the second reading of the Bill—"a local authority have, without "the approval of the Minister of Health, debited any amount "in the accounts of the gas undertaking of the authority and "credited that amount in any other account of the authority, "the local authority shall be liable to pay that amount to the "appropriate board", except to the extent mentioned.

The point made on that section is that, if the council had chosen to debit their undertaking with X thousand pounds and credit some other of their accounts with a similar sum after February 10, 1948, and before May 1, 1949, without the authority of the Minister of Health, then, save as thereby provided, the council would have been liable to repay that amount to the area board in question. The significance of that is that the answer to the question whether the council's own legislation applied up to the vesting date would have to be: save only as qualified by s. 37.

Section 47, which was referred to by Mr. Ashworth, is in Part III of the Act, which concerns financial provisions, and makes provision for reserve funds of area boards and of the Gas Council. Sub-s. 1 provides: "Each Area Board and . . . the "Gas Council shall establish and maintain a general reserve fund "for the purposes of the Area Board or the Gas Council, as the "case may be". Then, as regards charges to be made to the constituents of a new area board, provision is made in s. 53. The substance of that section, as far as relevant, is that the area boards start by maintaining the existing charges and maintain them until power is given to them to make their own charges, the idea being that these boards shall make ends meet.

The last section to be referred to is s. 56, on which the whole matter really turns. It provides for the continued application, to the extent and subject to the provisions there stated, of existing local enactments; and the issue here really turns in the last resort on whether, on the true construction of s. 56, having regard to the other matters which I have mentioned, any part, and, if so, what part, of the powers or obligations in cl. 43 of the Act of 1880, as amended, survive. It is conceded by the urban district council that a great many of them cannot survive on any view. It is, for example, obviously inconsistent with the other provisions of the Act of 1948 to which I have referred that there should remain a power to utilize this surplus of 30,000*l.* odd by way of reduction in the gas charges for the Hinckley area, because s. 53 provides how tariffs are to be charged. Equally, the provisions in the clause relating to payment of the various stocks and other charges which take priority over these other matters cannot survive in the hands of the board, because other provisions are contained in the Act for the meeting of those charges. Indeed, Mr. Capewell, from the first, has stated that, since none of the earlier powers or provisions of cl. 43 can be regarded as translated, so to speak, into the hands of the area board, the only thing which can remain, and he says nevertheless does remain, is the power which becomes, by force of the elimination of all other obligations, the obligation to utilize the whole of the 30,000*l.* by way of reduction of rates, which means, in effect, an obligation to pay it over to the rating authority.

I confess that from the start that struck me as a surprising result, because, as my brother Jenkins pointed out, the result would be that the Gas Act, 1948, must be taken as providing that there should be excepted from the assets transferred to the area board any surplus profit accrued, even though not ascertained, at the vesting date; and, if that were the intention, it would be difficult to contrive a more oblique method of producing the result than the one which is suggested, namely, the treating of cl. 43 as preserved to that limited extent in accordance with s. 56 of the Act. On the other hand, it is said that, if there had been a deficiency, it would have been the obligation of the local authority to make good to the area board that deficiency out of their rates, and that that is so by virtue of the preserved effect of cl. 44 of the Act. No doubt, if that were true, it would be natural to expect the arrangements to be reciprocal. I do not myself think that it is true, but it will be necessary to examine both cl. 43 and cl. 44, as amended, in relation to s. 56 in order to test the validity of that argument.

It is now convenient to consider s. 56 more in detail. The earlier sections are the necessary background and may, indeed, add support one way or the other; but the conclusion that I reach rests on the proper interpretation of s. 56. In those circumstances, arguments on the other sections become more or less ancillary.

Section 56, sub-s. 2, provides: " All local enactments in force " at the vesting date and applicable to any statutory undertakers " . . . local authorities or composite companies . . . shall as from " the vesting date have effect ". Let me pause there. It is pointed out by the definition section, s. 74, that an enactment may equally mean a part of a section or clause of an Act, as well as the whole of a local Act; and, therefore, Mr. Capewell is entitled to say that if, upon a fair and sensible reading of cl. 43 and s. 56 together, one part of the clause is appropriately preserved, that is not defeated by saying that other parts would not be preserved.

The sub-section continues: the local enactments are to have effect " (*a*) as if for references to the undertaker "—that is in this case Hinckley Urban District Council—" there were substi-" tuted references to the area board "; so that cl. 43 and cl. 44, as respectively amended, are to be read as substituting, for references to " the Hinckley Council ", " the West Midland Area " Board ". Then under (*b*) they are to have effect " as if for any " references (however worded and whether expressed or implied) " to the gas undertaking or any part thereof or to the limits of " supply of the undertaker "—that is, of the council—" there " were substituted a reference to so much of the business carried " on by the area board as corresponds to that undertaking "; that is to say, you have to read, for references to " the Hinckley " gas undertaking ", " that part of the new board's undertaking " which today corresponds with the gas undertaking of the " Hinckley Council ". This is not for any limited or specified period of time, but, on the face of it, for all time. The sub-section has this proviso: " Provided that any such local enactment " which provides for the regulation of charges made by the under-" taker and any other such local enactment which is inconsistent " with or rendered redundant by the provisions of this Act shall " cease to have effect, as from the vesting date, so, however, " that this proviso shall not be taken as affecting any local " enactment which contains special provisions for the protection " of any person or class of persons and is not rendered redundant " by the provisions of this Act ".

At first sight, that is not a very simple piece of legislation. As Mr. Ashworth pointed out, it first of all enacts that local enactments are to remain in force but with very important substitutional references. Then, by way of proviso, it says that parts of any local enactments providing for "the regulation of "charges" or inconsistent with or rendered redundant by the Gas Act, shall not survive. But to that exception there is, again, a further exception, namely, that this proviso does not affect local enactments which are described as containing special provisions for the protection of any person or class of persons.

Mr. Capewell also referred to sub-s. 4, which provides: "For "the purpose of securing . . . a uniform statutory code applicable "throughout the area of each area board, the Minister may by "order provide for the repeal or amendment of any such local "enactment as has effect under sub-s. 2 . . .". That may, of course, provide an answer to the difficulty created by the absence of any limit of time in sub-s. 2 of this section, because the Minister could always by order put an end to any surviving Act in order to secure uniformity.

We have had the exercise of substituting in cll. 43 and 44, for references to "the council", references to "the West Midland "Area Board"; and, for "the Hinckley Council's gas under-"taking", references to "that part of the business of the total "area undertaking which corresponds to the old Hinckley gas "undertaking". It has involved some intellectual effort, and I say at once that the conclusion at which I have arrived is that these two clauses are defeated, prima facie, by the exempting provisions of the proviso, because it seems to me on examination that they are either inconsistent with the Gas Act or made redundant by the provisions of that Act.

I have already referred in passing to illustrations from the Act of 1948, and I do not wish to take too much time by mere repetition. I have pointed out that the various headings in cl. 43 for directing the surplus revenues to be used in paying the charges and cost of maintenance and in keeping down the charges on the debenture stocks are redundant, and really that, as Mr. Capewell concedes, it is only the disposition in favour of the relief of rates that can, in the circumstances, survive; but, if it does survive, it does so in a form so different from the original that it seems to me to be outside the scope and purpose of the section. All that under the original Act might have been applied in relief of rates was so much of any surplus left over after meeting a number of priorities and after the exercise of the discretion to set aside certain reserves. It is said now that cl. 43 survives as creating, in the circumstances, an absolute obligation to apply the whole sum of 30,000*l*. in relief of the ratepayers. It is not a survival, but an entire transmutation; and, therefore, without taking time in illustrating further the effect that s. 56, sub-s. 2, imposes upon the language, I conclude, as I have said, that prima facie the proviso applies. And what I have said upon cl. 43 applies no less, in my judgment, to cl. 44, as amended or revised by para. 25 of the Order of 1928. Indeed, the language of that Order supplies the answer. Leaving out any other difficulties of language, it provides that any shortage or deficiency in the revenues for the making of the payments to which the moneys received in respect of the undertaking are applicable under cl. 43 shall be made good out of the general rate. Once, therefore, the conclusion is reached that the obligations of cl. 43 have gone, cl. 44 (or what is taking its place) seems really to be left without sense or meaning. I therefore reach the conclusion that I have indicated, unless it can be said that the exception to the proviso to s. 56, sub-s. 2, can save the day for the plaintiffs. That depends upon the view that is taken of the formula: " so, how-" ever, that this proviso shall not be taken as affecting any local " enactment which contains special provisions for the protection " of any person or class of persons ".

Lloyd-Jacob, J., treated that as being a reference to what is commonly found in all legislation, public and private, namely, sections for the protection of any particular person or class of persons, the short purport and effect of which is to say that " nothing in this Act shall affect the rights of so and so or of any " such class of persons, either by the general law or by particular " legislation ". For my part, I agree with the judge that that is what is intended by this reference; but, even if a somewhat wider or looser meaning is to be given to this phrase " special " provisions for the protection of any person or class of persons ", a power in a local authority to say that any particular residual surplus might go in relief of rates, as it might alternatively go in the reduction of gas charges, is not a special provision for the protection of ratepayers. It does not, as Mr. Heald said, protect them from anything. Under cl. 43 the urban district council may think fit to relieve the ratepayers by utilizing their surplus, but to pick out this final power and say that it is a provision for the protection of the ratepayers seems to me to offend against the proper use of language; and I therefore hold that there is nothing in the final words of sub-s. 2 of s. 56 to help the plaintiffs.

That seems to dispose of the appeal. But the matter has been put alternatively by Mr. Capewell. It may be useful to refer back finally to some of the earlier provisions in so far as they throw light on the view which I have taken and its validity. The alternative method of approach which Mr. Capewell invited us to adopt was to say that in any case the surplus profit, though its quantity was not discovered, was an existing thing, a right or a chose in action, which had belonged to the council right up to the vesting date. He says, further, that, if accordingly there was up to the vesting date an obligation on the part of the council to apply this surplus as the statute enjoined, then the residuary interest of the ratepayers was a liability of the council, or an obligation on the council, which had accrued within the meaning of s. 38, sub-s. 2 (*c*), of the Interpretation Act, 1889, and survived notwithstanding any repeal of the local legislation so as to bind the area board. I do not think that it was. I think that all that the ratepayers had up to May 1, 1949, was the hope that the council might, when they came to make their final decision and when they had discharged their various prior obligations as gas suppliers, think fit to devote the balance, in part or wholly, in relief of rates; but I can put it no higher than that. No method could have been adopted on their behalf on any date before May 1 of enforcing such an obligation by applying for an order of mandamus or otherwise.

Therefore, in the absence of any obligation in any proper sense of the term, I do not think that this alternative method of attacking the matter assists Mr. Capewell. I can well understand that other private gas Acts may take quite different forms and there may be in other Acts provisions which might impose an obligation, final and enforceable before the vesting date, upon a local authority to apply surplus profits when ascertained in a particular way; but that is not so in this case. If such a case comes before the courts, the courts may have to say whether in such circumstances that obligation attached in some way to the area board. I emphasize that in this case the claim of the ratepayers could never be, or have been before May 1, 1949, higher than an expectation that, when other things were paid or discharged, they might get part of the surplus applied to their relief.

Nor do I think that Mr. Capewell can support his argument by saying that the obligations of cll. 43 and 44 (particularly cl. 43) must survive so as to impose upon the area board an accounting duty such as was up to May 1, 1949, imposed on the Hinckley Council by cl. 43. I think that the effect of the Gas Act is not as involved as that. By the Gas Act, on the vesting date all the property, rights and obligations relative to the gas undertaking of the council passed to the new area board. In order that they might perform their statutory obligation of vesting the property, rights and obligations the council would have to satisfy the area board, if called upon, that they had properly made a transfer; but beyond that I think it not necessary to keep alive in the area board any of the accounting provisions of cl. 43.

On the other hand, I do think that the earlier provisions support the view that in the case of a local authority (whatever the treatment meted out to other gas undertakers) it would be contrary to the conception of the Act to treat the transfer as being subject to the sort of reservation which Mr. Capewell's argument, as I think, would necessarily impose upon it. In my view Mr. Heald and Mr. Ashworth are entitled to say that the terms of ss. 19 and 37 of the Gas Act, support the view that no such accounting back, so to speak, as Mr. Capewell has suggested could have been contemplated by the Act.

It may be that the powers which the council undoubtedly had under cl. 43 of their Act until the moment of transfer were liable to be qualified to some extent by s. 37; but, so far as their powers were concerned, they clearly remained (and they could be exercised) until the date when they were lost on the vesting of the undertaking. If any such adjustment as the council demand was contemplated, ss. 19 and 37 could hardly have taken the form they did. Though the matter becomes ancillary, I think it supports the conclusion which I have reached. I cannot, according to my reading of the Act, find any compulsion, in attempting to get unity of treatment between private company undertakers and local authority undertakers, which would lead me to a different conclusion.

I hope that I have met the various points which have been made. It is not an easy matter to formulate, and I am conscious that I may have been unsuccessful, but in the last resort it seems to me that the case must turn on the view taken of the effect of s. 56 in preserving any part of cl. 43; and, for the reasons which I have given, I cannot hold that the effect for which Mr. Capewell argued can have been intended. As it seems to me, it can only be achieved by a very elaborate mental exercise and a very strained and artificial use of language, and I think that it is too elaborate and too strained to be justified.

JENKINS, L.J. I agree. The sum of 30,178*l*. claimed by the council represents a surplus earned during the thirteen months immediately preceding the vesting date appointed under the Gas Act, 1948. It was earned during that period, but, owing to the ordinary exigencies of accounting, it was not ascertained until some months afterwards and as it had not been ascertained, no appropriation of it had been made to any of the particular purposes to which it would have been applicable under s. 43 of the Act of 1880, as amended by the Order of 1922. The council claim that that sum of 30,178*l.* should be paid over to them. One has a certain sympathy for the contention that a profit earned by a local authority in carrying on a gas undertaking should, when that gas undertaking is transferred to another body, enure for the benefit of the local authority's ratepayers; but the terms of the transfers effected under the Gas Act, 1948, were no doubt settled in a way which was considered to be the fairest and best from the point of view of the area of each transferee board as a whole.

However that may be, the only question for this court is whether, on the true construction of the Gas Act, 1948, in its application to this particular urban district council and their own relevant private Act, the claim of the council can be maintained.

First comes the fact that under s. 17, as applied to a local authority such as the council by s. 18 of the Gas Act, 1948, all the property, rights, liabilities and obligations of the council, limited, to put it shortly, to property held or used by the council wholly or mainly for the purposes of their gas undertaking or wholly or mainly in their capacity as gas undertakers, and to rights, liabilities and obligations acquired or incurred by the council wholly or mainly for those purposes or in that capacity, were on the vesting date transferred to and vested in the defendant board. That transfer and vesting included every single asset that the council possessed in connexion with their gas undertaking. It follows that the assets transferred included the sum representing the surplus earned by the council down to the vesting date. That surplus was somewhere embedded in those assets and with those assets it passed over to the defendant board. There was no provision, as there might have been if it had been so intended, to the effect that a final account should be made up to the appointed day and that any surplus shown on that account, or perhaps such part of any such surplus as the Minister might agree, should be applied in the relief of rates in like manner as it could have been applied if the Act of 1948 had not been passed. There is no provision for any apportionment of that kind, as there must inevitably have been had it been intended that such an apportionment should take place.

Nevertheless, Mr. Capewell says that in effect a similar result can be produced by implication, and he puts the matter, to summarize it, in two ways: first, he says that under s. 18 the assets were transferred subject to liabilities and obligations incurred by the council wholly or mainly for the purposes of their gas undertaking or in their capacity as gas undertakers. He says that those liabilities and obligations included the liability or obligation that the council were under, by virtue of s. 43 of the Act of 1880 and the amending Order of 1922, either to carry to the district fund—that is, now, the general rate fund—any surplus or balance remaining in any year or to apply the same in reduction of the price charged by the council for the supply of gas. Mr. Capewell says that this was a liability or obligation which passed to the defendant board under s. 18. Although it is put in the alternative form, he says that, having regard to the Gas Act, 1948, the only possible mode of application of the surplus remaining out of those prescribed by s. 43 of the Act of 1880, as amended by the Order of 1922, was its payment over to the general rate fund; and he says that the repeal of the Act of 1880 cannot affect this, because, under the Interpretation Act, 1889, s. 38, sub-s. 2, where any Act passed after the coming into force of that Act repeals any other enactment, "then, unless the "contrary intention appears, the repeal shall not . . . (b) affect "the previous operation of any enactment so repealed or any-"thing duly done or suffered under any enactment so repealed; "or (c) affect any right, privilege, obligation or liability acquired, "accrued or incurred under any enactment so repealed". He says, further, that this was a liability or obligation "accrued or "incurred" under the Act of 1880 before the vesting date appointed under the Gas Act; and accordingly that it is preserved even if s. 43 of the Act of 1880 has been repealed. In other words, it is contended that s. 43 of the Act of 1880, as amended, had, before the vesting date, already operated to make this surplus applicable by carrying it to the general rate fund.

I find myself unable to accept that argument. First, while saying nothing which might prejudice other cases in which the enactments to be considered may have a different form, I find great difficulty in seeing how the obligation of the council under s. 43 of the Act of 1880 to carry any surplus to the general rate fund can properly be called a liability or obligation in the sense in which those expressions are used in s. 18. I should have thought that the provisions of s. 43 of the Act of 1880, so far as they enjoin payment of a profit into the general rate fund, are really in the nature of statutory provisions as to the manner in which any profit not required for the purposes of the gas undertaking is to be treated in the accounts of the council. Those provisions presupposed a profit which became the property of the council, and, inasmuch as the council were a local authority trading in the matter of gas at the risk, and it may be at the expense, of the ratepayers, the application of any profit derived by the council from this source had to be regulated to ensure that it was treated in a proper way; but I find great difficulty, in the context afforded by s. 18 of the Gas Act, in holding that s. 43 of the Act of 1880 did, within the meaning of s. 18 of the Gas Act, impose an obligation or liability on the council, owed, as it were, from themselves in their capacity as gas undertakers to themselves in their capacity of a local authority, so as to place the board, upon the transfer to them of the council's undertaking, under an obligation to repay to the council the surplus in question.

Be that as it may, I cannot see that on April 30, 1949 (to be precise, at midnight on that date), there was any accrued liability or obligation under s. 43 of the Act of 1880 in respect of this surplus. The most that can be said, so far as I can see, is that, if the council had continued to carry on their gas undertaking and the Gas Act, 1948, had not been passed, then this surplus, when ascertained, could either have been applied in reduction of the price of gas or carried to the general rate fund. That is the farthest it is possible to go, and I cannot see that this constituted at the relevant date a liability or obligation to adopt the latter alternative.

The second way in which the case is put by Mr. Capewell turns on s. 56, sub-s. 2, of the Gas Act. It is said that on the true construction of that sub-section, s. 43 of the Act of 1880, as amended by the subsequent Order of 1922, must be considered as remaining in force with the substitution of references to " the " board " for references to " the council ", and with the construction, to put it very shortly, of references to the council's undertaking as if they were references to the corresponding part of the defendant board's undertaking. The validity of that contention depends on the effect in relation to s. 43 of the Act of 1880 and the relevant Order of the proviso to s. 56, sub-s. 2, of the Gas Act, which says: " Provided that any such local enactment which " provides for the regulation of charges made by the undertaker " and any other such local enactment which is inconsistent with " or rendered redundant by the provisions of this Act shall cease "to have effect, as from the vesting date, so, however, that this "proviso shall not be taken as affecting any local enactment "which contains special provisions for the protection of any "person or class of persons and is not rendered redundant by the "provisions of this Act".

Under that proviso, if s. 43 of the Act of 1880, as amended by the Order of 1922, provides for the regulation of charges made by the undertaker, it is to cease to have effect. The trial judge regarded s. 43 as being such a section. It is true that, in so far as in certain circumstances it enables a surplus to be applied in reduction of the price of gas, it does in a sense involve a regulation of charges; but, speaking for myself, I do not think it can be described as a section providing for the regulation of charges made by the council within the meaning of the proviso. The judge, however, went on to hold that s. 43 was inconsistent with the provisions of the Act of 1948. I agree with him and with my Lord that its provisions are palpably so inconsistent. It seems to me that from beginning to end they are appropriate, and appropriate only, to the gas undertaking while carried on by the council, and that no amount of ingenuity can translate them into provisions which would be appropriate to the undertaking to be carried on by the defendant board. I think, too, that they are fairly within the expression "redundant". For example, the provisions as to the payment of loans are completely redundant under the new dispensation.

It is said, however, that s. 43 of the Act of 1880 falls within the description of a local enactment containing "special provi-"sions for the protection of any person or class of persons and "not . . . rendered redundant by the provisions of this Act", within the meaning of the proviso. The special provision for the protection of any person or class of persons which s. 43 is said to contain is the provision to which I have several times referred about carrying the surplus to the general rate fund. That is said to be a special provision for the protection of a person or class of persons. I agree with my Lord that it cannot reasonably be brought within that description at all. In my view, it is not a special provision, nor is it for the protection of any person or class of persons. It is a provision under which the ratepayers of Hinckley as a body might benefit from time to time through a reduction in rates due to a contribution made from the gas undertaking; but, in my judgment, it is not a protective provision in the sense in which that expression is used in the proviso to s. 56, sub-s. 2, of the Gas Act.

I have only to add that I think that there are two sections in particular which support the conclusion to which I have come. The first is s. 19 of the Gas Act, which relates to arrangements made by a local authority before the vesting date for the making of a financial adjustment as between the accounts of the gas undertaking of the local authority and any other account of the local authority. It provides that the appropriate credits or debits can be made in respect of those transactions. As it seems to me, that section shows that transactions as between different departments of a local authority are to be considered in a somewhat special light: they are not regarded as falling within the general description of liabilities or obligations on the local authority; but, where arrangements have in fact been made for financial adjustments between different accounts of the local authority, effect may be given to those arrangements as if, so to speak, they were arrangements between two distinct persons. If it had been intended to treat the provisions of s. 43 of the Act of 1880 as to the application of surpluses as being, for the purposes of the Gas Act, a liability on the council in their capacity as gas undertakers to themselves in their ordinary capacity as a local authority, some express provision to that effect would inevitably have been made.

The other section of the Gas Act to which I refer is s. 37. Mr. Capewell endeavoured to persuade us that s. 37, sub-s. 1, could not apply to a transfer of a surplus from the accounts of the gas undertaking to the general rate fund, because, he said, that was a type of transfer which was expressly authorized—nay, in certain circumstances, enjoined—by s. 43 of the Act of 1880. For my part, I cannot accept that argument. I think that sub-s. 1 of s. 37 must include within its purview payments of a kind which would be lawful and valid payments apart from the special provisions of this sub-section. I think that the sub-section makes it reasonably plain that, as from the date mentioned, February 10, 1948 (which, I understand, was the date of the second reading of the Gas Act, 1948), the taking out of the gas undertaking, if I may describe it by that expression, of surpluses and crediting them to another account was to be made a matter requiring the approval of the Minister of Health. To my mind, that strongly supports the view that in the case of the local authorities it was not intended that a surplus made during any period of operation preceding the vesting date should, after February 10, 1948, be considered as available for transfer to the general rate account of a local authority. That supports the view that in this case no such apportionment as would give the council the benefit of a surplus earned down to the appointed day, but not yet ascertained or appropriated, was intended.

Accordingly, I agree with my Lord that the judge came to a right conclusion, and that the appeal should be dismissed.

HODSON, L.J. The result of this appeal depends on the construction of the Gas Act, 1948, and, in particular, of ss. 17, 18 and s. 56, sub-s. 2. So far as s. 56, sub-s. 2, is concerned, I have nothing to add to what has fallen from my Lords, with which I wholly agree. So far as the argument based on ss. 17 and 18 is concerned, that is to say, the argument put forward on the basis that the local enactment of 1880 has ceased to have effect, I would prefer to base my judgment not on any doubt as to whether there can be an enforceable obligation between one part of the council and another, but rather on the ground already expressed, that what survives here, or could possibly have survived at the vesting date, was not a liability at all. That which existed at the vesting date was an option to dispose of the surplus in certain specified ways; and it is in that respect that the board stand in the shoes of the council and not as persons who have taken over a liability.

I agree that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal.

Solicitors: *Lees & Co., for J. G. S. Tompkins, Hinckley; Sherwood & Co., for A. C. Croasdell, Birmingham.*

H. C. G.

Affirmed. C.A. [1951] 2 All E.R. 457.

Affirmed. [1951] Ch. 1026

NOVELLO & CO. LD. v. HINRICHSEN EDITION LD. AND ANOTHER.

WYNN-PARRY, J.

1950
Dec. 12, 13, 14, 15, 18, 19, 20.
1951
Jan. 16, 17, 18, 19, 23, 24, 25, 26, 30, 31;
Feb. 1, 2, 21.

Copyright—Infringement alleged by licensees—Licences granted under emergency legislation relating to enemy property—Defendants alleging ownership—Transfer of business in Germany by confiscatory decree—Application to property in United Kingdom.

Emergency legislation—Licences in respect of enemy property—Owner of copyright not enemy when licence granted—Ultra vires—Position of enemy shedding enemy character—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2 & 3 *Geo.* 6, *c.* 107), *s.* 2.

Trading with the enemy—Application to copyright in United Kingdom—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 4.

The plaintiffs sued the defendants for breach of copyright in two musical works. They sued as licensees under two licences, dated February 19, 1940, and June 1, 1948, respectively granted to them by the Comptroller-General of Patents, Designs and Trade Marks under s. 2 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The defendants admitted the acts alleged to constitute infringement, but they contended that the copyright in these works was vested in the second defendant, who had authorized the acts in question of the first defendant, and that no infringement had therefore been committed.

In 1938 the music publishing firm of C. F. P., of Leipzig, was owned by H. H. and one of his sons in partnership. The second defendant, who was the eldest son of H. H., anticipating the Nazi persecution of the Jews, had emigrated to England in 1937. Decrees were passed in 1938 by the Nazi government in pursuance of their policy of oppression of the Jews. The decree dated December 3, 1938, provided: "(1.) The owner of a Jewish industrial "enterprise . . . may be ordered to sell or liquidate the enterprise "within a definite time. Certain conditions may be stipulated in "the order. . . . (2.) A trustee may be appointed for Jewish "industrial enterprises, the owners of which have been ordered . . . "to sell or liquidate, for the . . . completion of the sale or liquida-"tion. . . . (4.) As soon as the owner of the enterprise is notified "of the order through which a trustee is appointed according to "para. 2, he loses the right to dispose of the property . . .".

An edict dated December 13, 1938, appointed a custodian of the publishing firm C. F. P. under the above decree, and prohibited H. H. and his son from exercising any rights as owners of the firm. An agreement of sale dated July 22, 1939, was entered into by the custodian as "seller", and two other members of the Nazi party as purchasers. The price of RM. 1 million fixed by the custodian was an admitted under-valuation. H. H. and his son were not parties to the sale agreement, but under compulsion they signed an agreement acceding to the sale on the same day. Consent to the sale was finally given by the Minister of Economics on September 25, 1939.

H. H. died in Belgium in 1942, predeceased by the son who was a partner. His personal property in the United Kingdom vested ultimately in the second defendant as administrator with the will annexed. On the evidence the beneficial interest in this property had, by June, 1948, become free from enemy taint.

The plaintiffs contended that the interests in the United Kingdom of the firm C. F. P. passed under the sale agreement of July 22, 1939; and that the accession agreement signed by H. H. and his son was effective as a ratification of the sale. They further contended that, although the sale agreement had not been ratified on September 5, 1939, when the Trading with the Enemy Act, 1939, became law, the sale agreement was not executory, and that that Act did not prevent an effective transfer of the English copyright.

The plaintiffs contended with respect to the licences, that a licence could be granted under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, so long as the owner of the copyright had been an enemy at any time between September 3, 1939, and the date of the application. It was also contended that once the jurisdiction of the Comptroller to grant licences under sub-s. 1 of s. 2 of the Act had arisen, no one could exercise the copyright without the licence of the Comptroller so long as the Act remained in force.

Held, (1.) that the decree of December 3, 1938, was confiscatory in policy, and the courts of this country would not give effect, so far as regarded assets within their jurisdiction, to the law of a foreign country which was confiscatory in policy; and that this doctrine extended to the sale by the custodian appointed under that decree; and that the sale agreement of 1939 was therefore ineffective to pass the English copyright even if that agreement were otherwise valid in English or German law.

Frankfurther v. *Exner* (*W. L.*), *Ld.* [1947] Ch. 629 followed.

(2.) That the deprivation of H. H. and his son of their property was not the result of any consensual agreement, because their signature later of the accession agreement could not affect the scope of the sale agreement which was determined at the moment of its execution, and which, by reason of its dependence on a confiscatory decree, did not extend to the transfer of the copyright in the United Kingdom.

(3.) That, even if the sale agreement were valid by German law, it was not effective until the ratification of September 25, 1939, by which time the Trading with the Enemy Act, 1939, had already become law, and a contract made by an enemy subject after that Act came into force was, by virtue of s. 4, ineffective to transfer the copyright in this country, and this was so notwithstanding that the ratification of September 25 was retroactive in German law.

(4.) That for the purpose of a licence under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, it was not sufficient to say that the owner of the copyright was an enemy at some time between September 3, 1939 and the date of the application, but that a licence could only be granted where the owner of the copyright was an enemy at the date of the application, and, the owners of the copyright in question having shed their enemy character by 1948, the licence dated June 1, 1948, was accordingly ultra vires and invalid.

(5.) That even if the jurisdiction of the Comptroller to grant licences under s. 2 of the Act had arisen in respect of a particular copyright, there was nothing in the Act which could operate to prevent the copyright owner who had shed his enemy character from exercising his copyright.

ACTION.

The plaintiffs, Novello & Co. Ld., sued the defendants, Hinrichsen Edition Ld. and Max Hinrichsen, for infringement of copyright in respect of two musical works, " Rustle of Spring ", Opus 82, No. 3, by Sinding, and "Sonatinas", by Clementi Ruthardt. They sued as the holders of two licences, dated February 19, 1940, and June 1, 1948, respectively granted to them by the Comptroller-General of Patents, Designs and Trade Marks under s. 2 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939.

The defendants admitted the acts which were alleged to constitute infringement, but denied infringement. They contended that the copyright in the above works in the United Kingdom was vested in the defendant Max Hinrichsen, as the administrator with the will annexed, of his father Henri Hinrichsen, and that the acts of the defendant Hinrichsen Edition Ld. were authorized by the defendant Max Hinrichsen.

The case concerned the ownership of the music publishing firm of C. F. Peters of Leipzig. The business, which was established early in the last century, came into the ownership of the Hinrichsen family during the latter half of the century. In 1894 Henri Hinrichsen became a partner in the business, and in 1901 the sole owner. In 1933 he took his eldest son, the defendant Max Hinrichsen, into partnership.

In November, 1937, Max Hinrichsen, anticipating the persecution of the Jews by the Nazi Party, left the partnership and emigrated to England. Henri Hinrichsen then took into partnership his son Hans. Henri Hinrichsen had two other sons in Germany, Robert and Paul, and a son Walter who emigrated to the United States of America in 1936.

By an agreement of September 1, 1937, the firm of C. F. Peters appointed the plaintiffs as their agents for the United Kingdom and certain other territory for the sale of C. F. Peters publications. The agreement contained no assignment of the English copyright in any of the works forming the C. F. Peters catalogue. The plaintiffs pressed for such an assignment, but Henri Hinrichsen refused to agree to it. In January, 1938, the parties entered into a supplemental agreement which was indorsed on the agency agreement. The terms of those agreements were not material to this case.

Wynn-Parry, J., found it to be a notorious fact, of which he was bound to take judicial notice, that an essential part of the programme of the Nazi Party was the oppression of the Jews. In furtherance of this object they passed a large number of decrees during their tenure of power, three of which were material to this action. The first was dated April 26, 1938, and was headed "Order Concerning the Registration of Jewish Property".

By that decree all Jews, as defined by the Nuremberg Law of 1935, were obliged to register and value their total home and foreign property as at the date of the coming into force of the order.

A second decree dated June 14, 1938, provided for the compulsory registration of Jewish industrial enterprise as defined in the decree, with a limited right of appeal against having to register.

The third decree, dated December 3, 1938, was material to this action, since it was under this decree that steps were taken to dispossess Henri Hinrichsen and Hans Hinrichsen of the business of C. F. Peters. The decree was entitled " Decree Regarding the " Utilization of Jewish Property " and was headed " Industrial " Enterprises ". Paragraph 1 provided: " The owner of a Jewish " industrial enterprise (Third Decree to the Reich Citizen Law " of June 14, 1938) . . . may be ordered to sell or liquidate the " enterprise within a definite time. Certain conditions may be " stipulated in the order ". Paragraph 2 was in these terms: " (1.) A trustee may be appointed for Jewish industrial enterprises, " the owners of which have been ordered in accordance with " s. 1 to sell or liquidate, for the temporary continuation of the " enterprise and for the completion of the sale or liquidation, " especially if the owner of the enterprise has not complied with " the order within the fixed period and his application for an " extension of time has been rejected. (2.) The trustee is empowered to undertake all judicial and extra-judicial actions " and legal measures, which the business of the enterprise, its " liquidation or sale require. His authority replaces any legally " required power of attorney. (3.) The trustee must exercise the " care of a responsible business man and is subject to State " control. (4.) The owner of the enterprise is to pay the expense " of the trustee in connexion with the work ".

By para. 4: " As soon as the owner of the enterprise is notified " of the order through which a trustee is appointed according to " para. 2, he loses the right to dispose of the property for the " administration of which the trustee has been appointed. He " regains this right only if the appointment of the trustee is " revoked ".

Article II of the decree was headed: " Land and Forest Enter-" prises. Real Estate and Other Property ". By it a Jew might be ordered to sell wholly or partly his agricultural or aboricultural enterprise, his other fixed properties, his other real estate, or other properties within a fixed time; and paras. 2 to 4 of art. I were made applicable. By para. 7 Jews were forbidden to acquire real estate and mortgages by contract. By para. 8 Jews required authority to dispose of real estate and mortgages, and of other property if a sale had been ordered pursuant to para. 6.

By November, 1938, the Hinrichsen family in Germany was already feeling the effect of the persecution and living in apprehension of the future. This was evidenced by a letter of November 12, 1938, written by Frau Hinrichsen, wife of Henri Hinrichsen, to Walter Hinrichsen.

On November 15, 1938, the Minister for National Enlightenment and Propaganda wrote to Hans Hinrichsen, who was then in a concentration camp, a letter in these terms: "As of today "I exclude you from the Reich Chamber of Culture and Reich "Chamber of Music. This decision is irrevocable. Through this "edict you lose the right to participate in any activity in the field "of Reich Chamber of Culture, and therefore you lose at the "same time the possibility to exercise all rights which you had "as partner, respectively part owner, of the music publishing "house, C. F. Peters, Leipzig. As custodian of the music publishing house of C. F. Peters, I have appointed the deputy of "Department IIA of my Ministry, SS-Standartenfuehrer, G. "Noatzke, Berlin. You must hold yourself at his disposal in "Leipzig". A similar letter was written to Henri Hinrichsen.

On December 13, 1938, Noatzke wrote from the Ministry for National Enlightenment and Propaganda as follows: "I hereby "give you notice that (pursuant to the instructions which I "received on November 15, 1938, from the Minister for National "Enlightenment and Propaganda concerning the conduct of your "business) I have been appointed, with effect from December 10, "1938, Trustee of the Music publishing firm of C. F. Peters in "accordance with cl. 2 of the order regarding the utilization of "Jewish property of December 3, 1938. (Signed) Noatzke".

On December 15, 1938, Hans Hinrichsen was released from the concentration camp at Sachsenhausen on condition that he should emigrate as soon as practicable. Further pressure was brought to bear on the Hinrichsens. On January 16, 1939, the Devisenstelle wrote to the firm of C. F. Peters (that was, Noatzke) requiring the cancellation of the supplemental agreement of January 3, 1938, on the ground that it had been entered into without proper consent and unjustifiably prejudiced German interests in respect of foreign currencies, together with written proof of such cancellation. The last paragraph of this letter read:

"The application put before me concerning the Hinrichsens' "emigration will be kept in abeyance pending the clearing up of "the case in question".

Negotiations were eventually set on foot, by or with the approval of Noatzke, for the acquisition of the business of C. F. Peters by a Dr. Hermann and a Dr. Petschull, members of the Nazi Party. Although the terms of the sale agreement were negotiated by Dr. Franz on behalf of the Hinrichsens and by a Dr. Mohring on behalf of the proposed purchasers, neither side had much freedom of negotiation, although the purchasers had freedom to withdraw. The purchase price of RM. 1 million was fixed by Noatzke with the approval of the Ministry of National Enlightenment and Propaganda or by the Ministry itself. For the purpose of the sale the previous year's balance sheet was altered, and the evidence was that the price in question represented a gross under-value.

The agreement was dated July 22, 1939. The first party to the agreement was Noatzke, described as "official at the Ministry "for Public Enlightenment and Propaganda" and as "the "seller", and the other parties were Dr. Hermann and Dr. Petschull. Neither Henri Hinrichsen nor Hans Hinrichsen was a party to the agreement. Noatzke in his declaration before the notary said this: "In accordance with the regulation governing "the utilization of Jewish property of December 3, 1938, I have "been appointed under para. 2 trustee for the purpose of con-"tinuing the business for the time being and achieving the sale "of the non-limited company of C. F. Peters of Leipzig".

There was a further provision in the document which illustrated the Nazi policy of taking away the whole or most of the purchase price. This was stated to be RM. 1 million, of which RM. 550,000 were to be paid immediately upon ratification of the contract. The remainder was to be payable in sterling.

Clause 4 provided: "Should the part payment of RM. 550,000 "together with the proceeds of the entire property of the former "partners not suffice to cover the amounts for taxes, excises "and personal obligations required by the former partners for "their emigration, the seller is authorized to withdraw from the "contract unless the purchasers offer to pay the deficit".

Shelley, K.C., and *Guy Aldous* for the plaintiffs.

S. Pascoe Hayward, K.C., and *Skone James* for the defendants.

Cur. adv. vult.

Feb. 21. WYNN-PARRY, J., reading his judgment, stated the facts, and continued:—Upon that review of the facts I come unhesitatingly to the conclusion that the sale agreement was ineffective to pass any interest in any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as the owners of the business of C. F. Peters.

This case appears to me to be covered by the decision of Romer, J., in *Frankfurther* v. *Exner (W. L.) Ld.* (1), and indeed to be an a fortiori case. The facts in that case as stated in the headnote were as follows: "The plaintiff, a Jew, formerly resided "in Vienna where he carried on a leather business. The defen-"dants, an English company, dealt in leather and leather goods. "In 1933 the defendants appointed the plaintiff as their agent "in Austria. Pursuant to this agreement the defendants were "accustomed to consign goods to the plaintiff in Vienna. These "goods remained the property of the defendants, the plaintiff "sending the purchase price to the defendants on a sale being "effected. When things got difficult for Jews in Austria, the "plaintiff started to remit funds to the defendants on account of "the goods which had been consigned to him before any sale had "been made.

"On March 10, 1938, German forces invaded Austria and "Austria was incorporated in the German Reich, such incorpora-"tion being recognized by our Foreign Office. Jewish businesses "were shortly afterwards placed in the hands of German State "officials known as commissars. These commissars were "appointed pursuant to the Austrian Decree 80 of April 13, 1938, "which was entitled 'Law as to the Appointment of Official "'Administrators and Control Officers'. That decree provided "by s. 1, 'For the protection of important public interests the "'Reichsstathalter is empowered to appoint official adminis-"'trators . . . for undertakings having their head office in the "'province of Austria'. Section 2, 'The official administrator "'shall have full legal powers to act on behalf of the under-"'taking. During the period of administration the authority of "'the proprietor of the undertaking . . . to act on behalf of the "'undertaking shall be in abeyance'. One S. was appointed "commissar of the plaintiff's business and took complete control, "the plaintiff in May, 1938, being arrested and imprisoned.

"On May 6, 1938, the plaintiff wrote a letter to the defen-"dants informing them that his firm had been placed under the

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(1) [1947] Ch. 629.

" control of a commissar and stating that, ' No dealing with my " ' credit balance with you without the consent of S. will be " ' legally binding '. That letter was signed by the plaintiff and " S. On May 10, 1938, the plaintiff had a credit balance with " the defendants of 2,258*l*. 19*s*. 11*d*. Goods of the defendants " of considerable value were on consignment with the plaintiff. " S. got in touch with the defendants, who asked him to sell " their goods then in Austria. S. from time to time sold the " defendants' goods on consignment in Austria but he did not " remit the proceeds to the defendants. They on receipt of " notices of sales debited the plaintiff's credit balance with the " purchase price. In this action the plaintiff claimed payment " of 2,258*l*. 19*s*. 11*d*.".

On these facts Romer, J., held: " first, that, on its true con" struction, the Austrian Decree 80 was confiscatory in character " and operation. Though not strictly penal, it was to be regarded " in this country in the same way as a penal law. Secondly, that " as between the commissars and the plaintiff our courts would " not recognize the claim of S. to property in this country ".

In the course of his judgment Romer, J., said (2): " On the " face of it the decree bears a semblance of innocence, but when " one sees vague phrases such as ' for the protection of important " ' public interests ', and ' carrying on the businesses administered " ' in a manner consonant with the public interest ', one is " entitled to inquire what manner of legislation it really was, and, " for this purpose, to see what was done under it. We know " what happened to the plaintiff. He told me about it in his " evidence. Jail, deprivation of any voice in the conduct of his " business, and appropriation of its assets without compensation, " followed ultimately by permission to leave the country with " nothing left to him but his life, his clothing and some furniture. " Dr. Bretsch said that by Austrian law the commissar could not, " in any possible sense, be regarded as an agent for the plaintiff. " He said that Schober was the statutory agent appointed by the " State to act on his behalf. ' The important public interests ' " in the decree were regarded by the executive as being the " elimination of the Jews, and the ' public interests ' referred to " in s. 3 were interpreted as being the Nazi interests. Now, it is " quite true that the Nazis did not openly and unashamedly steal " the property of the Jews by decrees clearly and unambiguously " worded, until later on, and from November, 1938, onwards a

(2) [1947] Ch. 629, 635.

"series of laws was passed for the purpose; but, if the expulsion "by the State of a man both from the direction and the beneficial "ownership of his business without compensation, coupled with "the transfer of control to the State, for the benefit of the State, "is not confiscation within the ordinary usage of that word, it is "difficult to know what is".

In my view every word of that reasoning applies in this case. The decree of December 3, 1938, was plainly of a penal and confiscatory character. Noatzke was appointed for the avowed object of giving effect to its confiscatory purpose, and the sale agreement represents no more than the discharge by him of that function. The decree, the appointment of Noatzke and the sale are indissolubly linked together, and the resulting position is no different than it would have been if the decree itself had directly effected the transfer of the business of C. F. Peters from Henri Hinrichsen and Hans Hinrichsen to Dr. Hermann and Dr. Petschull on the terms of the sale agreement.

Henri Hinrichsen and Hans Hinrichsen were deprived of their property by confiscatory measures. It is established by the authorities (many of which were reviewed by Romer, J., in his judgment in the above case, and which I do not intend to review again) that the courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy. Romer, J., in *Frankfurther* v. *Exner (W. L.) Ld.* (3) has held that this doctrine extends to an act such as the appointment of a so-called trustee pursuant to such a decree, the effect of which is to take out of the control of the owner the management of his business. In my view I am not extending this doctrine by applying it to a sale by a trustee so appointed; but if indeed I am extending it, I do so without hesitation, finding as I do that the law is confiscatory in nature, the trustee was appointed to carry it out, and the sale agreement represented no more than the performance of his function. It follows, therefore, that assuming the sale agreement is otherwise valid under English and German law, it was ineffective in the eye of English law to effect any transfer of the English copyright owed by Henri Hinrichsen and Hans Hinrichsen as owners of the business of C. F. Peters.

It was argued by Mr. Shelley that the present case is distinguishable from that of *Frankfurther* v. *Exner (W. L.) Ld.* (3), because of the presence of the sale agreement. The burden of

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(3) [1947] Ch. 629.

Mr. Shelley's argument, as I understood it, was that the ratio decidendi of the cases on which Romer, J., founded his conclusion does not apply when the act said to amount to confiscation is the result of a consensual document and not the direct result of legislation. I cannot accept this argument. It involves concentrating on the form of the matter and shutting one's eyes to any inquiry as to the substance. For the reasons which I have given, I regard the deprivation of Henri Hinrichsen and Hans Hinrichsen of their property at a gross under-valuation as the inevitable consequence of the decree. It was somewhat curious to listen to the attempt on behalf of the plaintiffs to justify the sale in face of the view expressed by one of their directors, a Dr. Aber, both at the time and in the witness-box that it was robbery, a view with which I find myself in entire agreement.

Mr. Shelley then sought comfort in another contention, to appreciate which it is necessary to refer to a further agreement which has been described as the accession agreement. That is a document dated July 22, 1939, the same day as the sale agreement. The parties are Doctors Hermann and Petschull on the one hand and Henri Hinrichsen and Hans Hinrichsen on the other. It recites that Doctors Hermann and Petschull have concluded the sale agreement with "the trustee appointed in "accordance with para. 2 of the regulation concerning the utiliza-"tion of Jewish property dated December 3, 1938". By cl. 1 Henri Hinrichsen and Hans Hinrichsen were expressed to accede to the contract of sale in its entirety. The agreement contains a number of other provisions to which for my present purpose I need not refer.

It is perfectly true that Henri Hinrichsen and Hans Hinrichsen signed this agreement. But it is essential to have in mind the circumstances in which they did so. Their signatures to this agreement were required as a formality—see a memorandum of Dr. Franz dated December 30, 1938—and in my view they were required for no other purpose. They were, however, compelled to go to Berlin to sign. They took no part in the execution of the sale agreement and were not present when it was signed, being kept in an adjoining room. After the sale agreement was signed the accession agreement was put before them in the presence of the notary and the other parties. Dr. Petschull told me that Henri Hinrichsen and Hans Hinrichsen looked shocked. It is clear that they were not willing parties. The whole ceremony lasted only a few minutes and was nothing but a tragic farce.

Mr. Shelley, as I understand his argument, prays in aid this accession agreement by contending that in effect it incorporates into it the whole of the terms of the sale agreement which it purports to ratify; that therefore the validity of the sale purported to be effected by the sale agreement must depend on the validity of the accession agreement; that the accession agreement was at the worst a voidable contract as having been executed by Henri Hinrichsen and Hans Hinrichsen while under duress, but that it was, therefore, capable of ratification after the duress had ceased to operate; that ratification in fact took place, and therefore the sale was effective.

I do not accept this argument. In my view neither the character nor the operation and effect of the sale agreement can be changed by anything appearing in the accession agreement. The element of duress may affect the validity or enforceability of an agreement, but it can never affect its scope. The scope of the sale agreement was determined once and for all at the moment of its execution. For the reasons which I have given, the sale agreement (so far as the courts of this country are concerned) did not extend to transfer any interest in the English copyright.

The courts of this country are bound not to recognize the extra-territorial effect of the sale agreement on that copyright because of the confiscatory nature of the measures in question. This is the application of a rule of public policy which involves a limitation of jurisdiction. No question of affirmation or ratification can therefore arise so far as the sale agreement is concerned. But unless the accession agreement can operate to affect the scope of the sale agreement (and I hold that it cannot), it is immaterial to consider whether or not the accession agreement was voidable on the ground that it was entered into by Henri Hinrichsen and Hans Hinrichsen under duress and, assuming that it was, whether or not it was subsequently affirmed. In my judgment either the accession agreement is linked with the sale agreement and suffers from the same vice as that document, or, if it is not to be regarded as so linked with it, it is just a worthless piece of paper.

The next point which I propose to consider is a point taken by the defendants under the Trading with the Enemy Act, 1939. For the purpose of appreciating this point it is necessary to turn again to the sale agreement, to postulate that it was a valid document according to German law at the time of its execution, that it was not limited in scope as I have held it to be, and therefore, apart from the point under examination, that it was effective to transfer the English copyright. On this basis the defendants contend that the operation of the Trading with the Enemy Act, 1939, was to prevent any effective transfer of the English copyright.

The rules of construction under German law are different from the English rules of construction, at any rate in this respect, that a German court will take into account many matters which an English court cannot do. In the present case, for instance, the language of the accession agreement could be prayed in aid for the purposes of construing the sale agreement. Subject to this, however, I am satisfied, after considering the expert evidence of Dr. Cohn for the plaintiffs and Dr. Mann for the defendants, that the rules of construction under the two systems do not differ materially.

It was argued on behalf of the plaintiffs that the sale agreement was not executory. In support of this, reliance was placed on the use of the present tense. By cl. 6 of the sale agreement it is provided: " The parties are in agreement that the validity " of the above contract is dependent on the consent of " two Ministries which are there specified " as the former partners of " the firm are Jews ". The experts on German law—Dr. Cohn who gave evidence on behalf of the plaintiffs and Dr. Mann who gave evidence for the defendants—were agreed that the effect of that clause was to render the agreement inchoate until consent was given or refused. If consent should be given, the agreement would become fully valid and further would be treated as being effective from its date. If, on the other hand, consent should be refused, the agreement would be a nullity.

The Trading with the Enemy Act, 1939, received the Royal Assent on September 5, 1939, but the final consent to the sale agreement—that of the Ministry of Economics—was not given until September 25, 1939, by a letter significantly headed: " Re " de-Jewing of the Music Publishing House of C. F. Peters, " Leipzig ". By s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939, it is provided: " No assignment of a chose in action " made by or on behalf of an enemy shall, except with the " sanction of the Treasury, be effective so as to confer on any " person any rights or remedies in respect of the chose in action. " . . .". It is true that the effect of the Ministry's consent was to make the contract effective as from its date; but as I have pointed out, until that consent was given, the contract was wholly ineffective to pass any property. It only became cohate on September 25, 1939, and only then did it operate on property. It was, therefore, a contract by which a chose in action was effectively assigned by an enemy only after the coming into force of the Trading with the Enemy Act, 1939. The assignment is therefore within the mischief of the Act, and is not cured by being given retroactive effect under German law. For this reason also the sale agreement must be treated as having been ineffective to transfer any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as owners of the firm C. F. Peters.

It is then said, however, that even if the scope of the sale agreement is limited, as I hold it to be, or alternatively even if the scope of the agreement is not so limited, but the point taken under the Trading with the Enemy Act, 1939, is good, nevertheless the defendants cannot succeed in their defence because of the operation of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. I say at once that I am unable to accept (indeed I found myself hardly able to follow) the argument which was addressed to me on this point. The Act is one which was passed in an emergency for the public benefit during that emergency, and from its nature it is one which should not be given a wider interpretation than is necessary to achieve the main purpose for which it was enacted.

The jurisdiction of the Comptroller-General to grant licences is conferred, and therefore limited, by s. 2. Sub-section 1 of s. 2 sets out the conditions which must exist before the jurisdiction of the Comptroller-General arises. There must be an application to the Comptroller-General, and it must be shown at the date of that application, firstly, that there is an enemy or enemy subject who is or has at any time since September 3, 1939, been the owner of a copyright; secondly, that it is in the public interest that that copyright should be exercised; and, thirdly, that a qualified person is ready and able to exercise the copyright. It was contended by Mr. Shelley as regards the first condition that it need not be shown that the owner of the copyright is an enemy at the date of the application, but that it would be sufficient to show that he had had that character for however short a time between September 3, 1939, and the date of the application.

In my view the section cannot possibly bear that meaning. The postulate is the existence of an enemy or enemy subject with this qualification, that he is or has at any time since September 3, 1939, been the owner of a copyright. That qualification limits the class of persons brought within the scope of the section by reference to the answer to the question, do they own, or have they owned at any time since September 3, 1939, a copyright?

It in no way points to the time at which they are to be considered enemies or enemy subjects for the purpose of the section. The language of the section, therefore, affords no ground for saying that if it can be postulated of a person that he was for a time between September 3, 1939, and the date of application an enemy, then even though he has shed that character before the date of the application, nevertheless the Comptroller-General can exercise the jurisdiction given to him by the later sub-sections of the section.

Henri Hinrichsen died on September 30, 1942, in Belgium, his wife, his son Hans and the executor named in the will having predeceased him. His personal property in this country, which on the basis of my judgment included the copyrights in question, thereupon vested in the President of the Probate, Divorce and Admiralty Division of this court, or if not in him then in the Crown, but liable to be divested upon an administrator of his estate being appointed. Subsequently the property vested in the second defendant as administrator with the will annexed. It is, I think, immaterial to consider where the beneficial interests under his will lay, but even if it were it appears from the evidence that before June of 1948 all the beneficiaries were free of enemy character.

Upon this reasoning and the earlier reasoning in this judgment, the granting of the second of the two licences under which the plaintiffs sue—namely, that dated June 1, 1948—was ultra vires the Comptroller-General. In saying this I wish to make it clear beyond doubt that I am in no degree criticizing the Comptroller-General or his officials. So far as I am aware the scope of the sale agreement has for the first time been exhaustively canvassed and pronounced upon in this action. Henri Hinrichsen and Hans Hinrichsen were enemy subjects when the earlier licence was granted, and it is only because of the view which I take of the scope of the sale agreement, and the fact that the plaintiffs do not dispute the title of the defendant Max Hinrichsen as the administrator of Henri Hinrichsen's will, that the jurisdiction of the Comptroller-General to grant the second licence has come into question.

It remains, however, to consider the other relevant provisions of the Act in regard to the earlier licence. The power given to the Comptroller-General by sub-s. 1 of s. 2, so far as relevant to the present matter, is to grant an interest in the copyright for the whole of the residue of the term of the copyright or for such less period as he thinks fit. Sub-section 2 opens with the words:

"The power of the comptroller under this section to make an "order granting a licence shall include the power . . .". In fact apart from his power under sub-s. 3, which is co-extensive with his power under sub-s. 2, his power to give directions under sub-s. 6 and his powers to vary and revoke under sub-ss. 7 and 8, the scope of his power is defined in sub-s. 2.

It is contended by Mr. Shelley that the true effect of that sub-section is that provided the jurisdiction of the Comptroller has once arisen under sub-s. 1, then so long as the Act remains in force, no one can exercise the copyright in question without the licence of the Comptroller. I cannot accept this contention. The Act does not say this. It does no more than say that the Comptroller may grant licences within the ambit of the section. I can find no support either in the language of the Act or in the public policy which required its enactment for the proposition that, if the owner of a copyright who has shed his character of an enemy wishes to exercise his copyright, he should not be entitled to do so subject, of course, to any licences which may have been granted by the Comptroller-General.

Let me test the matter in this way. Suppose that a man owns a copyright and becomes an enemy so that the jurisdiction of the Comptroller arises under sub-s. 1 of s. 2, but that no application for a licence is made under that sub-section by anyone. Suppose then that the owner of the copyright sheds his character of enemy, and desires to exercise his copyright. Upon what show of reasoning is it to be said that he must, in those circumstances, obtain a licence from the Comptroller before he exercises his own copyright? In my view, the argument that he must makes nonsense.

In this case the licences in question were non-exclusive. Under sub-s. 4 of the section their limited effect is to take away from the owner of the copyright "any right in relation thereto "the exercise whereof would be inconsistent with the exercise of "the licence in accordance with and subject to the terms on "which it is granted". While this sub-section is designed to protect the statutory licensee, its clear implication is that the residual rights of the owner of the copyright are preserved.

For the reasons which I have given, the defendant Max Hinrichsen is properly to be regarded as the owner of the copyright in the two works in question. As such he is entitled to permit the exercise of that copyright by the defendant company, provided that the statutory licences of the plaintiffs are not prejudiced so long as they continue to exist.

If my judgment stands, then no doubt upon application by the defendants the Comptroller will revoke the later licence on the ground that, as now appears, he had no jurisdiction to grant it. As regards the other licence, no doubt an application will be made to the Comptroller for its revocation. I have no jurisdiction over the Comptroller and it is not for me to direct him what to do. I will only say this. I observe that under sub-s. 8 (*d*) of s. 2 of the Act the Comptroller may revoke the licence if he is of opinion that circumstances have arisen which make it just and equitable to do so. I have had an advantage which perhaps he cannot have. I have listened to an exhaustive canvassing of this case for nineteen days; and at any rate upon the facts and evidence before me I am quite certain of one thing, namely, that the plaintiffs, Novello & Company Ld., have no merits whatsoever. They have designed to cling—the verb is that used by their own counsel—to their statutory licences at all costs. With this end in view, they have involved the defendants in protracted and costly litigation in which every possible point, however technical, has been put forward and persisted in, although by their reply they assert that their only object is and has been to be satisfied as to the title of the defendant Max Hinrichsen to the English copyrights before dealing with them. In these circumstances their reiterated protests that they have had and still have at heart the best interests of the Hinrichsen family ring hollow in the ear.

[His Lordship then considered questions involving German law which do not call for report, and concluded:] In the result this action fails, and must be dismissed.

Judgment for the defendants.

Solicitors: *Shaen, Roscoe & Co.; Kaufman & Seigal.*

I. G. R. M.

1951
Jan. 22;
Feb. 12.

Harman and
Danckwerts,
JJ.

In re A DEBTOR, No. 21 of 1950 (No. 2). *Ex parte* THE PETITIONING CREDITORS *v.* THE DEBTOR.

Bankruptcy—Receiving order set aside—Petitioning creditors ordered to pay costs—Amount of debt greater than that of costs—Notice of intended execution by debtor to recover costs—Intimation by creditors of intention to present fresh petition—Application by creditors for stay of execution of order to pay costs—R. S. C. Ord. 65, *r.* 14.

R. S. C., Ord. 65, r. 14, provides: "A set-off for damages or "costs between parties may be allowed notwithstanding the "solicitor's lien for costs in the particular cause or matter in which "the set-off is sought".

The Divisional Court allowed a debtor's appeal against a receiving order made in the county court, set aside that order because the bankruptcy proceedings had been defective, and ordered the petitioning creditors, a company, to pay the debtor the costs of the county court proceedings and of the appeal, amounting to about 72*l*. The petitioning creditors were judgment creditors of the debtor for 409*l*. 1*s*. 4*d*., the balance of a larger sum (for which they had obtained judgment). The debtor's solicitors told the petitioning creditors that it was intended to issue execution against the petitioning creditors for the sum owing in respect of the order to pay costs. The petitioning creditors applied to the Divisional Court for a stay of execution in respect of that order, and stated their intention to present a fresh bankruptcy petition. For the debtor it was contended that to grant a stay would amount to allowing a set-off and that it was contrary to bankruptcy practice to allow a set-off in the case of a sum owing for bankruptcy costs except in the case of sums owing for other costs in bankruptcy.

Held, (1.) that the court had a discretion to allow a set-off and therefore power to grant a stay of execution if it thought fit; and (2.) that the case was one in which a stay of execution ought to be granted.

Reid v. *Cupper* [1915] 2 K. B. 147, *Puddephatt* v. *Leith* (*No.* 2) [1916] 2 Ch. 168, *Young* v. *Mead* [1917] 2 I. R. 258, and *Knight* v. *Knight* [1925] Ch. 835 applied; *Ex parte Cleland* (1867) L. R. 2 Ch. 808, *Ex parte Griffin* (1880) 14 Ch. D. 37, *In re Bassett* [1896] 1 Q. B. 219, *In re A Debtor* [1907] 2 K. B. 896, *In re Drummond* [1909] 2 K. B. 622, *Mercer* v. *Graves* (1872) L. R. 7 Q. B. 499, *Pringle* v. *Gloag* (1879) 10 Ch. D. 676, *Blakey* v. *Latham* (1889) 41 Ch. D. 518, and *David* v. *Rees* [1904] 2 K. B. 435 considered.

Statement in Williams on Bankruptcy (11th to 15th editions inclusive, and 16th ed. (1949) at p. 199) that "Costs given in "bankruptcy cases can . . . only be set off against other bankruptcy "costs . . ." disapproved.

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APPLICATION by petitioning creditors.

On November 13, 1950, an appeal by the debtor to the Divisional Court against a receiving order which had been made in Windsor county court was allowed. The receiving order was set aside on account of defects in the bankruptcy proceedings and the petitioning creditors, a company, were ordered to pay to the debtor the costs of the proceedings in the county court and of the appeal, amounting to some 72*l*. The company (the applicants) were judgment creditors of the debtor for 409*l*. 1*s*. 4*d*., the balance of a larger sum (for which they had obtained judgment). The debtor's solicitors notified them of an intention to issue execution against the applicants to recover the sum owing in respect of the order for costs.

The applicants now applied to the Divisional Court for a stay of execution in respect of the order for payment of costs and intimated that they were proposing to present a fresh bankruptcy petition against the debtor.

K. G. Jupp for the applicants. In this case the court certainly ought to grant a stay of execution, notwithstanding that the view may be taken, on behalf of the debtor, that to do so would be tantamount to allowing a set-off, and that a set-off of bankruptcy costs against anything save other bankruptcy costs is against practice. Even formerly it was only the fact that the solicitor had a lien for costs that precluded set-off, though it must be admitted that that was a very strong bar indeed: *Ex parte Cleland* (1); *Ex parte Griffin* (2). Sixteen years later, Vaughan Williams, J., in *In re Bassett* (3), protested against his inability to allow costs of an appeal from a county court to the High Court in a winding up to be set off against costs of an appeal between the same parties from the county court to the High Court in bankruptcy proceedings. He said (4): "I do not think that I "ought to allow this appeal. I should much like to allow it here, "because it would be a most just thing to do". In *In re A Debtor* (5), Bigham, J., held that there could be no set-off in bankruptcy proceedings between a creditor and his debtor where the creditor made costs payable to him part of the debt on which he based his bankruptcy petition against his debtor. In *In re Drummond* (6) a creditor's bankruptcy petition based on a judgment debt was dismissed because he failed to establish the act of bankruptcy alleged. The creditor failed to comply with an order to pay the debtor's taxed costs of the petition, and, on the debtor's taking out, under the Debtors Act, 1869, a judgment summons against the creditor for not complying with it, it was held that the court had not jurisdiction to set off his judgment debt of 50*l.* 6*s.* 6*d.* against the debtor's taxed costs, which amounted to 20*l.* 19*s.* 8*d.* Phillimore, J., strongly deprecated having to make an order for payment of those costs but, on the evidence, did not see how he could refuse to do so.

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(1) (1867) L. R. 2 Ch. 808.

(2) (1880) 14 Ch. D. 37.

(3) [1896] 1 Q. B. 219.

(4) Ibid. 221.

(5) [1907] 2 K. B. 896.

(6) [1909] 2 K. B. 622.

Against this line of cases beginning with *Ex parte Cleland* (7), however, which were based on rules prohibiting interference with a solicitor's lien by set-off, there developed another line. Thus, in *Blakey* v. *Latham* (8), Kay, J., said that the supposed equity of the other party's solicitor was the most extraordinary equity he had ever heard of.

Order 65, r. 14, which replaced the rules that forbade the interference, is conclusive in favour of the applicants in the present case. The Annual Practice, 1950, Vol. 1, at p. 1460, describes it as not applying to the costs of independent proceedings—which, of course, does not make it inapplicable in the present case—and cites *Blakey* v. *Latham* (9) and *David* v. *Rees* (10). The Annual Practice, however, immediately goes on to state that " in independent actions the court has discretion to allow " the set-off either subject to or notwithstanding the lien . . ." for which it cites *Reid* v. *Cupper* (11), and quotes the statement of Younger, J., in *Puddephatt* v. *Leith* (*No.* 2) (12), that " the " old views as to the sanctity of a solicitor's lien no longer " obtain ", which view the Court of Appeal accepted in *Knight* v. *Knight* (13).

Thus, in the present state of the authorities, the court certainly has discretion to allow a set-off and, therefore, power to order a stay of execution where it thinks fit to do so. A solicitor has other means than a lien of being sure of his costs: for example, it is quite open to him to make certain that the client will be able to pay the costs and, if he finds that he will not, to refuse to take his case: *Pringle* v. *Gloag* (14).

This case is pre-eminently one in which it would be proper for the court to order a stay of execution. To allow execution to

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(7) L. R. 2 Ch. 808.

(8) (1889) 41 Ch. D. 518, 522.

(9) 41 Ch. D. 518.

(10) [1904] 2 K. B. 435.

(11) [1915] 2 K. B. 147.

(12) [1916] 2 Ch. 168, 180.

(13) [1925] Ch. 835.

(14) (1879) 10 Ch. D. 676.

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proceed would work an injustice, especially in view of the applicants' expressed intention to present a fresh bankruptcy petition.

Claud Duveen for the debtor. A stay of execution ought not to be granted. In Williams on Bankruptcy (16th ed. 1949), at pp. 198–199, the effect of *Ex parte Griffin* (15), *In re Bassett* (16) and *In re Drummond* (17) is set out, and there follows the statement "Costs given in bankruptcy can therefore only be set off "against other bankruptcy costs". That holds good whatever be the effect of Ord. 65, r. 14. In the present case, all that the applicants ought to be allowed to do is to have their debt rank with the debts of other creditors. If a stay of execution be ordered, they will be able to get the whole amount on presenting their fresh bankruptcy petition.

Also, even if it be granted that the solicitor's lien no longer has its pristine sanctity, one very practical result of allowing a stay of execution in a case, such as the present, where bankruptcy proceedings have failed and the debtor has been given costs may well be to disincline solicitors from acting for debtors in such cases. For that reason and for the others which have been stated, the court should allow the debtor to proceed to execution in the present case.

Cur. adv. vult.

Feb. 12. The following judgments were read:—

DANCKWERTS, J. The applicants presented a petition in Windsor county court against the debtor, and a receiving order was made. On November 13, 1950, an appeal to this court by the debtor was allowed and the receiving order was set aside on account of defects in the bankruptcy proceedings, and the applicants were ordered to pay to the debtor the costs of the appeal and of the proceedings in Windsor county court.

Those costs amount to some 72*l*. The applicants, however, are judgment creditors of the debtor for a balance of 409*l*. 1*s*. 4*d*. remaining out of a larger sum for which they originally obtained judgment. The debtor's solicitors have notified the applicants of an intention to issue execution against the applicants to recover the sum owing in respect of the order for costs. In these circumstances the applicants have applied to this court for a stay of

(15) 14 Ch. D. 37.

(16) [1896] 1 Q. B. 219.

(17) [1909] 2 K. B. 622.

execution of the order for payment of the costs and have intimated that they are proposing to present a fresh bankruptcy petition against the debtor. At the moment there is no bankruptcy.

It seems somewhat remarkable if a debtor, who owes a creditor a sum of 409*l.*, is entitled to issue execution against that creditor to recover a much smaller sum of 72*l.* for costs directed to be paid by the creditor. It is urged, however, on behalf of the debtor that (a) to grant a stay would be equivalent to allowing a set-off to be made, and (b) the practice of the Bankruptcy Court prohibits a set-off being admissible in the case of a sum owing for bankruptcy costs except in the case of sums owing for other costs in bankruptcy. The reasons adduced for this suggested practice are (1.) that to allow a set-off would be to enable the creditor to obtain payment in full of part of his debt instead of a dividend in equality with other creditors, and (2.) that the effect of allowing a set-off would be to deprive the debtor's solicitor of his lien and his sole hope of recovering his charges as solicitor in acting for the debtor.

There appears to have been a disposition at one time to treat the solicitor's lien on costs recovered as so strong a right that no set-off could be allowed to a creditor of the client, and the client was spoken of as merely a trustee for his solicitor: see *Ex parte Cleland* (18), per Lord Cairns, L.J. In *Ex parte Griffin* (19), James, L.J., said: " the equitable owner of costs is the solicitor " who has conducted the litigation ", and quoted Lord Eldon (at a time when he was Chief Justice of the Common Pleas) as saying, in *Hall* v. *Ody* (20), that in the Court of Chancery he " never knew the idea entertained of arranging the funds till the " respective attorneys were paid their costs ". Treating the bankruptcy rule as the same as the practice in the Court of Chancery, the Court of Appeal in that case refused to allow costs in another court to be set off against costs in the Court of Bankruptcy.

In *In re Bassett* (21), Vaughan Williams, J., felt compelled to hold that costs of an appeal from a county court to the High Court in proceedings in the winding up of a company could not be set off against costs of an appeal from a county court to the High Court in bankruptcy proceedings, although the two appeals were between the same parties.

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(18) L. R. 2 Ch. 808, 813.

(19) 14 Ch. D. 37, 38, 40.

(20) (1799) 2 B. & P. 28.

(21) [1896] 1 Q. B. 219.

In *In re A Debtor* (22), Bigham, J., felt bound, on a statement of the Taxing Master as to the practice, to hold that there could be no set-off of costs in bankruptcy proceedings between a creditor and his debtor where the creditor made costs payable to him part of the debt on which he based his bankruptcy petition against his debtor (the petition having been dismissed on technical grounds).

In *In re Drummond* (23), Phillimore, J., was faced with a judgment summons under the Debtors Act, 1869, to compel payment by a creditor, whose bankruptcy petition had been dismissed, of the taxed costs of the petition awarded to the debtor who owed the creditor more than the amount of the costs. Though he struggled against it, the judge felt compelled to make an order for payment by instalments. Apparently it was admitted that, if the debtor had sued for the amount of the costs, the creditor could have counterclaimed for his debt, and there would have been a set-off, but it was urged in argument that if set-off were allowed in bankruptcy proceedings no debtor could get a solicitor to act for him because his lien for costs might be defeated by the set-off.

In these cases the court appears to have reached the conclusion that no set-off was admissible, but with reluctance, no doubt because it appears contrary to reason that a debtor who owes a larger sum to a creditor should be entitled to enforce his claim against that creditor.

However, later the tide seems to have turned against the debtor and the consideration rendered to the solicitor's lien seems to have been reduced. In *Blakey* v. *Latham* (24), Kay, J., described the supposed equity of the other party's solicitor as the most extraordinary equity he ever heard of.

R. S. C., Ord. 65, r. 14, permits a set-off to be made of costs between parties, notwithstanding a solicitor's lien, but this rule was held in *David* v. *Rees* (25) to be confined to cases in which the judgments for costs sought to be set off against each other are in the same action or proceeding, and not to extend to cases in which the judgments for costs are in distinct and independent litigations. But in *Reid* v. *Cupper* (26) the Court of Appeal, though treating the decision in *David* v. *Rees* (25) as binding, stated grounds for questioning the correctness of that decision. The court reached the conclusion that the allowance of a set-off

(22) [1907] 2 K. B. 896.
(23) [1909] 2 K. B. 622.
(24) 41 Ch. D. 518, 522.
(25) [1904] 2 K. B. 435.
(26) [1915] 2 K. B. 147.

was really discretionary. The Lords Justices considered that the court had a discretionary power to allow a set-off and a discretion as to the terms on which they would allow it.

The decision of the Court of Appeal in *Reid* v. *Cupper* (27) was applied by Younger, J., in *Puddephatt* v. *Leith* (*No.* 2) (28), in which a set-off of costs ordered to be paid by a defendant to a successful plaintiff in the Chancery Division was allowed against the sum due for judgment with costs recovered by the defendant (when he was plaintiff) in another action in the King's Bench Division. Younger, J., remarks (29), after considering *Reid* v. *Cupper* (27), that Lord Eldon's views have now been displaced by those of Kay, J. (that is, in *Blakey* v. *Latham* (30)), as to what is the best and most salutary rule of practice in this matter, and he decided that in the Chancery Division he had a discretion as to the allowance of the set-off and proceeded to consider how he ought to exercise that discretion. Younger, J., reached the conclusion that the existence of a solicitor's lien was not sufficient to justify refusal of a set-off, remarking that the old views as to the sanctity of a solicitor's lien no longer obtained.

It has been said in some of the cases that the bankruptcy practice has always followed the Chancery practice in these matters. The decision of Younger, J., has been applied in bankruptcy by an Irish court in *Young* v. *Mead* (31). In *Knight* v. *Knight* (32), *Puddephatt* v. *Leith* (*No.* 2) (28) was cited in the Court of Appeal without dissent from it, and Lord Atkin, L.J., seems to have regarded it as clear that the court had a discretion to allow a set-off, so as to defeat a solicitor's lien, though in that particular case the court refused to allow a set-off.

In the result, therefore, I conclude that we are not fettered in the manner that was so distasteful to Vaughan Williams and Phillimore, JJ., and we have a discretion to allow a set-off, and, therefore, clearly power, if we think fit, to order a stay of the order of November 13, 1950, for the payment of costs by the applicants to the debtor.

In the circumstances of this case should a stay be directed so as to prevent the debtor issuing execution against his creditor? Prima facie, it seems to me that it is most unfair that the creditor should have to pay his debtor. Sir George Jessel, M.R., in *Pringle* v. *Gloag* (33), said: "If a solicitor says, unless I have

(27) [1915] 2 K. B. 147.
(28) [1916] 2 Ch. 168.
(29) Ibid. 179.
(30) 41 Ch. D. 518.
(31) [1917] 2 I. R. 258.
(32) [1925] Ch. 835.
(33) 10 Ch. D. 676, 680.

"a lien I cannot get paid, the answer is he should see before he "undertakes a particular business for a client that that client is "able to pay him for it: a solicitor is not compelled to work for "an insolvent client". On the other hand, it is said that unless the debtor recovers these costs, his solicitor will have no chance of being paid, and that this will discourage solicitors from giving persons who are in danger of being made bankrupt the legal assistance which they need against proceedings wrongfully instituted against them. It is said also that a set-off would enable the creditor to that extent to be paid in full. On the other hand, if the debtor recovers the costs, his solicitor obtains payment in full. It is unfortunate that in successive editions of Williams on Bankruptcy the statement has been repeated that in bankruptcy a set-off is only admissible as regards several orders for costs in bankruptcy, because this statement may have misled those who have to deal with bankruptcy matters. But it is difficult to see why an unpaid creditor should be required to provide for the costs of his debtor's solicitor, and be subject to the risk of an execution to recover the amount of such costs. Accordingly it seems to me that a stay of execution should be granted in this case.

Harman, J. The applicants, being unable to recover from the debtor a balance due for goods sold and delivered, obtained judgment against him and, in 1950, the judgment remaining unsatisfied, served a bankruptcy notice and obtained a receiving order against him. In November of last year this court felt constrained, for technical reasons having nothing to do with the merits of the debtor, to set that order aside (see *In re a Debtor* (34)), with the result that a sum of costs amounting to 70*l.* or so has become due from the applicants to the debtor, who now threatens to levy execution in respect of that sum and resists this application for a stay on the ground that costs in bankruptcy ought not to be set off against a petitioning creditor's debt.

On the face of it and apart from authority I should have thought that justice demanded that this set-off should be allowed. Two reasons are urged against it, first, that it will interfere with the lien of the debtor's solicitor, and, second, that if the applicants are allowed to set off the costs they will be obtaining payment in full in priority to other possible creditors. As to the first of these reasons there was a time no doubt when a solicitor's lien

(34) Ante, 313.

for his costs was sacrosanct, and in 1832 and 1853 rules were made forbidding a set-off which interfered with such a lien, and James, L.J., in *Ex parte Griffin* (35) said: "The equitable owner "of costs is the solicitor who has conducted the litigation". The modern rule, however, does not take that view. The rules of 1832 and 1853 have been superseded by Ord. 65, r. 14, which provides: "A set-off for damages or costs between parties may "be allowed notwithstanding the solicitor's lien for costs in the "particular cause or matter in which the set-off is sought". The case of *David* v. *Rees* (36) decided that this rule was limited in its effect to costs incurred in one and the same litigation, but the Court of Appeal in *Reid* v. *Cupper* (37) came to the conclusion that, the rules in 1832 and 1853 being out of the way, the old discretion of the court revived in cases not touched by the modern rule, and that a discretion existed to allow a set-off when just.

It seems to me, as it seemed to Kay, J., in *Blakey* v. *Latham* (38), that as between the parties there can be no equity to refuse a set-off and that to suggest that there is some equity obliging one party to pay the costs of the solicitor to the other is absurd. Kay, J.'s observations are as follows (39): "If this "case were absolutely free from authority I confess it seems to "me difficult to see why the solicitor's lien should intercept the "right. Take the simplest case one can imagine. A brings an "action against B, and it is dismissed with costs. B brings "another action against A, and that is dismissed with costs. The "order in each case is, A to pay B his costs in the one action, "B to pay A his costs in the other action. Well, when those "costs are taxed, and the Master's allocatur is issued, there is "a judgment in each case for a definite amount, and there is no "doubt whatever that those judgments could be set off one against "the other. That being so, just suppose the case (which is the "only case in which the matter becomes the least material), that "one of those parties, A, was insolvent and unable to pay any"thing; why B should pay costs to A for the sake of A's solicitor "is what I cannot understand. I cannot see how there could be "any equity for that"; and, having quoted certain words of Cockburn, C.J., in *Mercer* v. *Graves* (40), Kay, J., added, "how "can A's solicitor possibly have an equity against B to make B "pay the costs which B is ordered to pay to A, when B cannot

(35) 14 Ch. D. 37, 38.

(36) [1904] 2 K. B. 435.

(37) [1915] 2 K. B. 147.

(38) 41 Ch. D. 518.

(39) Ibid. 521.

(40) L. R. 7 Q. B. 499.

" recover from A the costs which A is ordered to pay to B—how " can A's solicitor have an equity to make B pay instead of setting " them off? If this matter were free from authority, I should " say that is the most extraordinary equity I ever heard of ".

I am therefore of opinion that there is nothing in the point about the solicitor's lien. As to the other reason, I cannot see that any question of undue preference arises. There is no bankruptcy here; and in any event money set off under an order cannot constitute an undue preference.

It remains the fact, however, that in Williams on Bankruptcy (16th ed., 1949), at p. 199, it is categorically stated that costs given in bankruptcy can only be set off against other bankruptcy costs, and this statement has appeared at least since the eleventh edition of that work (the last one edited by Mr. Hansell) in the year 1915: see p. 166. These statements are based on the four cases cited by my brother Danckwerts: *Ex parte Griffin* (41); *In re Bassett* (42); *In re a Debtor* (43); and *In re Drummond* (44). All these cases, however, and also the 11th edition of Williams on Bankruptcy, preceded the decision of the Court of Appeal to which I have referred of *Reid* v. *Cupper* (45); and it seems to me that the statement in the 16th edition of Williams overlooks that decision and also the decision of Younger, J., in *Puddephatt* v. *Leith (No.* 2) (46). The old decisions about the practice in bankruptcy were based apparently on the view that they were following the practice in Chancery. Now whatever the practice in Chancery was at one time, it has at any rate since 1916 allowed a set-off in all proper cases notwithstanding the solicitor's lien, and I see no reason why bankruptcy practice should not follow the same rule.

I agree, therefore, with my brother Danckwerts in thinking that we have a discretion to allow this set-off, or a stay, which amounts to much the same thing, if it be just. In my opinion it would be right to allow it. I cannot see that as between the parties themselves there can be any justice in allowing the debtor to levy execution against the goods of his creditor, nor do I think this ought to be allowed for the sake of the debtor's solicitor. I cannot see any reason why the creditor should pay the costs of his debtor's solicitor if the latter is unable to do so, nor do I believe that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance on

(41) 14 Ch. D. 37.
(42) [1896] 1 Q. B. 219.
(43) [1907] 2 K. B. 896.
(44) [1909] 2 K. B. 622.
(45) [1915] 2 K. B. 147.
(46) [1916] 2 Ch. 168.

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A DEBTOR, No. 21 OF 1950 (No. 2), *In re*. *Ex parte* THE PETITIONING CREDITORS *v*. THE DEBTOR.

Harman, J.

the view that the petitioner's solicitor may blunder and thus give him the advantage of an order for costs against the petitioner.

In the upshot, therefore, we propose to grant the stay which is asked for.

[When counsel for the applicants asked for costs, Harman, J., said that the court did not think that the applicants ought to have any costs. The stay could have been asked for when the appeal was being heard, and it was only because the applicants did not ask for it then that the present application had come before the court. Therefore, although the court did not order the applicants to pay any costs, because it had held that they were right, the court did not think that they should have any costs. The debtor would have leave to appeal, as the matter was, no doubt, important.]

Application granted.

Solicitors: *Peacock & Goddard, for W. Parkinson Curtis, Bournemouth; Isadore Goldman & Son.*

K. R. A. H.

C. A.

1951
Feb. 28;
Mar. 1, 2, 16.

Evershed, M.R., Jenkins and Hodson, L.JJ.

In re SCARISBRICK.
COCKSHOTT *v*. PUBLIC TRUSTEE.

[1949 S. 1945.]

Charity—Will—Bequest of part of residue for "such relations" of the son and daughters of the testatrix "as in the opinion of the survivor "of (them) shall be in needy circumstances"—Validity.

A testatrix in disposing of her residuary estate, directed her trustees, after the death of her son and two daughters, to whom the income was to be paid during their lives in a specified way, to "hold "the same upon trust for such relations of my said son and "daughters as in the opinion of the survivor of my said son "and daughters shall be in needy circumstances and for such charit-"able objects either in Germany or Great Britain . . . for such "interest and in such proportions . . . as the survivor of my said "son and daughters shall by deed or will appoint". The parties agreed that one half of the fund was effectually devoted to charity. Roxburgh, J., held that the trust for the relations failed since they did not constitute a particular section of the poor, and that one half of the residuary estate was accordingly not effectually devoted to charity. On appeal:—

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SCARISBRICK, *In re.* COCKSHOTT *v.* PUBLIC TRUSTEE.

Held, (1.) that the disposition was one for the relief of poverty and entitled accordingly to qualify as a charitable disposition unless that result were defeated by the limitation of the class of beneficiaries to "relations" of the testatrix's children; and (2.) that the exception of gifts or trusts for the relief of poverty of the relations of an individual from the general rule under which an element of public benefit was essential to every other form of legal charity was not restricted to perpetual or continuing trusts, but covered a trust for immediate distribution. Accordingly, one half of the residuary estate of the testatrix was held upon valid charitable trusts for distribution amongst poor members of the class of relations of the testatrix's three children.

Dictum of Sir William Grant, M.R., in *Attorney-General* v. *Price* (1810) 17 Ves. 371 explained.

Attorney-General v. *Bucknall* (1741) 2 Atk. 328, *Isaac* v. *Defriez* (1754) 2 Amb. 595, *White* v. *White* (1803) 7 Ves. 423, *Gillam* v. *Taylor* (1873) L. R. 16 Eq. 581 and *In re Compton* [1945] Ch. 123 considered.

Thomas v. *Howell* (1874) L. R. 18 Eq. 198 questioned.

Per Evershed, M.R. If on its true construction this were not a valid charitable gift, there should be implied a gift over in equal shares to the statutory next of kin of the three children of the testatrix respectively to be ascertained at the date of the determination of the last life interest.

Lambert v. *Thwaites* (1866) L. R. 2 Eq. 151, *Wilson* v. *Duguid* (1883) 24 Ch. D. 244 applied.

Decision of Roxburgh, J. [1950] Ch. 226 reversed.

APPEAL from Roxburgh, J. (1).

By her will dated July 27, 1911, Dame Bertha Petronella Scarisbrick appointed her son, Sir Tom Talbot Leyland Scarisbrick, Bart., and her two daughters, Alexandra Emma von Lang Puchof and Erneste Beatrice Kraemer, to be executors and trustees thereof, and made by cl. 11 the following disposition of her residuary real and personal estate: "I devise and bequeath "all my real and personal estate in the United Kingdom of "Great Britain and Ireland and in the British Dominions beyond "the Seas not hereby otherwise disposed of unto my trustees "upon trust to pay the income thereof in equal shares to my said "daughters during their joint lives and to the survivor of them "during her life And after the death of the survivor of them to "pay the same income to my said son Sir Tom Talbot Leyland "Scarisbrick Baronet during his life And after the death of the "survivor of my said daughters and son the trustees for the time "being of this my will shall hold the same upon trust for such "relations of my said son and daughters as in the opinion of the

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(1) [1950] Ch. 226.

"survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany "or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic "Church and Faith) for such interests and in such proportions "and manner in every respect as the survivor of my said son and "daughters shall by deed or will appoint".

The testatrix died on April 28, 1915, survived by the son and two daughters above referred to, and her will, with one codicil thereto not material for the present purpose, was duly proved by the son on June 15, 1915, power (never exercised) to prove the same being reserved to the two daughters.

The son, Sir Tom Scarisbrick, died on May 18, 1933, and his interest as heir-at-law of the testatrix in any real estate of hers undisposed of by her will passed to the Public Trustee as his legal personal representative. He left him surviving one child, namely, a son, the defendant, Sir Everard Talbot Scarisbrick, Bart.

The daughter, Mrs. Puchof, died on July 2, 1940, survived by a daughter, the defendant, Mary Erneste von Schmieder. She had one other child, a son, Karl Herman Ernst von Lang Puchof, but he has not been heard of for many years, and it was not known whether he is living or dead or whether he ever had any issue.

Mrs. Kraemer, the remaining daughter of the testatrix, died without issue on May 12, 1948. She as "the survivor" of the testatrix's "said son and daughters" was the person by whom the power of appointment conferred by cl. 11 of the will became exercisable according to the terms of that clause, but in fact she never did exercise it.

The whole of the testatrix's personal estate was exhausted in the payment of funeral and testamentary expenses, debts, and legacies, and the property now remaining subject to the trusts of her will consisted exclusively of assets forming part of, or representing, her real estate.

This summons was taken out by Sir Everard T. Scarisbrick and George Cockshott, then the trustees of the will, the only defendants to the summons being the Public Trustee as representing the estate of Sir Tom Scarisbrick, the heir of the testatrix, and the Attorney-General, representing the claims of charity. When the case came on for hearing before Roxburgh, J., the parties agreed that one half of the residuary estate should be considered as having been devoted to charity and that his decision should be confined to the other half of the residuary estate subject to the first half of the trusts, namely, those in favour of relations in needy circumstances.

Roxburgh, J., held that the trusts of this half of the residuary estate were not valid charitable trusts (1). The Attorney-General appealed. On the appeal leave was given for Sir Everard T. Scarisbrick, who was one of the statutory next of kin of the son and daughters, to be struck out as a plaintiff and added as defendant to contend that, in the event that one half of the residue was not held on charitable trusts, it passed to those statutory next of kin. Frau M. E. von Schmieder was also added as defendant, being one of the statutory next of kin and alleged to be in needy circumstances. On the appeal all parties agreed to be bound by the agreement made by the Public Trustee and the Attorney-General, and that the appeal should be argued on the footing that it only related to one half of the residuary estate.

Cross, K.C., and *Denys Buckley* for the Attorney-General. It is established by the authorities known as the "poor "relation" cases that in the case of trusts established for the relief of poverty a valid charity may be created, although the beneficiaries are limited to the relations of the settlor or testator. Roxburgh, J., has held that there is a distinction between the case of a perpetual trust for poor relations and a trust for immediate distribution between poor relations, and that in the latter case such a trust is not charitable. It is submitted that this distinction is not well founded.

"Relations" prima facie includes any one who can show a common ancestor. However, since, if all gifts were construed in that sense, some would fail for uncertainty, a gift to divide between "my relations" is construed as a gift to statutory next of kin. If, however, there is no direct gift to relations but there is a power to appoint to relations, the appointor can select any relation even though the appointee may not be one of the statutory next of kin. If the power is not exercised, then the trust in default of appointment will be confined to statutory next of kin. Here there is a power of selection. If the Attorney-General is right in his contention that this is a charitable trust, it will not fail because the power was not exercised.

In *Attorney-General* v. *Bucknall* (2) a trust to assist poor relations was held to be a valid charitable trust. In that case it would seem that capital as well as income could be applied. In *Edge* v. *Salisbury* (3) no question of perpetuity arose. The trust was for the "nearest relations". In *Isaac* v. *Defriez* (4) a perpetual trust for poor relations was held to be good.

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(1) [1950] Ch. 226.

(2) (1741) 2 Atk. 328.

[He referred to *Brunsden* v. *Woolredge* (5); *Widmore* v. *Woodroffe* (6); *White* v. *White* (7); *Mahon* v. *Savage* (8); *Attorney-General* v. *Price* (9); *Liley* v. *Hey* (10); *Browne* v. *Whalley* (11); *Gillam* v. *Taylor* (12); *Attorney-General* v. *Duke of Northumberland* (13); *Thomas* v. *Howell* (14).]

In some cases where there was a trust for immediate distribution it has been held that a charitable trust was not created. The court reached this conclusion in order to escape the application of the Mortmain Act of 1736.

The decisions on trusts for the benefit of poor employees show that a gift in favour of a restricted class will be held a valid charitable trust. [*Spiller* v. *Maude* (15); *In re Gosling* (16); and *In re Drummond* (17) referred to.]

Gibson v. *South American Stores* (*Gath & Chaves*) *Ld.* (18) shows that trusts which are prima facie of a private character may be charitable if there is the necessary element of poverty.

To sum up, the court is bound to hold that some trusts for poor relations are valid charitable trusts. The question is whether this is true of all trusts for poor relations and, if not, where the line is to be drawn. Roxburgh, J., held that it is drawn between perpetual trusts where the capital is retained by the trustees and other gifts and trusts. It is contended that this view is not supported by principle, and is contrary to authority. If a perpetual trust is a valid charitable trust, what of the same trust for, say, eighty years? The suggested distinction is contrary to *Attorney-General* v. *Bucknall* (19). In *White* v. *White* (20) it seems very unlikely that the trust was perpetual. These two cases, and also the Irish case of *Mahon* v. *Savage* (21), are against the view of Roxburgh, J. But the observations of Sir William Grant, M.R., in *Attorney-General* v. *Price* (22) are

(3) (1749) 1 Amb. 71.
(4) (1754) 2 Amb. 595.
(5) (1765) 1 Amb. 507.
(6) (1766) 2 Amb. 636.
(7) (1802) 7 Ves. 423.
(8) (1803) 1 Sch. & L. 111.
(9) (1810) 17 Ves. 371.
(10) (1842) 1 Hare 580.
(11) [1866] W. N. 386.
(12) (1873) L. R. 16 Eq. 581.
(13) (1877) 7 Ch. D. 745.
(14) (1874) L. R. 18 Eq. 198.
(15) (1881) 32 Ch. D. 158.
(16) [1900] W. N. 15.
(17) [1914] 2 Ch. 90.
(18) [1950] Ch. 177.
(19) 2 Atk. 328.
(20) 7 Ves. 423.
(21) 1 Sch. & Lef. 111.
(22) 17 Ves. 371.

in its favour. *Thomas* v. *Howell* (23) is considered a very doubtful authority in Jarman on Wills (7th ed.), p. 208. Therefore it is contended that Roxburgh, J.'s decision should not be accepted.

Then comes the question whether the relations to benefit are limited to the statutory next of kin or are relations on the widest basis.

[EVERSHED, M.R. As against those appearing for next of kin it would be argued that what saves the provision in question is that it is for the needy. If so, it might well be that no family relation would be likely to benefit.]

If no relations were in needy circumstances a different question would arise, but that problem is not before the court. It makes all the difference that the persons to be selected must be poor. The trust declared in the testatrix's will was influenced by the desire to relieve the poor.

[EVERSHED, M.R., referred to *Gibson* v. *South American Stores* (*Gath & Chaves*) *Ld.* (24).]

In *Goff* v. *Webb* (25) it was held that there was a good charitable trust although there were no poor relations.

Pennycuick, K.C., and *Wilfrid Hunt* for the Public Trustee. The testatrix gave a power to appoint among a composite class consisting of such relations of her son and daughters " as in the " opinion of the survivor . . . shall be in needy circumstances ". It is not for a class of next of kin of the son and two daughters. If all the testatrix had had in mind was to benefit grandchildren, she would have made a very different provision. Where one person is given power to select the particular relations, the court cannot exercise the power in the donee's place. There is an uncertainty which prevents the court from treating this half of the provision made after the death of the testatrix's children as creating a charitable trust even though the relations to be selected after the death of the son and two daughters were to be needy. [They referred to *Brunsden* v. *Woolredge* (26).] It was suggested for the Attorney-General that, on the construction of the material documents, the persons to benefit were not the next of kin but all the relations who were poor. It would be absurd to impute an intention to benefit relations irrespective of whether they were poor or not. [They referred to *Widmore* v. *Woodroffe* (27) and *Mahon* v. *Savage* (28).]

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(23) L. R. 18 Eq. 198.
(24) [1950] Ch. 177.
(25) (1601) Tothill 30.
(26) 1 Amb. 507.
(27) 2 Amb. 636.
(28) 1 Sch. & Lef. 111.

The main question is whether there is an intestacy because the power of selection was never exercised, or whether a charity was created. It has been said that a trust is not charitable unless it is for the public benefit. To that an exception is made in *Gibson* v. *South American Stores (Gath & Chaves) Ld.* (29).

[EVERSHED, M.R., referred to *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (30), where a trust for providing education for the children of employees was held not to be a valid charitable trust.]

But does the exception apply to the distribution of funds among poor relations? It cannot be said that there is no difference between a trust for immediate distribution and a continuous trust. If the surviving daughter had exercised the power in favour of a single person that would have been good. A trust for immediate distribution is very different from a trust for perpetual distribution. Cases which can be regarded as creating charitable trusts must be limited, as far as possible, to matters that are of public interest. A trust for the benefit of poor relations is not such a trust. It is important to refer to cases relied on in support of this appeal. In *Attorney-General* v. *Bucknall* (31) it is not clear whether the trust was for immediate distribution or for distribution of income only. It is significant that there was in that case no argument as to the validity of the gift and it would not be right to apply that case. The second case is *White* v. *White* (32), a trust created for the benefit of apprentices. It was intended to apply to capital for the purpose as soon as possible. The third case relied on was *Mahon* v. *Savage* (33). Those were the only three cases relied on as showing that a trust for immediate distribution could be charitable.

Against those authorities must be set *Attorney-General* v. *Price* (34), where a gift in favour of the testator's poor kinsmen and kinswomen and their offspring and issue in a particular place was held to be a charitable bequest since it was to have perpetual continuance. It was contrasted with an immediate bequest of a sum to be distributed among poor relations.

It is submitted that the effect of the authorities as regards trusts for immediate distribution lack unanimity and that in these circumstances the "poor relations" cases should not be extended to include such trusts. Where there is a trust for such members of a class who have the qualification of poverty and some other qualification such as relationship to a named person as A.B. shall determine, that is a gift to individuals to be ascertained in a particular way and is not a charity. Trusts for poor relations are anomalous. It is submitted that a trust for immediate distribution between poor relations should be related to the general principle which requires the existence of a public element to make the trust valid, rather than to the exception. It is submitted, first, that where there is an exception to a general principle which exception is itself based on principle, it is necessary to see whether any particular case falls within the principle or the exception; secondly, that, where, as here, the exception to the general principle that every trust must have a public character is not based on any principle but on an unbroken series of decisions, then, for any case to come within the exception, it must be shown to come within the scope of those decisions; thirdly, that in equity there is no ground for extending the exception from the general rule which is not covered by the "poor "relations" cases; and fourthly, that, since there are conflicting decisions with regard to the question whether a trust for immediate distribution between poor relations is a good charitable trust, such a trust for immediate distribution should not be treated as coming within the "poor relations" cases and this whether or not there is any difference in substance between such a trust and a perpetual trust for poor relations. The exception to the general rule resulting from the "poor relations" cases should not be extended.

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(29) [1950] Ch. 177.
(30) [1951] A. C. 297.
(31) 2 Atk. 328.
(32) 7 Ves. 423.
(33) 1 Sch. & Lef. 111.
(34) 17 Ves. 371

If the contention is right that this is not a valid charitable trust, it is not possible to imply a gift over in favour of next of kin or poor next of kin and in default of appointment the trust property devolves on the heir at law of the testatrix.

E. Blanshard Stamp for Sir Everard T. Scarisbrick. The intention of the testatrix was to benefit the next of kin of her children. It is not possible to ascertain in whose favour the surviving child of the appointor would have made an appointment. Accordingly, in default of appointment the fund devolves on the next of kin of the children.

J. F. Bowyer for Frau M. E. von Schmieder, representing poor next of kin. If this is not a charity, a gift in default of appointment should be implied in favour of next of kin who are in need.

Cross, K.C., in reply. It is submitted that this is a charitable trust, which does not fail because the machinery for selecting the beneficiaries has failed. It is submitted that what Lord

Simonds said in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (35) suggests that trusts for the relief of poverty are in a class by themselves and are all good charitable trusts. There is no principle which justifies a distinction between trusts for immediate distribution and trusts in perpetuity.

Pennycuick, K.C., in reply.

Cur. adv. vult.

March 16. The following judgments were read:—

EVERSHED, M.R., whose judgment was read by Hodson, L.J., stated the facts and continued:—As will presently appear, two distinct problems have arisen for consideration. First, what, on the true construction of the relevant part of cl. 11, was the intention of the testatrix? Did she, primarily, intend a benefit to such of a wide and otherwise unascertainable class of her children's "relations" as the survivor of her children should appoint subject only to the qualification that those selected should, in his or her opinion, be "in needy circumstances"; a qualification not by any means the same as that of the objective standard of poverty, and not having the effect of limiting the amount appointed to the relief of poverty? On that view of construction, the gift would have failed of effect by reason of the non-exercise of the power of appointment, and the claim of the heir-at-law would succeed, subject only to the question whether there should be implied a gift over in default of appointment to the statutory next of kin of the three children of the testatrix respectively or in favour of some other class of their "relations". Did the testatrix, on the other hand, intend primarily to relieve poverty, the persons to be relieved being chosen from the class of "relations" of the three children? If that be the true construction of the will, then the present case must be added to the number of modern authorities beginning with *In re Compton* (36) in which the validity of the claim to qualify as "charities" of the "poor relations" cases has been considered.

Of the two questions I have posed, Roxburgh, J., did not expressly consider the first in his judgment. But he must be taken to have construed the will in the second of the senses above suggested; for his judgment was devoted entirely to a consideration of the second question. And that question he decided adversely to the Attorney-General. Holding himself

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(35) [1951] A. C. 297, 308.

(36) [1945] Ch. 123.

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bound to treat as exceptions to the general rule, which requires a public interest or characteristic to support a charity, the "poor "relations" cases, beginning with *Isaac* v. *Defriez* (37), he nevertheless decided that the present case was not within that class by reason of the fact that distribution once and for all among the selected "poor relations" was contemplated. From that decision the Attorney-General has appealed.

Before considering the two questions involved in the appeal, two preliminary matters must be referred to. It is to be noted that the relevant language in cl. 11 is part of a larger disposition comprehending charitable objects in Germany or the United Kingdom selected by the survivor of the three children; and that there is no gift over in favour of any class of "relations" in default of appointment. It is clear, therefore, that arguments could be presented: (a) for the view that if that part of the disposition concerning the "relations" is invalid as a charitable bequest, the whole disposition fails and the heir-at-law can claim the entire residue; and (b) for the view (already indicated) that if the first suggested construction of the clause is correct there should be implied some gift over in default of appointment.

The first point was met before Roxburgh, J., by an agreement between the Attorney-General and the heir-at-law to treat the residuary gift as being of two distinct parts, namely: (1.) a gift of one half in favour of the class of relations or persons selected therefrom, and (2.) a gift of one half in favour of "such "charitable objects either in Germany or in the United King-"dom", etc.; and since it was conceded by the heir-at-law that the second part was unimpeachable as a good charitable gift, the debate was confined to the first part only, regarded as a separate disposition of half the residue amounting in value to 6,000*l*.

I am not to be taken as criticizing in any way the propriety of the agreement made, but it could bind no-one interested in or claiming under the will save the parties to the agreement, the Attorney-General and the heir-at-law. And it is not clear how far the agreement was meant to extend or could extend—for example, if the gift in favour of the relations be held a good charitable gift but objects within the disposition should not be found sufficient to exhaust the fund, would the argument then be open that the whole residue should go to the "charitable "objects in Germany or the United Kingdom"? I assume that it would. However that may be, it is sufficient (having regard

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(37) 2 Amb. 595.

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to the concessions made on behalf of other parties presently mentioned) to say that for the purpose of deciding in this appeal the two main questions above formulated the gift can be treated as divided into two distinct and independent halves; but this assumption will not necessarily apply when the result has hereafter to be considered of the working out of any order made on the basis of the answers given to those two questions.

As regards the second preliminary point, when the appeal first came on for hearing in this court last June, the court's attention was drawn to the absence of anyone to argue for next of kin (Mr. Pennycuick for the heir-at-law saying frankly that he felt somewhat embarrassed thereby). The appeal was stood over for the purpose of adding necessary parties. As a result, the name of Sir Everard Scarisbrick was struck out as a plaintiff and added as a defendant, and there was also added as a defendant Frau von Schmieder, one of the two children of Frau Puchof, the first of the testatrix's daughters to die. Mr. Stamp, as counsel for Sir Everard Scarisbrick, has argued for the view that the disposition in favour of relations being invalid as a charitable gift and there having been no appointment, there should be implied a gift in default of appointment equally in favour of all the next of kin of the three children respectively of the testatrix, a class in fact consisting of three persons, Sir Everard, Karl Puchof (if living), and Frau von Schmieder. Mr. Bowyer's position as counsel for Frau von Schmieder was more delicate. His client is said to be in fact "in needy circumstances" and to be alone in that respect of the small class of "relations" so far known. That class is, in theory, capable of almost infinite expansion, but proof of relationship soon becomes extremely difficult in fact. Mr. Bowyer, therefore, felt that his client's interest was first to support the argument of Mr. Cross for the Attorney-General. But, as an alternative (in case it were held that the disposition failed in effect as a charitable gift) then he asked the court to imply a gift over in favour of next of kin as submitted by Mr. Stamp, but having carried over into the implied gift (as it were) the same "poverty" qualification as appertains to the class of possible appointees.

I should observe it to be conceded that if any gift over is to be or can be implied it must be confined to statutory next of kin (whether further qualified as Mr. Bowyer says or not)—for a gift over to all the persons composing the class of possible appointees, that is all persons who could claim common ancestry however remote with any of the three children of the testatrix would plainly be void for uncertainty.

As regards the agreement made between the heir-at-law and the Attorney-General, neither Mr. Stamp nor Mr. Bowyer was able to suggest any ground for the view that the agreement was against the interests of their respective clients, and they were therefore both content to treat the agreement (limited as I have indicated above) as generally binding all present and future interests under the will. Mr. Stamp was in any case in the added difficulty that the agreement was in fact made in his presence as a party to the action, albeit that he was then a plaintiff and suing in the capacity of a trustee of the will only.

I accordingly now turn to the first main question—that of the construction of the relevant words of cl. 11 of the will, and I confess I have for my part found it one of considerable difficulty. It has been most forcibly pointed out by Mr. Cross' opponents that if the words are intended (as he says) to be a disposition in relief of poverty, then the persons selected must qualify as "poor" when the disposition in their favour takes effect; and the disposition ought to be confined also to the relief of their poverty. If these were the purposes to be achieved, then the method selected of appointment by the deed or will of a person who was entitled to a prior life interest in the entire fund, and the unlimited terms of the discretion conferred by the power itself, could hardly (it was said) be less appropriate. An appointment by deed, without conditions which might be exceedingly difficult in this case effectively to frame, confers an immediate reversionary interest on the appointee, and he or she would, therefore, be entitled to take though he or she did not survive the life tenant, and however much in the meantime his or her circumstances might have changed. And an appointment by will (unless made very shortly indeed before the appointor's death) would hardly get over better the difficulty of possible change of circumstances. Thus (according to the argument) the machinery devised by the testatrix could only be really effective in the special case of an appointment by deed accompanied by a surrender pro tanto of the appointor's life interest. Then, further, the persons to be benefited are not those judged "poor" by some objective standard, but such as shall, in the opinion of the appointor, be "in needy circumstances", a qualification capable without extravagance or caprice of covering a far wider class than the poor.

In spite, however, of these difficulties I have on the whole come to the conclusion that the primary intention of the testatrix was the relief of poverty properly so called, and that the choice of a bad or unworkable machinery is not, alone or in conjunction with the other elements in the case, sufficient to cause the alternative view of the construction to prevail. The phrase "in "needy circumstances" is to my mind merely periphrastic for "poor", and to the point founded on the words "in the "opinion" of the appointor I venture to give the same answer as I gave to the similar point in *Gibson* v. *South American Stores* (*Gath & Chaves*) *Ld.* (38).

That case related to a trust in favour of a class of persons defined, so far as material, as follows: "all persons who in the "opinion of the London Board are or shall be necessitous and "deserving". It was argued that the London Board had an uncontrolled power of selection, that those chosen for benefit would be chosen by reference not to any objective standard of poverty, but according as the London Board judged them to be both necessitous and deserving. In reference to that argument I said in my judgment (39), with which Asquith, L.J., and Wynn-Parry, J., agreed: "But the first point that arises—and "I think that I can dispose of this quite briefly—is in regard to "the effect of the words 'in the opinion of the London Board'. "It is said that they confer a discretion without limit, and that "the result of this is that the class is not of people who are in "truth necessitous and deserving, but of people whom the "London Board may—and, it is suggested, may by the most "extravagant process of thought—regard as covered by those "two words. I do not think that such an extended meaning can "be given to that phrase. I think that the discretion is a fiduciary "one. A member of the class may be both necessitous and "deserving, but one can well imagine that difficulties might "arise, for example, whether it could be said that a particular "individual qualified under both heads. I take this provision "to mean that in the event of doubt the opinion (which must be "bona fide given in the exercise, as I say, of a fiduciary dis-"cretion) of the London Board is to be taken as conclusive. I "do not think, therefore, that that extends the class so as to "make it cease to be a gift for the relief of poverty".

I think that similar reasoning applies in the present case. I think here, as in the *South American Stores* case (40), that the

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(38) [1950] Ch. 177.
(39) Ibid. 185.
(40) [1950] Ch. 177.

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discretion is fiduciary. Poverty in relation to any individual or individuals cannot be an absolute standard. To some extent it must always be a matter of degree. There will be cases of doubt and difficulty, and in such cases the opinion of the appointor (given bona fide and as an exercise of a fiduciary discretion) is intended to be conclusive. In my judgment, the discretion should not be treated as so extending the class of beneficiaries as to make the gift other than one for the relief of poverty.

But the most powerful argument in favour of construing the gift in this sense lies, in my judgment, in the context in which the words are found. The disposition in favour of relations is part of a disposition, the other objects of which are "such "charitable objects either in Germany or in the United King-"dom", etc. In that geographical position, as it were, it seems to me that the emphasis, the primary purpose, of the relevant words should be taken to be the relief of poverty.

I therefore conclude that the disposition in question is one for the relief of poverty and entitled accordingly to qualify as a charitable disposition, unless that result is defeated by the limitation of the class of possible beneficiaries to "relations" of the testatrix's children.

It follows that the question of an implied gift over in default of appointment does not arise for determination, and that the claims of the next of kin represented by Mr. Stamp and Mr. Bowyer fail. But since the case may go further, and since I think the point of construction one of difficulty, I will state in a few sentences my present view on those claims.

In my opinion, if I am wrong in the view I take of the construction of the gift, there should here be implied a gift over in equal shares to the statutory next of kin of the three children respectively, to be ascertained at the date of determination of the last life interest—that is, as if each of the children had died on that date. The matter is no doubt one of intention or presumed intention to be derived from the language of the instrument. But it is, I think, also clear that, where there is a power to appoint among a class, there will prima facie be implied a gift over in default of appointment to all the members of the class in equal shares; for the testatrix had manifested an intention to benefit that class: see *Lambert* v. *Thwaites* (41). It is no less clear that where the class is that of the "relations of A", then the gift over will be limited to the statutory next of kin of A, since otherwise the uncertainty of the class would render such a gift over void: see *Wilson* v. *Duguid* (42).

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(41) L. R. 2 Eq. 151, 155.

It is, however, said by Mr. Pennycuick that there is here no sufficient evidence of the necessary intention; and he particularly relies on the fact that the class is not the simple one of "the "relations of A", but that of "the relations of three persons, A, B and C", being brother and sisters. And since they must be assumed to die successively but in a wholly uncertain order, the class of statutory next of kin of all of them is not a possible or intelligible conception. I am disposed to think that this argument is met by importing the word "respectively" so as to make the class the statutory next of kin of A, B and C respectively, and I do not see any real difficulty in making this importation. If (as must be assumed for this purpose) the testatrix's intention was not to relieve poverty among the relations specified but to benefit those relations, then I think it is legitimate to imply a gift over, in default of appointment, to the statutory next of kin of the three children respectively.

On the other hand I do not think, on this hypothesis, that it is right or necessary to qualify the class of next of kin by reference to a poverty qualification. On this hypothesis the testatrix is not intending the relief of poverty: the discretion to the appointor is unfettered in that respect, and the relevant words become equivalent to "such relations . . . as the appointor regards as "deserving". Such a qualification, essentially personal to the appointor, cannot sensibly be carried over into the gift in default of appointment: see, for example, *Brown* v. *Higgs* (43), and, generally, Hawkins on Wills (3rd ed.), p. 73 *et seq*.

It becomes now necessary to consider the second main question: does the gift constitute a good charitable disposition? Upon this question, as already indicated, Roxburgh, J., though accepting as binding authority the "poor relations" cases, thought nevertheless that the present case fell outside their ambit. Founding himself mainly upon the language of Sir William Grant, M.R., in *Attorney-General* v. *Price* (44), he thus stated his conclusion (45): "In the case of gifts for poor relations having "perpetual continuance, the courts have, rightly or wrongly, uni-"formly regarded the necessarily fluctuating body of recipients, "not as a class standing in a personal relationship to the testator,

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(42) 24 Ch. D. 244.

(43) (1803) 8 Ves. 561.

(44) 17 Ves. 371.

(45) [1950] Ch. 226, 235, 236.

"but as constituting a particular section of poor people. But "where the distribution among poor relations is to be completed "within the period allowed by the rule against perpetuities, there "is no such uniformity; and to regard such recipients, not as "beneficiaries under a family trust, but as a particular section "of the poor, would, in my judgment, be to defy, not only "Sir William Grant, but also the Court of Appeal in *In re* "*Compton*" (46).

I find myself unable to agree with this conclusion, which appears to me to introduce into a subject already difficult a technical and unjustifiable refinement. Nor do I think it supported by authority, particularly the two authorities specifically relied upon by the judge, *In re Compton* (46) and *Attorney-General* v. *Price* (44).

We have inevitably, but quite properly, been referred to a large number of authorities; but it will not be necessary for me, in this judgment, to refer to more than a few of them. Having regard to the judgments of this court in *In re Compton* (46) and to the judgments of this court and of the House of Lords in the cases which have followed *In re Compton* (46), Roxburgh, J., held himself—and he could do no other—bound to treat the "poor "relations" cases as anomalies or exceptions to the general rule, which requires benefit to the public, or to a section of the public, as an essential characteristic of a valid charity. And this court is bound no less than the court of first instance. Indeed the language of Lord Simonds in the most recent case in the House of Lords, *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (47), provides support for the view that at this time the House itself might be disinclined to question the validity of the poor relations cases.

"I would also" (he said), "as I have previously indicated, "say a word about the so-called 'poor relations' cases. I do "so only because they have once more been brought forward as "an argument in favour of a more generous view of what may "be charitable. It would not be right for me to affirm or to "denounce or to justify these decisions. I am concerned only "to say that the law of charity, so far as it relates to 'the relief "'of aged, impotent and poor people' (I quote from the statute) "and to poverty in general, has followed its own line, and that "it is not useful to try to harmonize decisions on that branch of

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(44) 17 Ves. 371.
(46) [1945] Ch. 123.
(47) [1951] A. C. 297, 308

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"the law with the broad proposition on which the determination "of this case must rest. It is not for me to say what fate might "await those cases if, in a poverty case, this House had to con"sider them. But, as was observed by Lord Wright in *Admiralty* "*Commissioners* v. *Valverda* (*Owners*) (48): 'This House has "'no doubt power to overrule even a long-established course of "'decisions of the courts, provided it has not itself determined "'the question', yet 'in general this House will adopt this course "'only in plain cases, where serious inconvenience or injustice "'would follow from perpetuating an erroneous construction or "'ruling of law'. I quote, with respect, those observations to "indicate how unwise it would be to cast any doubt on decisions "of respectable antiquity in order to introduce a greater harmony "into the law of charity as a whole".

The question for our determination is, therefore, reduced to a single narrow point: is a trust for distribution once and for all within the perpetuity period among selected members of a class of poor relations within the ambit of the "poor relations" authorities? The question falls to be answered by reference to principle and common sense, and also by reference to such authorities (to which alone it will be necessary to refer) as directly or indirectly bear upon it. Roxburgh, J. (as I have already indicated) thought that there was a valid distinction between those cases (starting with *Isaac* v. *Defriez* (49)), in which the trust in favour of poor relations was "permanent", and those cases (such as the present) in which the testator or grantor has provided for what may be called, for brevity, immediate distribution among those persons selected as or those found to constitute the beneficiaries under the gift. Learned counsel have criticized the antithesis stated by the judge. Permanence is a very long time; and there would not appear to be any logical distinction for this purpose between a trust expressed to persist for ever, on the one hand, and a trust expressed to continue for some specified period of time, however short, on the other. But the real question still remains: is a trust for what I have called immediate distribution among "poor relations" within the embrace of the exception so as to amount to a valid charitable disposition?

As a matter of principle, Mr. Pennycuick thus forcibly formulated the argument for the heir-at-law. First, there is (said he) only one valid general rule applicable in charity cases—the general rule that a public interest or characteristic is necessary to support a valid charitable gift. Second, to this general rule the "*Isaac* v. *Defriez*" (49) line of cases form an anomalous, though well-established, exception. Third, if any case is by its facts not shown to be necessarily covered by the *Isaac* v. *Defriez* (49) line of cases, then it must be dealt with according to the one valid rule or principle that has been established; and there is no warrant in logic or otherwise for extending the scope of the *Isaac* v. *Defriez* (49) cases so as to include poor relations cases (such as the present), which contemplate, not the maintenance in perpetuity or for some less period of the "trust" defined by the testator or settlor; but a distribution once and for all within the perpetuity period of the fund in question.

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(48) [1938] A. C. 173, 194.

(49) 2 Amb. 595.

As I have already indicated, I am unable to accept this argument. Were it otherwise, a new and (as I think) a wholly indefensible artificiality would be introduced into a subject already more than amply technical. Mr. Pennycuick, at one stage of his argument, was compelled to submit that a trust for immediate distribution among such poor inhabitants of, say, the borough of Burton-on-Trent as might be selected by some individual specified in the will, would not constitute a good charitable disposition. I find this "reductio" impossible to accept. The supposed case would, as it seems to me, fall fairly and squarely within the terms and scope of the statute of Elizabeth. In truth, in no other class of case—that is in no case of a charitable disposition valid because of its public characteristic—is there any warrant for distinguishing between trusts maintained in perpetuity, or for some short or long period of time, and trusts for immediate or final distribution. Thus, in *Attorney-General* v. *Comber* (50), a trust construed as being for the benefit of the poor widows and orphans of the parish of Lindfield in Sussex did not lose its qualification as a charity by reason of the fact that—owing to the smallness of the fund—a single and final distribution had to be made.

The "poor relations" cases may be justified on the basis that the relief of poverty is of so altruistic a character that the public element may necessarily be inferred thereby; or they may be accepted as a hallowed, if illogical, exception. In any case the exception is in favour of trusts for "poor relations" and not of trusts of a particular type for poor relations. If the latter were the true view, then only those cases would be treated as exceptions to the general rule which, on their facts, were in substance

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(49) 2 Amb. 595.

(50) (1824) 2 Sim. & St. 93.

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identical with the poor relations cases in the books. Such a conclusion would lead inevitably to fine and irrational distinctions. The exception, in my view, is of "poor relations" cases generally, that is of cases in which relief of poverty is to be exercised within a class of persons identified by reference to relationship with particular individuals, and not within a class constituting, in strictness, a section of the community. If poor relations cases are to be qualified in the way suggested, then there will be introduced with poor relations cases a further anomaly, a distinction wholly foreign to all other kinds of charitable dispositions. In my opinion it would be wrong for this court so to do. If there must be an anomaly, let it be itself logical and coherent.

If this conclusion is that which principle and common sense suggest, do the decisions provide compelling authority to the contrary: more particularly, did Sir William Grant, M.R., in *Attorney-General* v. *Price* (51), lay down a distinction between trusts for poor relations to be maintained in perpetuity, or for some long or short period of time (which would be valid charitable dispositions) and trusts for "immediate" distribution among poor relations (which would not)? And has such a distinction been since affirmed by the courts, including this court in *In re Compton* (52), so as to conclude the present appeal against Mr. Cross?

I think that in respect to the authorities Mr. Pennycuick is upon somewhat stronger ground; but not, in my judgment, upon ground strong enough for his purpose.

Before I turn to the cases most strongly relied upon by Mr. Cross and Mr. Pennycuick, it is convenient to state two propositions: (1.) in none of the cases starting with *Isaac* v. *Defriez* (49) and constituting the class of "poor relations" cases treated in *In re Compton* (52) and since as an exception to the general rule was there a distribution, once and for all, among the poor relations: all were cases of perpetual or continuing trusts; (2.) where there is a gift of a fund or sum of money in favour of the "relations" of A.B. so that all members of the class are entitled to participate, the courts (in order to prevent failure of the gift on grounds of uncertainty) have construed "relations" as meaning statutory next of kin, and the gift as a simple gift to specific individuals, that is those who constitute at the relevant date the class of statutory next of kin of A.B.; but where the gift is in favour of such of the relations of A.B. as may be selected by the trustees or by a person named for the purpose, the courts will not restrict the meaning of the word "relations": it is, therefore, only in the case of the latter type of gift that such a problem as is here presented to the court can arise.

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(49) 2 Amb. 595.
(51) 17 Ves. 371.
(52) [1945] Ch. 123.

The first case relied upon by Mr. Cross, the founding authority, as it were, for his submission, is *Attorney-General* v. *Bucknall* (53), before Lord Hardwicke, L.C., in the year 1741. The case is somewhat shortly reported. It is referred to (sometimes as *Attorney-General* v. *Buckland*) and relied upon as good authority in later cases. And we also referred to the order made by Lord Hardwicke, L.C., preserved in the Public Record Office. From this material it is clear that a sum of money had been handed to another for application "to assist Ward's poor relations". That other having died without having completely distributed the fund, the residue had passed to the defendant Bucknall, and the question was whether in her hands the money was subject to a valid, that is a valid charitable, trust. The Attorney-General sued at the relation of several relatives, who were not all of them comprised in the class of Ward's next of kin. The Lord Chancellor held it to be a valid charitable trust of the capital of the fund. But Mr. Pennycuick was justified in pointing out that no one was before the court to argue for an intestacy—more particularly to argue for the view that the gift, being a gift of the corpus of the fund, had in the circumstances failed.

I find it necessary only to refer to two others of the cases cited by Mr. Cross; for he conceded that the rest added nothing in his favour. The first was *White* v. *White* (54). In that case a trust for "putting out poor relations" as apprentices was held good; and it was clear from the order (which we also obtained from the Public Record Office) that capital as well as income was used for the benefit of such as were found ready for apprenticeship. But the form of order showed also that the trust would be maintained at any rate for an appreciable period of time.

The second case was the Irish case of *Mahon* v. *Savage* (55), where a trust for distribution among the testator's poor relations was held valid and effectual, *Attorney-General* v. *Bucknall* (56) being relied upon as authority. But in that case the executors appointed by the testator were still acting and ready to make the necessary selection. It may, therefore, be doubted whether the question of charity was ever in strictness before the court.

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(53) 2 Atk. 328.
(54) 7 Ves. 423.
(55) 1 Sch. & Lef. 111.
(56) 2 Atk. 328.

On the other side, *Attorney-General* v. *Price* (57) is the "founding authority", and since the distinction upheld by Roxburgh, J., may be said to rest upon the language used by Sir William Grant, M.R., it is necessary to examine the report of the arguments and judgment somewhat closely. The subject-matter was a devise by will made in the year 1581, after a limited interest to the testator's wife, to Evan Johnes and his heirs with a direction that they should "for ever divide and distribute "according to his and their discretion amongst my poor kinsmen "and kinswomen and amongst their offspring and issue . . . the "sum of 20*l.* by the year . . .". The bill was filed by three poor relations of the testator on behalf of themselves and all others. The answer submitted that the devise was void for uncertainty.

Counsel for the bill contended that the devise was a good charitable devise and relied, not upon *Isaac* v. *Defriez* (58), but upon *White* v. *White* (59). Counsel for the defendants (and I quote from the report) "distinguished that case: as a fund to "be immediately applied in putting out as apprentices poor relations . . . which was properly a charity to the persons answering "that description: this being a trust to distribute an annual "payment among persons, denoted merely by the description "'poor kinsmen and kinswomen'".

The material part of the judgment is as follows: "This "appears to me to be in the nature of a charitable bequest: "particularly upon the case of *Isaac* v. *Defriez* (60); which is "both imperfectly and erroneously reported. This seems to be "just as much in the nature of a charitable bequest as that. "It is to have perpetual continuance, in favour of a particular "description of poor; and is not like an immediate bequest of a "sum to be distributed among poor relations".

It is plain enough that Sir William Grant, M.R., was distinguishing the case before him from that of a bequest for immediate distribution. But I think it far from plain that he was thereby intimating his view (which would have been mere obiter) that the latter was not a valid charitable bequest. Such an opinion would have been in flat contradiction to and would have made nonsense of the arguments submitted to him. As is clear from the report, the whole burden of the argument for the defendants and against the validity of the devise was that the case before the court, being a perpetual trust, was distinguishable from and not, therefore, governed by *White* v. *White* (61). If Sir William Grant, M.R., had meant what in some later cases he seems to have been thought to have meant, he would, on the face of the arguments, have been disapproving *White* v. *White* (61), and it is to my mind inconceivable that he would not either have said so in terms or otherwise have explained its effect. It was quite unnecessary for Sir William Grant, M.R., in deciding *Attorney-General* v. *Price* (62), to express any opinion on the validity or otherwise of a gift for immediate distribution; and whatever be the true analysis of *White* v. *White* (61), it certainly cannot be suggested that that case decided adversely to such a gift.

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(57) 17 Ves. 371.
(58) 2 Amb. 595.
(59) 7 Ves. 423.
(60) 2 Amb. 595.

The truth, to my mind, lies in the fact that Sir William Grant, M.R., had found the case of *Isaac* v. *Defriez* (60) (which had not been cited to him) and that *Isaac* v. *Defriez* (60) provided the answer to the distinction pointed out by the counsel for the defendants between *Attorney-General* v. *Price* (62) and *White* v. *White* (61). In my judgment, therefore, Sir William Grant, M.R., meant, and could only have meant, that the case before him, being a case of a perpetual trust, was covered by the authority of *Isaac* v. *Defriez* (60), and was, therefore, a good charitable devise, although it was not (as was, according to the argument, the case of *White* v. *White* (61)), a bequest of a sum to be immediately distributed among poor relations. The report of the judgment is no doubt abbreviated, but the sense of it cannot, I venture to think, in the light of the arguments be in doubt. In my opinion, therefore, the judgment of Sir William Grant, M.R., provides no authority for the validity of the distinction relied upon by Mr. Pennycuick.

But there can, I think, be no doubt that this view has not generally been accepted in the later cases. It will be sufficient for me to refer to three of them, upon which, in addition to *Attorney-General* v. *Price* (62), Mr. Pennycuick substantially relied, namely, *Liley* v. *Hey* (63), before Wigram, V.-C., *Gillam* v. *Taylor* (64), before Wickens, V.-C., and *Thomas* v. *Howell* (65).

In each of these cases the subject-matter of the gift was, or was concerned with, real estate, so that if the relevant trusts were charitable they would be void through failure to comply with the Mortmain and Charitable Uses Act, 9 Geo. 2, c. 36. And this was the result in *Gillam* v. *Taylor* (64), where the trust being in favour of the lineal descendants of Richard Wilson " as they may

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(60) 2 Amb. 595.
(61) 7 Ves. 422.
(62) 17 Ves. 371.
(63) 1 Hare 580.
(64) L. R. 16 Eq. 581.
(65) L. R. 18 Eq. 198.

"severally need", and being of a permanent character, was held (with regret by the Vice-Chancellor) to be a charity. But the contrary result was achieved in the other two cases. In *Liley* v. *Hey* (68) a discretionary trust to distribute income among twenty-four named persons was construed (the discretion not having then been exercised) as conferring beneficial interests for their lives upon all the twenty-four. *Thomas* v. *Howell* (66) went somewhat further. The gift was "to each of ten poor "clergymen of the Church of England" to be selected by the testator's friend, Joseph Butterworth Owen, 200*l.*, and the will was held to operate as conferring immediate gifts on the persons to be selected. Thus in both *Liley* v. *Hey* (68) and *Thomas* v. *Howell* (66) the court was able to say that the gifts did not amount to charitable trusts and were not, therefore, avoided. The statement of Sir William Grant, M.R., was cited (as it was also cited in *Gillam* v. *Taylor* (67), where the opposite conclusion was reached) in support of the supposed distinction vis-à-vis charity between continuing trusts and trusts for immediate distribution. So Mr. Hunt invited us to hold in the present case that (as in *Thomas* v. *Howell* (66)) there was a special power of appointment among the class of relations which, if exercised, would have produced, in effect, the result that the names of the appointees would be read into the will as legatees but which, not having been exercised, failed altogether of effect.

I cannot accept the argument, and the cases cited are not authorities which bind this court so to do. For reasons which I have given I do not think that Sir William Grant, M.R.'s judgment can or ought to be read as asserting the essential distinction. In my judgment the court in both *Liley* v. *Hey* (68) and *Thomas* v. *Howell* (66) by a benevolent interpretation sought to avoid, and avoided, the defeat of dispositions which it was anxious to uphold. "There is no doubt", said Malins, V.-C., in *Thomas* v. *Howell* (69), "that his object was to confer a benefit on those "that required it, and they were to be selected by Mr. Owen. "In one meaning of the word, that is certainly a charity, and "so in a certain sense, wherever a legacy is given, it is a charity; "but it would be carrying the doctrine of the court a long way "to say that, because a legatee is to have a gift on account of his "being a poor man, that therefore it is a charitable bequest within "the meaning of the Mortmain Act. It would be a monstrous

(66) L. R. 18 Eq. 198.
(67) L. R. 16 Eq. 581.
(68) 1 Hare 580.
(69) L. R. 18 Eq. 198, 208.

"injustice to hold this when the very object of requiring assist-"ance is the fact of a man being poor. In every case it depends "on whether there is a charity, which is to continue for a certain "specified time, as in the case of *Nash* v. *Morley* (70), where "you have not only old and infirm individuals and people with "large and sick families, but they are to sustain a particular "character at a particular time. Here I am asked to treat the "bequest as if poverty were the principal ground of the gift. "Nothing is more opposed to the meaning, in my opinion. It is "said that because the legacies are given to them as poor men "that, therefore, they cannot have it unless there is enough of "pure personalty to satisfy the charitable legacies. Suppose "the testator had said, 'I give to A, B and C, who are poor "'clergymen', that would not be a charitable legacy, but in "giving to ten poor clergymen, who are quite as good, and of the "same class of clergymen as those who are not poor, it is said "that is a charity. It appears to me to be just the same as if "they had been named, and I do not see on principle that it "makes any difference, or why they should not have it, because "they happen to be poor." The Vice-Chancellor's resolve to affirm the validity of the gift is patent, but I find difficulty in accepting all his reasoning. And Mr. Hunt's argument, in my judgment, begs the essential question—was the testatrix's primary intention to benefit selected members of a class of her children's relations or to relieve poverty?—a question which I have already answered in a sense adverse to Mr. Hunt.

It remains only to refer once more to *In re Compton* (71) and to the passage in Lord Greene, M.R.'s judgment where he referred to *Attorney-General* v. *Price* (72). It is true that he quoted the second part of Sir William Grant, M.R.'s judgment, which I have set out above. Roxburgh, J., drew, therefore, the conclusion that the Master of the Rolls was deliberately affirming the distinction and confining the exceptional "poor relations "cases" to those only, like *Isaac* v. *Defriez* (73), where the trusts were continuing. I do not so read Lord Greene's judgment. The existence and validity of the alleged distinction was not relevant to the decision and was plainly not, in my judgment, present to the minds of the court. I think that no inference can be drawn relevant to the present case from the citation of Sir William Grant, M.R. Although, therefore, I think the decided cases tend to support Mr. Pennycuick rather than Mr. Cross, I do not find any authority binding upon this court one way or the other; and I would, therefore, decide the present question in the Attorney-General's favour on grounds of principle, coherence and common sense.

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(70) (1842) 5 Beav. 177.
(71) [1945] Ch. 123, 138.
(72) 17 Ves. 371.
(73) 2 Amb. 595.

In my judgment the appeal should be allowed, and it should be declared that one-half of the testatrix's residue is held upon valid charitable trusts for distribution among poor members of the class of relations of her three children.

JENKINS, L.J. [after stating the facts]. It will be apparent from the foregoing narrative that questions of considerable difficulty arose with respect to the destination of the trust property on the death of Mrs. Kraemer, particularly in view of the inclusion amongst the objects of the unexecuted power of " such relations " of my said son and daughters as in the opinion of the survivor " of my said son and daughters shall be in needy circumstances ". The remaining objects of the power are, of course, by the express terms of the will exclusively charitable, and, if the power had been confined to these, it would only have been necessary to apply to the court for the settlement of a scheme with a view to the application of the trust property to charitable objects in Germany or in the United Kingdom selected with due regard to the preference expressed by the testatrix for charitable objects connected with the Roman Catholic Church and Faith. But is the trust charitable at all so far as it includes as objects of the power such relations of the three children of the testatrix as in the opinion of the survivor of them shall be in needy circumstances? If it is charitable quoad these objects, then no doubt the court can and should give effect to the charitable purpose of the testatrix by means of a scheme providing for the selection of the persons who are to take and the amounts they are to receive, and thus making good the failure of Mrs. Kraemer to exercise the power herself. If, on the other hand, the trust is not charitable quoad these objects, what effect (if any) can be given to this branch of it in default of appointment? Is there an intestacy on the ground of uncertainty or is there an implied trust in default of appointment in favour of some ascertainable class of " relations " of the three children, limited or not to such members of the class as can be shown to be in " needy circumstances "?

Apart from the agreement to which I am about to refer, that question would on the face of it give rise to two further questions, namely: If there is such an implied trust, to what proportion of the property does it extend; and if there is an intestacy is it limited to some proportion of the property or does the uncertainty to which it is due extend to and vitiate the entire disposition?

Before Roxburgh, J., the area of controversy was limited in the following respects:—(1.) In the proceedings as then constituted the plaintiffs were Sir Everard Scarisbrick and Mr. George Cockshott as the present trustees of the will, and the only defendants were the Public Trustee (as representing the estate of Sir Tom, the heir-at-law) and the Attorney-General (as representing the claims of charity). In those circumstances (to quote the learned judge) (74): "It appeared early in the argument that "there might be some conflict between the heir-at-law, who "was represented by counsel, and other persons who were not "represented, as to the destination of any part of the fund not "effectually given to charity, and it was thereupon agreed that "my decision should be confined to the question whether the "whole, or, if not, how much of the fund was thus effectually "given. The bequest plainly falls into two parts, and the second "is admittedly charitable". (2.) It was agreed before Roxburgh, J., between the Public Trustee and the Attorney-General that half the property should in any event be considered as having been effectively devised for the admittedly and expressly charitable objects mentioned in the second branch of the trust.

In view of this agreement and the state of the case as regards parties the learned judge, in effect, confined himself to the question whether the remaining half of the trust property, that is to say, the half to which the trust for relations in needy circumstances (as distinct from the trust for charitable objects eo nomine) was in accordance with such agreement treated as confined, was effectively devoted to charity, and on grounds to which I will presently refer decided this question in the negative, declaring accordingly that one-half and no more of the trust property was effectively so devoted, and directing the settlement of a scheme for the regulation and management of such one-half.

When the case first came before this court it was adjourned with a view to amendment as regards parties, in order that we might deal with the destination of the half of the property not effectively devoted to charity according to Roxburgh, J.'s decision in the event of that decision being upheld. Accordingly, Sir Everard was struck out as a plaintiff and he and Frau von Schmieder were added as defendants.

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(74) [1950] Ch. 226, 228.

Sir Everard's counsel argued for a trust in default of appointment in favour of the relations (limited on the principle stated in *Wilson* v. *Duguid* (75) to next of kin) of the testatrix's son and daughters. Frau von Schmieder's counsel argued for a trust in default of appointment in favour of such relations similarly limited, but with a further limitation to next of kin in needy circumstances. Sir Everard's counsel supported counsel for the Public Trustee in defending Roxburgh, J.'s decision, while opposing him in his claim that an intestacy resulted. Frau von Schmieder's counsel steered a somewhat complicated course, his primary claim being to the effect that his client being in needy circumstances should participate on the footing of a valid charitable trust, and the contention above indicated being in the nature of an alternative in the event of the trust being held not to be charitable.

It should be noted that the agreement between the Public Trustee and the Attorney-General by which the contest was limited to half the trust property was in this court adhered to by them and accepted by the other parties. But it does not follow that for the purpose of determining the primary question whether the trust is charitable so far as it includes relations in needy circumstances as objects of the power, cl. 11 should be construed as if it gave one-half of the property to such relations of the testatrix's three children as in the opinion of the survivor of them should be in needy circumstances for such interests, etc., as such survivor should appoint, and the other half to such charitable objects eo nomine for such interests, etc., as such survivor should appoint. Whatever the position in default of appointment may be, it is clear that under cl. 11 as a matter of construction Mrs. Kraemer, as the survivor of the three children of the testatrix, could have appointed the whole of the property to relations in her opinion in needy circumstances, to the exclusion of charitable objects eo nomine, or could have appointed the whole to charitable objects eo nomine to the exclusion of relations in needy circumstances, or could have appointed in any proportions she thought fit between or amongst any relations in needy circumstances and any charitable object or objects eo nomine.

As regards what I have termed the primary question, the following general propositions may be stated:—(i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public: see *In re Compton* (76), *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (77), and *Gilmour* v. *Coats* (78).

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(75) 24 Ch. D. 244, 251.

(ii) An aggregate of individuals ascertained by reference to some personal tie (e.g., of blood or contract), such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof for the purposes of the general rule: see *In re Drummond* (79), *In re Compton* (76), *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (77), and *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (80).

(iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (e.g., an educational trust confined as *In re Compton* (76), to the lawful descendants of three named persons, or, as in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (80), to the children of employees or former employees of a particular company).

(iv) There is, however, an exception to the general rule, in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are therefore not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract (e.g., the relief of poverty amongst the members of a particular society, as in *Spiller* v. *Maude* (81), or amongst employees of a particular company or their dependants, as in *Gibson* v. *South American Stores (Gath & Chaves) Ld.* (82)).

(v) This exception cannot be accounted for by reference to any principle, but is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned (see *In re Compton* (83)) though doubtless open to review in the House of Lords

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(76) [1945] Ch. 123.
(77) [1946] Ch. 194.
(78) [1949] A. C. 426.
(79) [1914] 2 Ch. 90.
(80) [1951] A. C. 297.
(81) 32 Ch. D. 158, n.
(82) [1950] Ch. 177.
(83) [1945] Ch. 123.

(as appears from the observations of Lords Simonds and Morton of Henryton in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (84)).

Applying these general propositions to the present case, I ask myself whether the trust in cl. 11 for "such relations . . . as in "the opinion of the survivor of" the testatrix's "son and daugh-"ters shall be in needy circumstances for such interests and in "such proportions . . . as the survivor . . . shall by deed or will "appoint" is a trust for the relief of poverty. If it is such a trust, then, as I understand the exception above referred to, it matters not that the potential objects of such trust are confined to relations of the son and daughters. If language means anything, a person in needy circumstances is a person who is poor and as such a proper object of charity, and no one can take under this trust who is not in needy circumstances. I do not think that the effect of the expression "in needy circumstances" is materially altered by the qualifying words "in the opinion of the "survivor . . .".

"Poverty" is necessarily to some extent a relative matter, a matter of opinion, and it is not to be assumed that the person made the judge of "needy circumstances" in the present case would have acted otherwise than in accordance with an opinion fairly and honestly formed as to the circumstances, needy or otherwise, of anyone coming into consideration as a potential object of the power. Under a similar trust which did not expressly make the appointor's opinion the test of eligibility, the appointor would in practice have to make the selection according to the best of his or her opinion or judgment. The express reference to the appointor's opinion merely serves to reduce the possibility of dispute as to the eligibility or otherwise of any particular individual on the score of needy circumstances. Accordingly, I dismiss the words "in the opinion of the sur-"vivor" as having no material bearing on the character of this trust. In so doing, I am fortified by the similar conclusion reached in this court as to the effect of the words "in the opinion "of the London Board" in *Gibson* v. *South American Stores (Gath & Chaves) Ld.* (85).

It is no doubt true that a gift or trust is not necessarily charitable as being in relief of poverty because the object or objects of it in order to take must be poor. Such a gift or trust may be no more than an ordinary gift to some particular

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(84) [1951] A. C. 297.

(85) [1950] Ch. 177, 185.

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individual or individuals limited to the amount required to relieve his or their necessities if in necessitous circumstances. One can conceive of a testator making a limited provision of this character for a child or children whose conduct in his view had reduced their claims on his bounty to a minimum. A disposition of that sort would obviously not be for the relief of poverty in the charitable sense. The same must be said of gifts to named persons if in needy circumstances, or to a narrow class of near relatives, as for example to such of a testator's statutory next of kin as at his death shall be in needy circumstances.

if narrow, not exception.

It is difficult to draw any exact line, but I do not think the trust here in question can fairly be held disqualified as a trust for the relief of poverty in the charitable sense on grounds such as those illustrated above. The class of relations to whom the selective power of appointment here extends is not confined to relations of the testatrix herself but consists of relations of the testatrix's son and daughters. "Relations" in this context cannot, in my opinion, be construed as meaning only the statutory next of kin of the son and daughters. It is, I think, well settled that a power of selection amongst the relations of a given person, as distinct from a plain gift to such relations, extends to relations in the full sense (i.e., all persons who can claim a common ancestor with the person in question) and is not confined to statutory next of kin as has been done in cases of plain gifts to "relations" to prevent complete failure of such gifts on the ground of uncertainty: see *Harding* v. *Glyn* (86) and *Mahon* v. *Savage* (87). Moreover, the language used points to a class of "relations" common to all three children of the testatrix, which is appropriate to "relations" in any degree, but hardly to statutory next of kin, as the statutory next of kin of each child would comprise a different class, and the trust is not expressed to be for the respective relations of the three children. The ambit of the trust thus extends to relations in every degree of the three children on both sides of the family. It should be added that the class of potential beneficiaries falls to be ascertained at the death of the survivor of the three children, not at the testatrix's own death. The power therefore extends to such of the relations in every degree of the three children on both sides of the family as might be in existence at the death of the survivor of the three children and should then in the opinion of such survivor be in needy circumstances. Thus the class of potential beneficiaries,

(86) (1739) 1 Atk. 469.

(87) 1 Sch. & Lef. 111.

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so far from being confined to a limited number of individuals whom the testatrix might be taken to have regarded as having some personal claim on her bounty, at all events to the extent necessary to relieve them from want, is so extensive as to be incapable of being exhaustively ascertained, and includes persons whom the testatrix may never have seen or heard of, and persons not even in existence at the time of her death.

Some gifts of the "poor relations" type may be found on their true construction to be gifts to the poorest of the class or to the class with a preference for the poorest, thus failing to satisfy the observation of Sir George Jessel, M.R., in *Attorney-General* v. *Duke of Northumberland* (88) that: "A gift which "is not a gift to the poor, that is, the actually poor, is not a "charity". That is not the case here. As pointed out above, no part of the property is appropriated to the exclusive purpose of appointment amongst the relations in needy circumstances. A person shown to be a relation and to be in needy circumstances would have become eligible as an object of the power, but neither any one relation individually nor even all the relations collectively (on the impossible supposition that they could be exhaustively ascertained) would have been entitled to claim that some part of the property must in any event come to him, or to them or some of them, inasmuch as the whole of the property could have been appointed to charitable objects eo nomine.

Accordingly, in the view I take, this is a trust for the relief of poverty in the charitable sense amongst the class of relations described, and, being a trust for the relief of poverty, is in view of the exception above stated, not disqualified from ranking as a legally charitable trust by the circumstance that its application is confined to a class of relations (albeit a wide class), with the result that its potential beneficiaries do not comprise the public or a section thereof under the decisions to which I have referred.

I am accordingly of opinion that as the law now stands the trust in question should be upheld as a valid charitable trust for the relief of poverty.

The judge took a different view. He founded himself, in effect, on the reluctance with which this court in *In re Compton* (89) recognized the exception of gifts or trusts for the relief of poverty from the general rule, that all forms of charity to be legally such must be for the benefit of the public or a section

(88) (1877) 7 Ch. D. 745, 749.

(89) [1945] Ch. 123.

thereof, as an exception of an anomalous character, which could not be assigned to any principle, but rested simply on the effect of a series of old decisions not now properly open to question in this court. The exception being of that nature, the learned judge reasoned, in effect, that where a gift ostensibly for the relief of poverty, but lacking the element of public benefit required under the general rule, is in question, it should, in accordance with the general rule, be held invalid as a charitable gift, unless it is in such terms as to fall unequivocally within the exception as established by the decided cases. Approaching the authorities from this point of view, the judge found that while gifts in perpetuity for poor relations had been uniformly held charitable, there was a conflict of authority as to the charitable status of gifts for immediate distribution amongst poor relations. He held that the trust in the present case was of the latter description, and accordingly that as the decided cases showed no more than that there was a conflict of authority on the question whether it was to be regarded as charitable or not, its claim to fall within the exception was not made out; with the result that the general rule must be applied, and that the trust in the present case did not qualify as a valid charitable trust, because it was not for the benefit of the public or a section thereof.

We were referred, as was the judge, to a large number of the so-called "poor relations" cases. In some of them gifts for immediate distribution amongst poor relations variously described have been held charitable: see, e.g., *Attorney-General* v. *Bucknall* (90), also referred to sub nom. *Attorney-General* v. *Buckland* (91); *Mahon* v. *Savage* (92). In others, gifts for immediate distribution amongst such persons have been held (like gifts to "relations" simpliciter) to be confined to the statutory next of kin of the propositus, the implication being that they were regarded as mere gifts to individuals not falling within the ambit of charity at all, which would accordingly fail for uncertainty unless so confined: see, e.g., *Edge* v. *Salisbury* (93); *Goodinge* v. *Goodinge* (94); *Brunsden* v. *Woolredge* (95); *Widmore* v. *Woodroffe* (96).

On the other hand, gifts of a perpetual character for the benefit of poor relations variously described have uniformly been held charitable: see *Isaac* v. *Defriez* (97); *White* v. *White* (98); *Attorney-General* v. *Price* (99); *Gillam* v. *Taylor* (100). It does not appear that in all the cases of this type the perpetual character of the gift was the ratio decidendi. Indeed, *White* v. *White* (101) may be said to cut both ways, as while the record shows the trust for putting out apprentices to have extended to the children of two families and their descendants (which implies perpetuity) it also shows that the capital as well as the income was applicable for that purpose (which in practice would necessarily limit the duration of the trust by exhaustion of the fund).

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(90) 2 Atk. 328.
(91) 1 Amb. 71.
(92) 1 Sch. & Lef. 111.
(93) 1 Amb. 70.
(94) (1749) 1 Ves. Sen. 231.
(95) 1 Amb. 507
(96) (1766) 2 Amb. 636.

But in *Attorney-General* v. *Price* (1) Sir William Grant, M.R., following *Isaac* v. *Defriez* (2), said: "This seems to be "just as much in the nature of a charitable bequest as that. It "is to have perpetual continuance, in favour of a particular "description of poor; and it is not like an immediate bequest of "a sum to be distributed among poor relations". It was, I think, upon this observation of Sir William Grant, M.R., that Roxburgh, J., largely founded himself in deciding as he did in the present case. In this connexion reference may also be made to the following passage from the judgment in *Gillam* v. *Taylor* (3): "The words here seem to me to import, beyond all "question, the creation of a perpetual fund or institution, in "which no person or persons is or are to have a personal right, "but which is to be given only to such as need in the opinion "of the trustees, and to be given to them according to their "necessities".

I should also refer to *Thomas* v. *Howell* (4), where a gift of 200*l*. each to ten poor clergymen to be selected by a specified person was held to be simply a gift to individuals, just as if they had been actually named in the will and therefore not a charitable gift, and not defeated by the Mortmain Act, 1736. *Liley* v. *Hey* (5), which also raised the question of mortmain, concerned a trust on the face of it unlimited in time to distribute the rents and profits of land annually amongst certain families according to their circumstances as in the opinion of the trustees they might need such assistance. This trust was held by Wigram, V.-C., not to involve a perpetuity and not to be avoided by the statute of Mortmain. But the decision, which has been doubted, seems to have turned on the construction which the Vice-Chancellor placed on the gift as being, in the first instance (in effect) no more than a discretionary trust for a number of persons during their respective lives, and therefore free from objection during that period.

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(97) 2 Amb. 595.
(98) 7 Ves. 423.
(99) 17 Ves. 371, 374.
(100) L. R. 16 Eq. 581.
(101) 7 Ves. 423.

(1) 17 Ves. 371.
(2) 2 Amb. 595.
(3) L. R. 16 Eq. 581, 584.
(4) L. R. 18 Eq. 198.
(5) 1 Hare 580.

I find myself unable to accept the judge's view as to the effect of the authorities. I think the true question in each case has really been whether the gift was for the relief of poverty amongst a class of persons, or rather, as Sir William Grant, M.R., put it, a particular description of poor, or was merely a gift to individuals, albeit with relief of poverty amongst those individuals as the motive of the gift, or with a selective preference for the poor or poorest amongst those individuals. If the gift is perpetual in character, that no doubt is an important circumstance as demonstrating that the intention cannot have been merely to benefit the statutory next of kin of the propositus or other particular individuals identified by the gift. Moreover, the gift, if perpetual, can only be supported on the footing that it is charitable—an illogical though in past practice probably a persuasive reason for holding it such.

But I see no sufficient ground in the authorities for holding that a gift for the benefit of poor relations qualifies as charitable only if it is perpetual in character. I do not think that the observation of Sir William Grant, M.R., above referred to goes by any means as far as that. It is fully satisfied if taken as meaning that an immediate bequest of a sum to be distributed among poor relations may on its true construction be no more than a gift to particular individuals (i.e., the next of kin of the propositus), whereas a gift having perpetual continuance cannot be so confined. If a gift or trust on its true construction does extend to those in need amongst relations in every degree, even though it provides for immediate distribution, then, inasmuch as the class of potential beneficiaries becomes so wide as to be incapable of exhaustive ascertainment, the impersonal quality, if I may so describe it, supplied in continuing gifts by the element of perpetuity, is equally present. To use the words of the passage quoted from *Gillam* v. *Taylor* (6), although no "permanent fund "or institution" is set up, the fund in such a case is nevertheless one in which "no person or persons is to have a personal "right, but which is to be given only to such as need in the "opinion of the trustees". It may further be observed that, just as a gift in perpetuity can only be supported if it is charitable, so, too, a gift to relations in every degree—in the absence, or in default of any exercise of, some power of selection—must fail for uncertainty unless it is charitable; this indeed being the reason for the restriction of any implied trust in default of appointment in such cases to statutory next of kin: see *Wilson* v. *Duguid* (7).

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(6) L. R. 16 Eq. 581.

The exception of gifts or trusts in relief of poverty from the general rule under which an element of public benefit is essential to every other form of legal charity may be anomalous. But that cannot in my view justify the restriction of its effect by recourse to yet another anomaly, the result of which would be that gifts or trusts in relief of poverty, which alone among charitable dispositions require no element of public benefit to make them valid, must alone among charitable dispositions—unless indeed it so happens that they do possess the element of public benefit—be of perpetual duration in order to be legally charitable. A disposition obviously cannot be held charitable merely because it involves a perpetuity or conversely be held not charitable merely because it is to take immediate effect. In cases of the class here in question its presence may aid the inference of charitable intent, but where a charitable intent is otherwise to be inferred from the terms of the disposition, the absence of perpetuity is surely immaterial.

Perpetuity in the strict sense would, as it seems to me, be a very capricious test to apply. The judge does, however, appear to have taken this as the test, and to have held that no trust for poor relations could qualify as legally charitable unless liable to exceed in duration the limit of a life in being and twenty-one years thereafter allowed by the rule against perpetuities. On this footing, a trust to apply the income of a fund in perpetuity in the relief of poverty amongst the poor relations of "X" would be charitable, but a trust precisely similar in every respect, save that it was limited in its duration to the period of the life of the last survivor of the issue now in being of His late Majesty King Edward VII and twenty-one years thereafter—a period which might reasonably be estimated at ninety, and might perhaps extend to 100 years or so—would not be charitable. I find myself wholly unable to accept that position. This difficulty was raised in the course of the argument, and I understood Mr. Pennycuick, for the Public Trustee, to concede that perpetuity in the strict sense was not essential, and that some degree of continuity would suffice. But what degree of continuity? To that he could provide no satisfactory answer, save that the distribution must not be "immediate". But what amounts to "immediacy" in this context? On this basis, the test propounded leads to nothing but a morass of uncertainty. One might add that if "immediate "distribution" is fatal on account of the personal quality it imports into the disposition, surely the relevant starting point from which to measure "immediacy" (in the case of a testamentary disposition) is the death of the testator, not the date on or from which distribution is to take place. In this case the date marked out for distribution and ascertainment of potential beneficiaries was the death of the survivor of the testatrix's three children—an event which did not in fact take place till some thirty-three years after her death.

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(7) 24 Ch. D. 244.

For my part I am content to accept as correctly stating the law on this subject the final paragraph of the passage from Tudor on Charities (5th ed.), p. 27, quoted by the judge: "The sounder "view is thought to be that a gift for immediate distribution "among poor relations, kindred, and so forth, is charitable, "except in cases where the intention of the donor, derived from "the construction of the documents, is to confine the benefit of "the gift to statutory next of kin. Outside this limit no line can "be drawn, and the objects ought not therefore to be treated as "less extensive where the gift is for immediate distribution than "where a perpetual trust is intended".

I should perhaps add that I do not think any assistance can be derived from *Thomas* v. *Howell* (8). It was not a "poor "relations" case, and must, I think, be regarded as of at least doubtful authority. As it happened, it seems from the report that the person named to select the ten poor clergymen in fact survived to perform that function. Had he not done so, it seems that according to the terms of the will the power of selection would have devolved on the testator's executors. But if the power of selection had been confined to an individual who died without exercising it, I venture to suspect that (questions of mortmain apart) the court would have had no difficulty in making the selection itself on the ground that the gift was clearly charitable. But, the selector having survived, the gift could be carried out literally in accordance with its terms. Effect could be given to it without recourse to the special powers of the court

(8) L. R. 18 Eq. 198.

in relation to charities, just as if it had been a simple gift of a pecuniary legacy to each of ten named persons. In these circumstances, the court found it possible to hold that the gift was not charitable for the purposes of, and therefore not defeated by, the Mortmain Act, 1736. I therefore find nothing in that case to displace the conclusion to which I have come; and I would say the same of *Liley* v. *Hay* (9), having regard to the grounds on which that decision appears to have proceeded.

For the reasons which I have endeavoured to state I hold that this appeal should be allowed, and that in lieu of the order made by Roxburgh, J., there should be a declaration to the effect that the whole of the residuary estate is effectively devoted to charitable purposes with appropriate consequential directions as to the settlement of a scheme.

The view I have formed on the primary question makes it unnecessary for me to decide what the destination of the half of the property, to which by the agreement above mentioned the issue was confined, might have been on the basis of Roxburgh, J.'s decision. Accordingly, notwithstanding the interesting arguments addressed to the court on this question, I refrain from expressing any opinion on it.

HODSON, L.J. Before Roxburgh, J., the parties then before the court agreed that the contest should be limited to half the trust property referred to in cl. 11 of the will of the testatrix on the footing that in any event one half of the property should be considered to have been validly demised for the admittedly charitable objects mentioned in the second part of the trust.

The judge decided that there must be a declaration that the last mentioned part of the trust property and no more was effectively devoted to charity, leaving over the question as to the destination of the other half of the trust property.

On the appeal of the Attorney-General to this court, the Public Trustee has argued in support of the judgment given in the court below, claimed a partial intestacy and resisted the contention of added parties that a trust in default of appointment should be implied either in favour of the next of kin of the testatrix's son and daughters or in favour of the same relations limited to next of kin in needy circumstances.

I have nothing to add to the judgments which have been delivered on the question of construction nor as to the formulation of the principles applicable to the question whether or not the disputed half of the residuary estate is held upon valid charitable trusts.

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(9) 1 Hare 580.

There remains the question whether, the poor relations cases being anomalous and an exception to the general principle, an exception within an exception exists so as to exclude gifts for immediate distribution from the ambit of charity. As Roxburgh, J., pointed out, the authorities, where there is no perpetuity, are conflicting. In *Attorney-General* v. *Price* (10), where the gift was in favour of the testator's poor kinsmen and kinswomen and their offspring and issue which shall dwell in the County of Brecon, Sir William Grant, M.R., followed *Isaac* v. *Defriez* (11), saying: "This seems to be just as much in the nature of a "charitable bequest as that. It is to have perpetual continu-"ance, in favour of a particular description of poor; and it is not "like an immediate bequest of a sum to be distributed among "poor relations".

It is, I think, true to say that the dictum of Sir William Grant, M.R., however it may be explained, has been treated in some of the later cases, as for example in *Thomas* v. *Howell* (12), as supporting the distinction drawn by Roxburgh, J., between gifts for poor persons having perpetual continuance and similar gifts for immediate distribution, so as to exclude the latter from the scope of charitable bequests.

On the other hand, in other cases, as my Lords have indicated, the distinction seems to have been treated as non-existent.

It appears to me that, on principle, it is unsound to draw such a distinction and that some, at any rate, of the difficulty in the cases dealing with immediate distribution arises from the fact that sometimes it is hard to say whether an immediate gift is for charity in the legal sense or whether a gift is given to persons because they are poor. This seems to have been in the mind of Malins, V.-C., in *Thomas* v. *Howell* (13) when he said: "It "would be carrying the doctrine of the court a long way to say, "that because a legatee is to have a gift on account of his being "a poor man, that therefore it is a charitable bequest within the "meaning of the Mortmain Act".

The judgment of Lord Greene, M.R., in *In re Compton* (14), quoted at length by Roxburgh, J., does not, in my opinion, although it quotes the much debated dictum of Sir William Grant, M.R., in toto and without comment, support the distinction. The cases referred to in the passage cited were all cases of perpetual trusts and the distinction now considered was not before the court.

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(10) 17 Ves. 371, 374.
(11) 2 Amb. 595.
(12) L. R. 18 Eq. 198.
(13) Ibid. 208.
(14) [1945] Ch. 123.

It is said, however, that on general principles the cases of immediate distribution should be controlled by the general law and not be subject to the anomalous treatment given to perpetual trusts in the poor relations cases. This is to create an anomaly upon an anomaly which is not easy to justify. It is also suggested as a practical justification for this treatment that the cases of perpetual trusts for poor relations are in practice difficult to assail because many long established charities are dependent on them; whereas there is not the same practical objection to declaring a gift for immediate distribution to be outside the scope of charity. I am, however, clearly of opinion that, in spite of the state of the authorities, the sounder view is against the distinction between immediate distribution and perpetual trusts and that the position is correctly stated in the passage cited from Tudor on Charities (5th ed.), p. 27. Accordingly, the gift here in question is charitable, even if regarded as one for immediate distribution.

In any event, I find a difficulty in ascertaining what is meant by immediate distribution. It would seem reasonable to understand " immediate " as immediate in relation to the death of the testator. There seems no sound reason to choose the end of the period allowed by the rule against perpetuities which may, as Jenkins, L.J., has pointed out, be far distant, rather than the period following at once upon the death of the testator in any particular case as setting a limit up to which gifts are not charitable and beyond which they are.

For myself, I do not think that the authorities relied upon by the Public Trustee compel the conclusion that immediate distribution is to be extended beyond the natural implication of the words to any period up to the limit set by the perpetuity rule.

It would appear, therefore, that it is at best open to doubt whether the trust in the first part of cl. 11 of the will of the testatrix can properly be described as a trust for immediate distribution although it is not, of course, a perpetual trust.

In view of the conclusion reached on this part of the case, I, for myself, would not desire to express an opinion as to the destination of the disputed half had the trust for relations in cl. 11 of the will been held not to be charitable.

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I agree that the appeal should be allowed and that there should be a declaration to the effect that the whole of the residuary estate is effectively demised to charity.

Appeal allowed.

Solicitors: *Treasury Solicitor; Pritchard, Englefield & Co., for Cockshott & Rayner, Southport.*

B. A. B.

In re COULTHURST, DECD.
COUTTS & CO. *v.* COULTHURST AND ANOTHER.

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Mar. 7.

Evershed, M.R., Jenkins and Hodson, L.JJ.

[1950 C. 2556.]

Charity—Charitable trust—Income of trust fund payable "to or for the "benefit of . . . the widows and orphaned children of deceased "officers and deceased ex-officers" of a bank—Validity.

A testator by his will directed that the income of a trust fund should be applied by a bank as the trustee of the fund "to or for "the benefit of such . . . of the . . . widows and orphaned children "of deceased officers and deceased ex-officers" of the bank "as the "bank shall in its absolute discretion consider by reason of his, her "or their financial circumstances to be most deserving of such "assistance . . .".

Held, that the testator had created a valid charitable trust, for his intention was that the income of the fund should go to those who had the quality of poverty within the meaning of the Statute of Elizabeth; and a gift for the benefit of widows and orphans was one which by its nature prima facie proceeded from general benevolence towards classes of persons suffering under circumstances of privation, rather than from motives of personal bounty to particular individuals. Poverty was a good qualification of charity, although the class of beneficiaries was chosen by reference to employment in a particular business.

Gibson v. *South American Stores* (*Gath & Chaves*) *Ld.* [1950] Ch. 177 applied.

Attorney-General v. *Comber* (1824) 2 Sim. & St. 93, and *In re Lucas* [1922] 2 Ch. 52 considered.

Decision of Vaisey, J., ante, 193 affirmed.

APPEAL from Vaisey, J. (1).

By cl. 7 of his will dated April 28, 1948, John William Coulthurst provided: "I give . . . 20,000*l*. . . . to the bank" Coutts

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(1) Ante, 193.

& Co. "and I direct that the bank shall stand possessed of the "said sum of 20,000*l*. . . . as a permanent fund which be (sic) "known and is hereinafter referred to as 'the Coulthurst Fund' "upon the trusts following. . . . (i) The Coulthurst Fund shall ". . . be invested in the name or under the control of the bank "in any investments for the time being authorized by law for "the investment of trust moneys. . . . (ii) In this clause the "expression 'deceased officer' means any officer (not being a "director or auditor) or clerk who was in the service of the bank "whether at 440 Strand or elsewhere at the date of his death at "a salary calculated on a monthly or larger periodic basis and "the expression 'deceased ex-officer' means any retired officer "(not being a director or auditor) or clerk who at the time of his "retirement was in the service of the bank as aforesaid at a "salary calculated on the foregoing basis and who at his death "was in receipt of a pension from the bank and the expression "'orphaned child' shall mean the child of any deceased officer "or deceased ex-officer who is under the age of seventeen years "and has lost both father and mother".

Sub-clause (iii) provided that at the expiration of every six months calculated from the date of the testator's death "the "bank shall pay or apply the income earned by the Coulthurst "Fund during such period of six months to or for the benefit "of such one or more exclusively of the others or other of "the widows and orphaned children of deceased officers and "deceased ex-officers living at the expiration of such half yearly "period as the bank shall in its absolute discretion consider by "reason of his her or their financial circumstances to be most "deserving of such assistance and so that the bank may pay any "income which it may decide to apply for the benefit of any "orphaned child without any further responsibility to see to the "application thereof".

Sub-clause (iv) provided: "The decision of the bank as to "who are widows and orphaned children of deceased officers and "ex-officers within the meaning of this clause shall be absolutely "conclusive and in arriving at any such conclusion the bank shall "have full power to act upon any evidence or information it may "think proper to accept".

Sub-clause (v) provided: "The trusts, powers and discretions "hereby expressed to be vested in the bank may be exercised by "its board of directors . . . or by any committee of the board of "directors to whom the board may think fit to delegate the "same".

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Sub-clause (vi) provided that if the bank should go into liquidation or the trusts otherwise fail or determine the Coulthurst Fund should sink into the residue of the testator's estate and be held accordingly.

On June 14, 1949, the testator died. The bank applied to the Chief Inspector of Taxes to obtain his recognition of the right of the Coulthurst Fund to exemption of its income from income tax on the ground that it was applicable for charitable purposes only. By letter dated October 11, 1949, the Chief Inspector replied that in his view the trust was not legally charitable.

By this summons, to which the testator's widow, who was one of his executors and sole residuary legatee, and the Attorney-General were defendants, the plaintiff bank, Coutts & Company, who was the other executor and was also trustee of the Coulthurst Fund, asked, among other things, whether the trusts of that fund were valid and effectual charitable trusts or were void as infringing the rule against perpetuity or otherwise.

It was stated in an affidavit by the manager of the trustee department of the plaintiff bank that the bank had existed as a bank since about the year 1700. It was originally carried on by a partnership, but in 1892 the partnership was converted into an unlimited company whose registered office was and had since 1904 been at No. 440 The Strand, London. The bank had five branches, all in England, and had 439 employees in the position of officers or clerks (not including any director or auditor); and the position at the date of the testator's death was approximately the same.

The affidavit went on to state that it would be difficult to say how many deceased officers and deceased ex-officers (within the definition of the will) there were at the time who had widows and orphaned children, but that there must be a considerable number; and that the bank were aware that some widows and orphaned children were, and that many of them might well be, both at the date of the affidavit and in the future, in real need of assistance. The deponent expressed the view that if the trusts of the Coulthurst Fund constituted a valid charitable trust, a real want would be, and would continue to be, filled. No other fund existed to provide exclusively for needy widows and orphaned children of deceased officers and ex-officers of the bank. There were, however, contributory pension schemes providing some, but not all, of the persons in that category with pensions, varying in amount up to 200*l.* a year.

Vaisey, J., held that the fund was held on valid and effectual charitable trusts. The widow appealed.

Neville Gray, K.C., and *Rawlence* for the widow. It is submitted that this gift on its true construction is not a valid charitable gift because it is not a gift for the relief of poverty. If, on its true construction, this is held to be a gift for the relief of poverty, then it is not disputed that, on the authority of *Gibson* v. *South American Stores (Gath & Chaves) Ld.* (2), it is a valid charitable gift, although the class of beneficiaries is limited by reference to employment by a particular company. This is a trust for distribution every six months between the members of the class who are then "most deserving of assistance". That provision shows that the testator's intention was not to relieve poverty but merely to provide for the members of the class who every six months might be least well off. It is not possible to imply here a qualification of poverty. In *Attorney-General* v. *Comber* (3) a gift for the benefit of widows and of orphans of a parish was held a good charitable bequest, that case is distinguishable since here poverty cannot be implied. None of the class of possible beneficiaries may in fact be poor.

Denys Buckley for the Attorney-General. This bequest constitutes a valid charitable gift. It is a gift for widows and orphans prima facie objects of charity, who having regard to their financial circumstances are most deserving. This gift is covered by the authority of *Attorney-General* v. *Comber* (3). It would be unreasonable to suppose that this class of beneficiaries might ever not have any poor members. The evidence shows that the class is so large that all the available income will be required. It is impossible to define "poverty". It does not mean destitution. It means that the possible beneficiary's circumstances are not such as to enable him to live in a manner which is suitable. If he is not assisted he will be compelled to "go short".

Wilfrid Hunt for the plaintiff bank.

EVERSHED, M.R., after stating the facts. The problem has arisen whether the trusts in cl. 7 of the testator's will constitute a valid charitable disposition. If they do not, then the Coulthurst Fund would go to residue. Mr. Gray mentioned, though he did not make a great point of it, that it is provided that "if "the bank should go into liquidation" or the trusts of the

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(2) [1950] Ch. 177.

(3) (1824) 2 Sim. & St. 93.

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Coulthurst Fund should otherwise fail, the fund would sink into residue. In the events which happened, the residuary legatee under the will is the first defendant, Mrs. Coulthurst, the widow of the testator. Battle is thus joined between the widow who claims that the trusts were ineffective as a charitable disposition, and therefore, by offending the rule against perpetuities, are invalid, and, the Attorney-General arguing for the validity of the disposition as a charity.

These charitable questions are always vexing and difficult. It has been recently said in the House of Lords that the law in regard to them is in many respects artificial. Vaisey, J., came to a conclusion in favour of the validity of the charity, and I am of the same opinion.

If this gift is valid as a charity, it must clearly be so on the ground that it is intended for the relief of poverty. It is not suggested that under any other head can the case be brought within the intendment of the Statute of Elizabeth of 1601. There is, of course, no use of the word "poverty" in the language to which I have alluded. But as was pointed out by Russell, J., in *In re Lucas* (4) (quoting from the judgment of Stirling, J., in *In re Dudgeon* (5)): "' . . . it appears to me "' that the cases cited on behalf of the charity do show this, "' that it is not absolutely necessary to find poverty expressed in "' so many words, but that the court will look at the whole gift, "' and, if it comes to the conclusion that the relief of poverty "' was meant, will give effect to it although the word "poverty" "' is not to be found in it' ". Then that very learned judge, singularly experienced in this type of case, referred to two other decisions which have been quoted to us: *Attorney-General* v. *Comber* (6), a decision of Sir John Leach, V.-C., and *Thompson* v. *Corby* (7), a decision of Lord Romilly, M.R.

That passage being taken as my guide in approaching the problem, the question is this: having regard to the whole context as well as to the precise language in cl. 7, is it right to infer, as the judge inferred, that the relief of poverty was meant? The alternative claim is that what was meant was that a class of widows and orphans should be benefited, not by virtue of possessing the objective standard or quality of poverty, but as being, at the end of each six-monthly period, the least well endowed in that class, whether or not they were in truth poor. It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to "go short" in the ordinary acceptation of that term, due regard being had to their status in life, and so forth.

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(4) [1922] 2 Ch. 52, 58.
(5) (1896) 74 L. T. 613.
(6) 2 Sim. & St. 93.
(7) (1860) 27 Beav. 649.

Vaisey, J., in my opinion rightly, approached the problem by considering what were the right inferences to draw from the particular language that this testator used. First of all, he drew attention to the class, widows and orphaned children. He said (8): "I rely on the fact that the will is dealing with widows and "orphaned children, classes which may, and, in my view, "must, include, if the class is sufficiently wide, many proper "objects of charity in the legal sense. Even today the status "of 'widows and orphaned children' suggests the possibility, "or, perhaps, even the probability, of impecuniosity". I agree that the class of widows and orphaned children is, at any rate, a class which directs one's mind to the idea of the relief of want or poverty. They have been from century to century the object of charitable benefactions.

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orphans suggest
pov.

In this connexion I will mention a point to which Mr. Neville Gray referred. According to the evidence of the manager of the trustee department of the bank, the bank at the moment has 439 employees, excluding directors and auditors. He goes on to say: "It would be difficult to say how many deceased officers "or deceased ex-officers (within the definitions in the will) there "are at present who have widows or orphaned children, but there "must be a considerable number and we are aware of some who "are, and, indeed, many of these widows and orphaned children "may well both now and in the future be in real need of assist- "ance". Mr. Gray pointed out that the judge may perhaps have overstated the effect of the will, in that he indicates that there were or might be "considerable numbers" of cases in real need of assistance. But I do not think that that can be fairly said to have influenced wrongly the conclusion of the judge on construction. This point has a bearing upon another aspect of the matter (namely, the provision for six-monthly distributions to which I will presently refer).

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Before leaving the inference to be drawn from the collocation of "widows" and "orphaned children", I would like to refer to a matter which seems to me to bear out what I have said. In *Attorney-General* v. *Comber* (9) there was a gift of one-fourth of certain property or its proceeds to "the widows and orphans "of the parish of Lindfield, Sussex". I agree that the reference to the parish may, perhaps, more naturally indicate the relief of poverty than a reference to former employees at monthly salaries of a bank, and I do not forget that the sum represented by this one-fourth share was a very small one. Still, the ratio decidendi of Sir John Leach, V.-C., was, I think, in reference to a different point. "A gift", he said (10), "to the widows and orphans of "the parish of Lindfield, could not in its nature have proceeded "from motives of personal bounty to particular individuals; it "must have proceeded from general benevolence towards two "classes of persons who were suffering under a common circum-"stance of destitution or privation, and is necessarily to be con-"fined to such of those two classes who are within the scope of "general benevolence"—in other words, the clause was read as though the adjective "poor" were inserted in it. So Russell, J., said (11): "I do not see how otherwise the decision of Sir John "Leach, V.-C., in *Attorney-General* v. *Comber* (12) and of Lord "Romilly, M.R., in *Thompson* v. *Corby* (13) can be explained".

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(8) Ante, 193, 197.

(9) 2 Sim. & St. 93.

I think that that citation lends some support to the view, which Vaisey, J., formed, that a reference to the class of orphans and widows is, by its nature, one which you would say, prima facie, proceeded from "general benevolence towards classes of "persons suffering under circumstances of privation" rather than "from motives of personal bounty to particular indivi-"duals". I am inclined, therefore, to think that a strong argument could have been put forward for the validity as a charity of this gift if the relevant paragraph had said no more than that the objects were to be widows and orphaned children of deceased officers and deceased ex-officers. But, in fact, there is the added qualification that the persons to benefit were those chosen by the bank as being "by reason of his, her or their financial cir-"cumstances . . . the most deserving of such assistance".

∴ would have validated it just on mention of orphans + widow

Vaisey, J., considered separately the formulæ "by reason of "his, her or their financial circumstances" and "most deserving "of such assistance". The whole sentence seems to me to mean, essentially, that the persons selected are persons whose financial circumstances are such that they are not only deserving of assistance, that is to say, wanting help, but, of all such, are those who most want it. I therefore think that this sentence,

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(10) 2 Sim. & St. 93, 94.
(11) [1922] 2 Ch. 52, 58.
(12) 2 Sim. & St. 93.
(13) 27 Beav. 649.

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so far from reversing the tendency which I should have thought emerged from the earlier words, rather emphasized it. The point was made that the use of the phrase "most deserving" had, in fact, the contrary result. If the persons to benefit were persons who, by reason of their financial circumstances, were deserving of assistance, then it might be said that the standard imposed was an objective one, namely, that they were persons whose financial circumstances left them in want. Can it be said that by using the superlative "most" you must discard the objective standard and that those to benefit are the people whom the bank will regard as being (of the whole class) the most deserving, that is the least undeserving? For my part, I think that that view is too subtle an interpretation of these words, and I think, reading the clause as a whole, it would defeat the intention in the mind of the testator.

I therefore take the indications, as Vaisey, J., took them (though I prefer to treat his second and third as being really one), as pointing much more strongly in favour of, than away from, a charitable intention (14): ". . . putting together the implication "of all those expressions, 'widows and orphaned children', "'financial circumstances', and 'most deserving of such assist- "'ance', I conclude", he says, "that a valid and effectual trust "is indicated".

There remains what I think is the most significant of the points which Mr. Gray advanced. It is of the essence of this direction that there should be six-monthly distribution. It follows, Mr. Gray says, that the testator must have meant that in any case each six months the money was to be distributed, with the necessary result that if there were no persons properly described as poor there must still be distribution. Again, I do not myself think that that is a strong enough countervailing circumstance. A point of administration is behind this provision. The people to take must plainly be persons then living and persons who at the time satisfy the qualifications; for example, a child must be under seventeen. I think, therefore, that the point of a six-monthly distribution was to make the ascertainment of the persons to take simple by having each six months a study of those who might be selected for benefit.

I should be guilty of mere elaboration without adding anything to the argument if I said more. These cases, I repeat, are never easy, and if one attempts too much analysis one is in danger

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(14) Ante, 193, 197.

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of getting lost among the trees and of losing the sense of the gift as a whole, perhaps involving oneself in the further danger of saying things which, bereft of their context, might create difficulties in other cases hereafter. The point being short and concerning the interpretation of a few lines of English, I confine myself to saying that I read the relevant words as being an expression of an intention on this testator's part that this money should go to those who had the quality of poverty within the meaning of the Statute of Elizabeth. Since the decision in *Gibson* v. *South American Stores* (*Gath & Chaves*) *Ld.* (15), it is clear that in this court this is a good qualification of a charity though the class of beneficiaries is chosen by reference to employment in a particular business. I therefore hold that this was a valid and effectual charitable trust.

JENKINS, L.J. For the reasons given by Vaisey, J., and by my Lord, I agree that the trust here in question, upon its true construction, is a valid charitable trust for the relief of poverty. Accordingly, I agree that the appeal fails and should be dismissed.

HODSON, L.J. I agree.

Appeal dismissed.

Solicitors: *Farrer & Co.; Treasury Solicitor.*

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(15) [1950] Ch. 177.

In re McARDLE, DECD.

[1950 M. 199.]

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Mar. 13, 14, 15, 16.

Evershed, M.R., Jenkins and Hodson, L.JJ.

Equitable assignment—Absence of consideration—Validity.

The residuary estate of a testator was held upon trust for his five children, of whom M. M. was one, in equal shares subject to the prior life interest of the testator's widow. In 1943 M. M. and his wife executed certain improvements, which were completed in 1944, to a property forming part of the testator's estate. The cost of the improvements was paid for by Mrs. M. M. The testator's five children signed a document dated April 30, 1945, in the following terms: "To Mrs. M. M. . . . In consideration of your "carrying out certain alterations and improvements to the property ". . . at present occupied by you, We the beneficiaries under the "will of [the testator] hereby agree that the executors . . . shall "repay to you from the said estate when so distributed the sum "of 488*l.* in settlement of the amount spent on such improvements". The testator's widow having died, Mrs. M. M. claimed payment of the 488*l.* The testator's children objected to the payment. Danckwerts, J., held that the document of April 30, 1945, constituted a valid equitable assignment. On appeal:—

Held, (1.) that, since the works had all been completed before the execution of the document of April 30, 1945, the consideration for the agreement was a wholly past consideration and, accordingly, the agreement for repayment of the sum of 488*l.* was a nudum pactum and not enforceable as a contract.

(2.) That it was impossible for the plaintiff to rely on the document of April 30, 1945, as constituting an equitable assignment. The document purported on the face of it to be a contract for valuable consideration and it could not be so construed that it could be used for the different purpose of an equitable assignment.

Semble, if the document of April 30, 1945, could have been construed as an equitable assignment, the absence of consideration would not have made it invalid.

Harding v. *Harding* (1886) 17 Q. B. D. 442, and *German* v. *Yates* (1915) 32 T. L. R. 52 considered.

Appeal from Danckwerts, J.

William Edward McArdle by his will dated August 16, 1933, appointed the National Provincial Bank Ld. to be his executor and trustee and directed them to hold his residuary estate, subject to the prior life interest in it of his wife Holly McArdle, upon trust for all his children who should attain twenty-one. The testator died on February 8, 1935. He was survived by four sons and a daughter, who all attained the age of twenty-one years.

In 1943 one of the sons, Montague Terence McArdle, known as Monty McArdle, was living with his wife Marjorie McArdle in a bungalow called Gravel Hill at Wimborne, which formed part of the testator's residuary estate. Monty McArdle and his wife executed certain works of improvement and repair to this property, the cost of which, amounting to 488*l.*, was paid by Mrs. Marjorie McArdle. The improvements and repairs were substantially completed by Christmas, 1943, and were finally completed in 1944.

In April, 1945, Monty McArdle presented to each of his three brothers and his sister a document which he and they signed in the following terms: "To Mrs. Marjorie McArdle, Gravel Hill, "Wimborne. In consideration of your carrying out certain altera-"tions and improvements to the property known as Gravel Hill

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"Poultry Farm, Wimborne, at present occupied by you, We the "beneficiaries under the Will of William Edward McArdle "Hereby agree that the Executors, the N. P. Bank Limited of "No. 1 Princes Street, London, E.C.2, shall repay to you from "the said estate when so distributed the sum of 488*l*. in settle"ment of the amount spent on such improvements. Dated "April 30, 1945".

Mrs. Holly McArdle died in 1948, and in 1950 Mrs. Monty McArdle requested the National Provincial Bank Ld. to pay to her the 488*l*. in accordance with the document of 1945. The testator's children, other than Monty McArdle, having refused to agree to the payment, the bank paid the 488*l*. into court under s. 63 of the Trustee Act, 1925.

By this summons Mrs. Marjorie McArdle asked for payment out to herself of the sum of 488*l*., the defendants to the summons being the testator's children, other than Monty McArdle.

On the direction of Danckwerts, J., Monty McArdle and the National Provincial Bank Ld. were added as defendants to the summons. Monty McArdle did not, however, enter an appearance. The application was strenuously resisted by the defendants and a number of serious charges were made against Monty McArdle and his wife.

Danckwerts, J., on all these issues, found in favour of Mrs. Marjorie McArdle, and held that the document of April 30, 1945, amounted to a valid equitable assignment giving her a right to recover the 488*l*.

The testator's children, other than Monty McArdle, appealed. Monty McArdle appeared on the appeal and supported Mrs. Marjorie McArdle, the respondent to the appeal. On the appeal various questions of fact and charges against Monty McArdle were considered at length which do not call for report.

J. G. Strangman, K.C., and *G. B. H. Dillon* for the children of the testator (other than Monty McArdle). The document of 1945 is an executory document. It is plain that no consideration moved from Mrs. Marjorie McArdle. In 1945 the testator's five children were entitled to the testator's residuary estate in reversion expectant on the death of the testator's widow. They together charged the fund with payment of 488*l*. in favour of Mrs. Marjorie McArdle. Since there was no consideration for the charge, it is not enforceable by Mrs. Marjorie McArdle for the following reasons: first, if her claim rests in contract she is a stranger to the consideration and she cannot sue upon the document which she alleges constitutes the contract: *Tweddle* v. *Atkinson* (1); *Dunlop Pneumatic Tyre Co. Ld.* v. *Selfridge & Co. Ld.* (2). Secondly, if her claim rests in covenant, she cannot enforce it, for she is a mere volunteer; equity will not perfect an imperfect gift, and in consequence, since she gave no consideration, the gift is imperfect and she is a volunteer. Thirdly, if it be said that this document amounts to a valid assignment, it is submitted that it is plain that it is an equitable assignment and accordingly it could only be enforced by an assignee for value. The plaintiff in the present case is a volunteer. It would be different if the five beneficiaries had constituted themselves trustees of this sum of 488*l.* forming part of the trust estate.

Astell Burt for Mrs. Marjorie McArdle and Monty McArdle. The document of April 30, 1945, constitutes a valid equitable assignment. The assignment relates to existing property and accordingly it is submitted consideration is not necessary in order to support it. This document amounts either to an assignment by each beneficiary of a portion of his one-fifth share of the residuary estate or to a collective assignment by the beneficiaries of a fund of 488*l.* out of the residuary estate.

An equitable assignment need not take any particular form: see Halsbury's Laws of England (2nd ed.), vol. 4, p. 437, para. 806, and also *Durham Bros* v. *Robertson* (3).

The question is still open whether consideration is necessary in all circumstances in order to support an equitable assignment. The authorities appear to draw a distinction between the assignment of existing debts and the assignment of future debts: see White and Tudor's Leading Cases in Equity (9th ed.), vol. 1, p. 105. The question must depend upon whether any future act is necessary on the part of the assignor. In the present case the debt was a debt in præsenti which was payable in futuro. The direction in *Harding* v. *Harding* (4) was to pay out of an ascertained share of an estate. It is submitted that this decision would have been the same, even if the balance of the estate had not been ascertained at the date of the assignment.

The present case falls within the principle enunciated by Lush, J., in *German* v. *Yates* (5). The dictum of Parker, J., in *Glegg* v. *Bromley* (6) that consideration is always required in order to support an equitable assignment is too wide.

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(1) (1861) 1 B. & S. 393.
(2) [1915] A. C. 847.
(3) [1898] 1 Q. B. 765.
(4) (1886) 17 Q. B. D. 442.
(5) (1915) 32 T. L. R. 52.
(6) [1912] 3 K. B. 474, 491.

[He also referred to *Donaldson* v. *Donaldson* (7) and *Tailby* v. *Official Receiver* (8).]

The real test whether an equitable assignment made without consideration is good is whether anything else remains to be done to complete the assignment. An authority to pay out of a particular fund, as here, amounts to a valid equitable assignment. The fact that this document is in the form of an agreement does not prevent its being a valid equitable assignment. [He referred to *Fisher* v. *Calvert* (9).]

EVERSHED, M.R. [after stating the facts]. The real question —and it is by no means easy—is whether this document of 1945 was an effective equitable assignment which passed to Mrs. Marjorie McArdle an indefeasible interest in a proportionate part of the residuary estate; for, if it is not, then I think it is clear, owing to the well-established doctrine of consideration, that it must fail to give her a claim which she can litigate since there was and is no consideration passing from her to support her claim.

Issue in question.

The judge came to the conclusion that there was here an equitable assignment, and that it was unnecessary, on the authorities, for such an equitable assignment, in a case in which the subject-matter is existing property, to be supported by valuable consideration. The problem is vexed and difficult. I think it is accurately stated in Snell's Principles of Equity (22nd ed.), pp. 57 and 58, as follows: "Whether value is necessary "for an equitable assignment is not clearly settled. It has been "held that value is not necessary for an assignment of a legal "thing in action which complies with the statutory provisions . . . "and it would seem to be unnecessary also for an assignment of "an equitable thing in action, such as a legacy or an interest in "trust funds, provided that the assignment is complete and "perfect; there is no reason why a man should not be able to "give away an equitable interest as freely as he can give away "a legal interest. But value appears to be necessary for an "equitable assignment of a legal thing in action; . . . such an "assignment being inoperative at law, the assistance of equity "is needed to make it effective, and equity will not assist to "make perfect an imperfect gift. Value is certainly necessary "for the assignment of rights of property not yet in existence" —for the reason that where the property is not in existence something else has to be done by the giver to give effect to the

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(7) (1854) Kay 711.
(8) (1888) 13 App. Cas. 523.
(9) (1879) 27 W. R. 301.

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gift. It can operate only in contract, if there is no subject-matter then capable of being given.

The sentence in that passage, " provided that the assignment " is complete and perfect ", is important; also the further sentence, " there is no reason why a man should not be able to give " away an equitable interest ". What the writer is saying there, and I accept it, is this: if what is done amounts to a gift, complete and perfect, of a subject-matter which is an equitable chose in action, then there is no reason in principle or in authority why the donee should not take the benefit just as much as he will if the giver gives him a pound note and puts it in his hand. Since the transaction is thus perfect, the question of consideration becomes irrelevant, for consideration is only necessary to support the assertion of a right to have made perfect something which is not yet perfect—for example, a contractual right.

Therefore I am prepared to accept, for the purposes of this judgment, the view that if what was done on April 30, 1945, was to assign, to make over, something completely and perfectly to Mrs. Marjorie McArdle, she is entitled to succeed notwithstanding the absence of consideration. But it seems to me equally clear that whether the transaction had that effect is a matter of the intention to be derived from the transaction itself and the evidence of it. " ' The mode ' " (I quote from White and Tudor's Leading Cases in Equity (9th ed.), p. 105) " ' or form of " ' assignment is absolutely immaterial provided the intention of " ' the parties is clear ' ".

I conceive that Mrs. Marjorie McArdle must be treated as coming here as a plaintiff, and that she must make out her case, which she attempts to do by producing this document. What is the proper inference of intention to be drawn from it in the light of any other properly admissible evidence? It has certain very marked features. It is plain, to start with, that it is drawn (and I should say deliberately drawn—certainly I do not think Mrs. Marjorie McArdle can be heard to say otherwise) so as to be, on the face of it, a valid contract. The draftsman, although he was Monty McArdle, or Monty McArdle's solicitor acting on his instructions, has been particularly careful in that respect. " In " consideration "—it begins in capital letters—" of your " (that is, Mrs. Marjorie McArdle's) " carrying out certain alterations " and improvements . . . We . . . hereby agree ", etc. It is pointed out by Mr. Astell Burt that, although that form of words indicates in the plainest terms possible that Mrs. Marjorie McArdle is promising that she will carry out certain works, the truth was, as everybody knew, that the works had been carried out some time before. He suggested that the reason for putting the document in that form was that it was drawn up a long time before, when the work had not been completed. Indeed, when this document was sent to the bank, as executor, with a covering letter which, singularly enough, bears date two days earlier, Monty McArdle, who sent it, made a quite different story of it.

We, however, must take this document as we see it, and I am bound to say that if, as Mr. Astell Burt has so strenuously contended, the draftsman, the man who put it forward and proffered it to his colleagues, chose to state facts contrary to the truth, one is not only entitled but bound to ask, why did he put it that way?; and I find it very difficult to avoid the conclusion that he was putting forward something which was not intended to be other than a contractual document. I agree that the mere fact that it is in some sense contractual may not prevent its being an assignment.

I pass now to the later terms. The agreement is "that the "executors" (the bank) "shall repay"—"*repay*"—"to you "from the said estate when so distributed the sum of 488*l.* in "settlement of the amount spent on such improvements". Although Mr. Astell Burt seemed quite shocked when I said so, the word "spent" there, as a matter of English, can only mean, and does quite plainly mean, "that shall have been spent". This document can therefore only mean that the parties are agreed that in return for Mrs. Marjorie McArdle's promise to do certain work, the bank will pay her a fixed sum by way of settling any claim she might otherwise have for what she would have spent on doing that work.

Nonsense

This document reached the bank via Monty McArdle. When Mrs. Holly McArdle died, if Mr. Astell Burt is right, Mrs. Marjorie McArdle must have been entitled to say to the bank: "I "have got an indefeasible right to recover this 488*l.* from you", and the bank must have paid it; but as I construe the document I think it is plain that the bank, reading it according to the ordinary sense of the language, could not have accepted that view; their attitude must have been this: we were told that we are to pay you this sum in settlement of some amount which will afterwards, that is, since the document was executed, have been due in respect of work done by you, if you have done it. We are bound to ask the donors whether the work promised has been done and whether, therefore, it is in order now for us to make

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this payment. It seems to me plain from the form that this document took, (and it was Monty McArdle's document) that the transaction was neither complete nor perfect, which it is essential that a voluntary equitable assignment should be. In other words, I do not think that it was a gift. The whole tenor of the document (not forgetting the stamp upon it) is quite contrary to the form which would have been appropriate to a gift. I quite agree with Mr. Astell Burt that there are cases showing clearly that, if a person entitled to a share, either immediately ascertained or to be later ascertained, in the residue of an estate, directs and authorizes the trustee to hand over that share or a part of it to another, that may well, and I will assume prima facie will, be treated by the court as operating as an equitable assignment—that is, as a voluntary gift of the share or the proportionate part as the case may be. But it does so because (and this is indeed Mr. Astell Burt's own test) the alleged donor has done everything that it lies in his power to do to make it complete and perfect. If this document had taken that form or had that effect, or if the intention that it should have that effect were clear (I refer to the passage I quoted from White and Tudor's Leading Cases in Equity (9th ed.), p. 105), then it would have operated as an equitable assignment. I regret that it has not that effect. I am for myself sorry that the other parties have been able, as I think they have, to evade the obligation which they imposed on themselves in 1945. But that is a matter for their conscience and not for this court.

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[His Lordship considered various issues of fact and concluded:] The result is that, regrettable though it may no doubt appear to some (including myself), I think that this appeal must be allowed.

Jenkins, L.J. I accept the proposition that a direction by a debtor to a trustee to pay a debt out of a specified trust fund may be a good equitable assignment of the trust fund to the extent of the debt. For that I need only refer by way of illustration to the last of the cases cited by Mr. Astell Burt: *Fisher* v. *Calvert* (10).

I am further prepared to accept the proposition that an equitable assignment of an existing interest in property of a character capable of being assigned may be a valid and binding assignment notwithstanding that it is made voluntarily—that is to say, notwithstanding that it has no consideration to support it and is in the nature of a mere gift. For that proposition reference may be made to two of the cases referred to: *Harding* v. *Harding* (11) and *German* v. *Yates* (12).

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(10) 27 W. R. 301.

But I accept that last proposition with this reservation: a voluntary equitable assignment, to be valid, must be in all respects complete and perfect so that the assignee is entitled to demand payment from the trustee or holder of the fund, and the trustee is bound to make payment to the assignee, with no further act on the part of the assignor remaining to be done to perfect the assignee's title. Failing these conditions, the voluntary assignment suffers the fate of other incomplete gifts: the donor has a locus pœnitentiæ and can change his mind at any time. No question of conscience enters into the matter, for there is no consideration, and there is nothing dishonest on the part of an intending donor if he chooses to change his mind at any time before the gift is complete.

Rules

To apply these considerations to the present case, the document which is said to operate as an equitable assignment is the document of April 30, 1945, signed by the five children of the testator. That document on the face of it purports to be an agreement for valuable consideration under which, when Mrs. Marjorie McArdle has carried out certain alterations and improvements to the property known as Gravel Hill Poultry Farm, in consideration of her so doing, the five children agree that she is to be paid a sum of 488*l.*, representing the cost of the work, out of the testator's estate when distributed. That is what it purports to be; and I think, notwithstanding the argument to the contrary, that it is really perfectly plain, so far as the construction of the document is concerned, that what it contemplates is the doing by Mrs. Marjorie McArdle of work yet to be done; and her doing that work is to form the consideration by virtue of which she is to be entitled to receive 488*l.* out of the estate.

That is what the document is, and if the document had correctly represented the facts, for my part I have no doubt that it would have operated as a valid equitable assignment of 488*l.*, subject to Mrs. Marjorie McArdle's performing her part of the bargain by providing the consideration she had contracted to provide in the form of doing the work. There might have been room for difficulty, and for argument, whether the work had been properly done or not, but those matters could have been resolved one way or the other, if necessary by an action; and ultimately, if Mrs. McArdle showed that she had done the work contracted for, her title to the 488*l.* would have been complete and, the agreement being for valuable consideration, it would not have mattered that further steps had to be taken in order to perfect her title.

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(11) 17 Q. B. D. 442.

(12) 32 L. T. 52.

But the true position was that, as the work had in fact all been done and nothing remained to be done by Mrs. Marjorie McArdle at all, the consideration was a wholly past consideration, and, therefore, the beneficiaries' agreement for the repayment to her of the 488*l.* out of the estate was nudum pactum, a promise with no consideration to support it. That being so, it is impossible for her to rely upon this document as constituting an equitable assignment for valuable consideration. But it is said that that does not matter, for it will serve its turn equally well as an equitable assignment voluntarily made; and, as appears from the second proposition which I have accepted for the purposes of this case, absence of consideration is not a fatal objection to an equitable assignment.

I return to the reservation subject to which I have accepted for the purposes of this case the general proposition that a voluntary equitable assignment may be valid and binding:—It is essential that such an assignment should be perfect and complete. Applying that test, it seems to me that Mrs. Marjorie McArdle's claim necessarily fails. It could not be said, in my view, that this document, presented to the bank, would give her a complete and perfect title to the 488*l.* The bank, in my view, would not have been obliged to pay that sum without taking proper steps to verify that the work which purported to form the consideration for the payment had in fact been done. That would inevitably have involved reference to the beneficiaries. The bank would ask the beneficiaries: "Are you prepared to release this sum of 488*l.*? "Mrs. Marjorie McArdle says the work has been done. Do you "agree?". If that had happened, it would, according to the evidence, have appeared that the work had in fact all been done before the document was signed. The bank might then well have asked: "That being so, what effect did you intend this document "to have? It purports to be a document for valuable consideration; now it looks as though there was no consideration at all". It seems to me that when they were thus referred to the beneficiaries might well have replied: "We had it in mind to make "a gift of the 488*l.* to Mrs. Marjorie McArdle; but what we in "fact did was to execute this document, which is not appropriate

" for that purpose, and now we have changed our minds and we " do not intend to make a gift of this 488*l*. at all ". It seems to me that, in the hypothetical circumstances which I have put, the beneficiaries would, owing to the necessity for the bank to refer to them to confirm Mrs. Marjorie McArdle's title to the 488*l*., have had a locus pœnitentiæ and would have been entitled to resile from the gift; and, as I have said, questions of conscience do not enter into the matter where donors choose to change their minds with respect to incomplete gifts.

Accordingly, in my judgment, this document, relied on as constituting, when communicated to the bank, a complete voluntary equitable assignment to Mrs. Marjorie McArdle of a sum of 488*l*. out of the testator's estate, fails to have that effect because it would not operate, and could not operate, to make a complete gift: it is a purported agreement for valuable consideration which is sought to be used for a different purpose, and, in my judgment, it is not available for that purpose.

Hodson, L.J. The judge decided the dispute in favour of Mrs. Marjorie McArdle on the footing that there was an equitable assignment of 488*l*., there being no contract between her and the signatories of the document of April 30, 1945, since there was no consideration moving from her. Mrs. Marjorie McArdle in this court has relied upon the document of April 30, 1945, admitting that it was not valid as a contract, for the reason that there was no consideration; and Mr. Astell Burt, on her behalf, has said, as I think he was entitled to say, that a direction to a debtor to pay out of a particular fund may be a good equitable assignment to the extent of the debt apart altogether from the question of consideration. But he is faced with this difficulty, which I think he is unable to get over: the evidence upon which he relies in support of his case that there is here a valid equitable assignment is the document of April 30, 1945, which is not expressed as a clean direction of the kind I have indicated, but is expressed as a contract to repay the sum of 488*l*. in consideration of certain alterations and improvements being carried out. It is, therefore, in my judgment, not open to him, having abandoned his case on contract, to read the document as if the contractual words did not appear therein.

Mr. Astell Burt has been compelled in his argument to read this document as if it began: " We the beneficiaries hereby agree " that the National Provincial Bank Ld. shall repay from the " estate when so distributed the sum of 488*l*. in settlement of the

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"amount spent on such improvements", ignoring the previous words. I think that the leaving out of those words is in itself fatal, because the bank, which has to act on the document, would have the words in front of it, and on reading those words there would, on the face of the document, be something further to be done by the donors to perfect the gift, because the bank would have to refer back to the donors to find out whether the donors were satisfied that the work referred to in the contract had been carried out. So the gift or equitable assignment, whichever way it is described (an equitable assignment without consideration being a gift), would be on the face of it incomplete. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Walmsley & Stansbury, for E. W. Marshall Harvey & Dalton, Bournemouth; E. P. Fullbrook & Co.; Routh, Stacey, Hancock & Willis.*

B. A. B.

C. A.
1951
Apr. 4.
Jenkins and Hodson, L.JJ.

DANISH MERCANTILE CO. LD. AND OTHERS *v.* BEAUMONT AND ANOTHER.

[1950 D. 659.]

Practice—Application to strike out name of plaintiff company—Adoption of proceedings by liquidator—Effect.

Where proceedings are started in the name of a plaintiff without proper authority, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, provided that the aggrieved defendant does not unduly delay his application. It is, however, open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, and to adopt the proceedings. When that has been done, then, in accordance with the ordinary law of principal and agent, and in accordance with the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object that the proceedings then ratified and adopted were in the first instance brought without proper authority.

Reynolds v. *Howell* (1873) L. R. 8 Q. B. 398; *London and Blackwall Ry. Co.* v. *Cross* (1885) 31 Ch. D. 354, and *Adams* v. *London Improved Motor Coach Builders Ld.* [1921] 1 K. B. 495 considered.

APPEAL from Roxburgh, J.

The first plaintiffs, Danish Mercantile Co. Ld., were incorporated on April 30, 1949, with a share capital of 2,000*l.* owned and controlled in equal proportions by one Sheridan, a British subject, and one Hoyer, a Danish subject, who were the only directors. The company was formed to import and sell in this country agricultural machinery manufactured in Denmark. The machinery was made by a Danish manufacturing company called Mads Amby, sold to a Danish firm called Daneco, in which Hoyer was interested, and resold by Daneco to the plaintiff company.

By a managing director's agreement dated May 4, 1949, between the company, Hoyer and Sheridan the latter was given wide powers of management. The agreement included a provision that "Mr. Sheridan shall manage and conduct the affairs "of the company as he in his sole discretion shall think fit", and a further provision that each of the parties thereto agreed and undertook "to do all acts and things and execute all docu-"ments necessary to carry this agreement into effect".

After the business of the company had been carried on for a year, disputes arose, with the result that the supply of machinery from Denmark was discontinued and other arrangements were made by Hoyer or his interests in Denmark for its marketing.

In reliance on his managing director's agreement, Sheridan instructed solicitors to start this action in the name of the plaintiff company. The action was approved neither by the company in general meeting nor by the board of directors before it was started.

The writ was issued on March 31, 1950. Interlocutory proceedings were taken and an interim injunction was granted in the action in April. In the course of the hearing of that motion, counsel for the defendants referred to the possibility of their contending that the proceedings had been brought without the authority of the company. The defendants were alive to that matter at that stage. On June 23, 1950, a petition was presented for the winding up of the company, and the usual compulsory winding-up order was made on November 4, 1950. The liquidator then appointed adopted the action.

On February 19, 1951, the defendants applied by motion to strike out the name of the company as plaintiff. Roxburgh, J., dismissed the motion, on the ground that the liquidator of the company had ratified the bringing of the action. The defendants appealed.

Shelley, K.C., and *H. E. Francis* for the defendants. This is an application to strike out the name of the company as plaintiff on the ground that the company was joined as plaintiff without its consent. The action was accordingly a nullity and it is not open to the liquidator of the company to adopt it. [They referred to *Keighley, Maxted & Co.* v. *Durant* (1); *Adams* v. *London Improved Motor Coach Builders Ld.* (2); *In re Lord E. Fitzgerald* (3), and *London and Blackwall Railway Co.* v. *Cross* (4).]

Aldous, for the plaintiff company, was not called on to argue.

JENKINS, L.J. Where an action is brought without the authority of the purported plaintiff it is, of course, well settled that the solicitor on the record for the purported plaintiff becomes personally liable to the defendants for the costs of the action.

[His Lordship stated the facts, and continued:] The grounds on which the present motion, which was launched on February 19, 1951, was opposed before the judge were these: first, reliance was placed on Sheridan's managing director's agreement of May 4, 1949. I will say no more about that agreement, because I am proceeding on the assumption that it was not effective to give Sheridan authority.

Secondly, it was said that a motion of this nature must be launched without delay and that there was such a delay in the present case as put the defendants out of court. The judge was much impressed by the facts adduced in support of that argument; but, for reasons which will appear, speaking for myself I find it unnecessary to decide whether, if the defendants had otherwise been able to make out a case of want of authority, they would have been shut out from pursuing this remedy on account of their delay, though I am far from saying that the judge was wrong in the conclusion at which he arrived on that aspect of the case. I am merely saying that I find it unnecessary to deal with that question one way or the other.

Thirdly, it is said that, even if it is conceded for the purposes of argument that the proceedings were in the first instance brought without authority, the liquidator in fact adopted the proceedings on behalf of the company and thus cured the original defect, on the ground that such a ratification relates back and cures the want of authority in the original act of the purported agent, just as in any other case of ratification. The judge

(1) [1901] A. C. 240.
(2) [1921] 1 K. B. 495.
(3) (1914) 112 L. T. 86.
(4) (1885) 31 Ch. D. 352.

decided that point in favour of the plaintiffs and in my judgment he was clearly right in doing so. Mr. Shelley, while not disputing the purported adoption of the proceedings by the liquidator, has addressed to us a careful argument designed to show that, where an action is brought without the authority of the purported plaintiff, the action is an utter and complete nullity, so that no amount of subsequent ratification can cure the defect; and he has referred us to a number of authorities which in his submission support the conclusion.

Of the cases on which he relied, the first was *Adams* v. *London Improved Motor Coach Builders Ld.* (5), which he cited for some observations of Atkin, L.J., who said: "I should like to point "out that it seems to follow that, if the defendants had been "successful in their contention that there was no employment by "the plaintiff of the solicitors, the result would be that the action "would be a nullity; it would be brought in the name of a "plaintiff who had given no authority to bring an action for him; "and the defendants would have the right to have the proceedings "stayed, and I presume to have the usual order that the solicitors "pay the costs of both parties. That is an application that can "be made equally by the defendant or by the plaintiff: see "*Geilinger* v. *Gibbs* (6); *Cape Breton Company* v. *Fenn* (7). I "do not stop to discuss those cases, but it seems to me to follow "from the fact of the action being brought without the authority "of the plaintiff that it is, so far as the defendants are concerned, "a nullity".

Next is *In re Fitzgerald (Lord)* (8), in bankruptcy, where the proceedings were brought in the name of the Official Receiver without his authority. A trustee in bankruptcy was subsequently appointed and he instructed the solicitors who had launched the proceedings to continue them in his name. The Official Receiver later pointed out that he had never authorized the proceedings, and the person against whom the proceedings were brought thereupon applied for a stay of all proceedings under the motion and asked that it might be dismissed as having been launched and maintained without the consent of the Official Receiver. Horridge, J., decided that the motion must be dismissed and that the solicitors must pay the opposite party's costs of the motion and of the application to stay the proceedings as between party and party, and also the solicitor-and-client costs of the Official Receiver.

(5) [1921] 1 K. B. 495, 503.
(6) [1897] 1 Ch. 479.
(7) (1881) 17 Ch. D. 198.
(8) 112 L. T. 86.

C. A.
1951

Danish Mercantile Co. Ld. v. Beaumont.

Jenkins, L.J.

Mr. Shelley placed some reliance on that case, because it is to be observed that the proceedings were stayed, even although the trustee wanted to carry them on; but that affords no true parallel to the present case, because the Official Receiver had never at any time authorized the proceedings. The question in the present case is a question between the company and the defendants, and the question is whether the company has effectively adopted the proceedings brought in its name. It is not a case where some successor of the original plaintiff, the original plaintiff never having authorized the proceedings, seeks to adopt and carry them on. There is no change of party in the present case. Therefore, I cannot regard that case as supporting Mr. Shelley's contention that the institution of the action without authority is a matter which admits of no subsequent ratification by the party made plaintiff.

The headnote to the report of *Reynolds* v. *Howell* (9) states: "Where an attorney brings an action without the authority of the "plaintiff, the plaintiff is entitled to have the proceedings stayed "without payment of costs". The question was whether the proceedings could be stayed unconditionally or stayed only on terms as to the costs. I think that the passage upon which Mr. Shelley principally relied was that where Blackburn, J., said (10): "How can we say that we ought to impose terms on "staying these proceedings, which, if the action went on further, "would be a nullity?". It is to be observed that there, again, appears the expression "a nullity", which was used by Atkin, L.J., in *Adams*' case (11). Mr. Shelley seeks to support his argument by stretching the word "nullity" to its fullest extent, so as to mean absolutely void ab initio without any possibility of subsequent validation; but I think that the most significant part of the judgment of Blackburn, J., in this case of *Reynolds* v. *Howell* (12) is to be found at the end of his judgment, in the passage to which Hodson, L.J., called attention in the course of the argument, where his Lordship said (13): "In this "case, as the action was brought without authority, on the "authority of *Robson* v. *Eaton* (14), the plaintiffs are entitled to "have the action stayed, and without payment of costs. I may "add that, in my opinion, if a plaintiff after action brought in "his name by an attorney without authority hears of it, and does "not repudiate it, he will be supposed to have ratified the

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(9) (1873) L. R. 8 Q. B. 398.
(10) Ibid. 399.
(11) [1921] 1 K. B. 495.
(12) L. R. 8 Q. B. 398.
(13) Ibid. 400.
(14) (1785) 1 T. R. 62.

"attorney's act". That passage seems to me to show clearly that, in the view of Blackburn, J., it was possible for a plaintiff to ratify the act of an attorney or solicitor in bringing an action in the name of that plaintiff without previously obtaining that plaintiff's authority so to do.

Lastly, Mr. Shelley referred to *London and Blackwall Railway Co.* v. *Cross* (15), when the case was before the Court of Appeal. The question in that case was whether the injunction could be granted to restrain the unauthorized use of the complainant's name in certain other proceedings and, reversing the judgment of Chitty, J., it was held in this court that that was not a permissible remedy. In the course of the judgments, a distinction was drawn between an application of that kind and an application of the kind which is now before this court; that is to say, an application in an action to stay the proceedings or strike out the plaintiffs on the ground that the proceedings were brought without the plaintiffs' authority. Lindley, L.J., said (16): "He"—that is, Chitty, J.—"put it on this ground, that Mr. Cross was "proceeding without authority, and that therefore there was "jurisdiction to restrain him from using the names of his alleged "principals, and he referred to the doctrine that if an action is "brought by a person without authority it can be stopped. That "is, no doubt, quite true, but upon what principle is that done? "It is upon the principle that the court can control the proceedings before itself, and if a person without authority is "bringing an action in the name of another it is an abuse of the "process of the court, and the court can stop it".

Then Fry, L.J., said (17) in the same context: "In that class "of cases the court stays the proceedings because it finds that "there has been an abuse of its own process, and because it has "a duty to keep its records truthful and prevent proceedings "taken before it from being other than what they are represented "to be". Then he contrasted that with the question of granting an injunction, which he said, the court had no general jurisdiction to do in certain cases.

Lopes, L.J., said, to the same effect (18): "It does not "appear to me that the analogy is correct, for there the court "would strike out the name of the plaintiff or defendant, or stay "the proceedings, as the case might be, on the ground that it "had full authority to prevent any abuse of its own proceedings"

(15) 31 Ch. D. 354.
(16) Ibid. 370.
(17) Ibid. 371.
(18) Ibid. 373.

I find nothing in any of those cases to constrain me to hold that the issue of a writ and the commencing of an action with the authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the solicitor concerned. So to hold would be to introduce, as I see it, an entirely novel doctrine into the ordinary law of principal and agent and to make a new exception to the general rule that every ratification relates back and is deemed equivalent to an antecedent authority.

In the absence of any decision compelling me to do so, I, speaking for myself, decline so to hold. I agree with what was said by Roxburgh, J., and I think that he rightly took the view that to accede to Mr. Shelley's contention would be inconsistent with the authorities in which questions of this kind have arisen, particularly in relation to companies. I would refer to the passage in Buckley on the Companies Acts (12th ed.), p. 169, where the relevant law is, in my view, correctly summarized. The passage occurs in the course of a discussion on the circumstances in which a company's name can be used as plaintiff in an action and the exceptions to the general rule that a company is the only proper plaintiff in respect of a wrong done to the company, a discussion, in short, of the aspect of company law related to what is commonly called the rule in *Foss* v. *Harbottle* (19).

The relevant passage (in Buckley) for the present purpose is in these terms: "(6) If the case be one in which the company "ought to be plaintiff, the fact that the seal is in the possession "of the adverse party will not necessarily preclude the intending "plaintiffs from using the company's name. Neither will it be "necessary to obtain the resolution of a general meeting in favour "of the action before the writ is issued. In many cases the "delay might amount to a denial of justice. In a case of "urgency, the intending plaintiffs may use the company's name "at their peril, and subject to their being able to show that they "have the support of the majority. In an action so constituted, "the court may give interlocutory relief, taking care that a "meeting be called at the earliest possible date to determine "whether the action really has the support of the majority or "not".

That passage, where it refers to the calling of a meeting, accords with the well-settled practice of the court in cases in which, in proceedings brought by a company, a dispute arises as to the authority with which the company's name has been used as plaintiff. It is common practice in such cases to adjourn any motion brought to strike out the company's name, with a view to a meeting being called to see whether the company desires the action to be brought or not. At first sight, that procedure is wholly inconsistent with Mr. Shelley's contention that an action brought without authority is a nullity which cannot be validated by ratification, as it would be entirely idle, if Mr. Shelley is right, to hold such a meeting at all. But Mr. Shelley seeks to extricate himself from that difficulty by an argument on these lines. He admits that it is the practice of the court in such cases to direct a meeting to be held; but the meeting is called, not to find out whether the corporators desire the action to proceed at the date of the meeting, but to find out whether, at the date on which the writ was issued, the corporators, if consulted on the matter, would have agreed to the action being brought.

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(19) (1843) 2 Hare 461

That seems to me to introduce a wholly impracticable refinement into this branch of the law. If Mr. Shelley's argument is right, then, for example, if shares had changed hands between the date when the writ was issued and the date when the meeting was held to decide whether the action was to proceed or not, such meeting, on the face of it, would be quite idle, because the only people whose views could be relevant in the matter would be those people who held the shares at the date when the action was brought. I can see really no justification at all for so understanding the law as summarized, correctly in my view, in the passage I have quoted from Buckley.

I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption as to the authority, does so at his own peril, and that, so long as the matter rests there, the action is not properly constituted. In that sense, it is a nullity and can be stayed at any time, provided that the aggrieved defendant does not unduly delay his application; but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action. When that has been done, then, in accordance with the ordinary law of principal and agent and in accordance with the ordinary doctrine of ratification, in my view, the defect in the proceedings as originally constituted is cured; and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were, in the first instance, brought without proper authority.

For these reasons I am of the opinion that Roxburgh, J., came to a right conclusion, and that this appeal fails and should be dismissed.

HODSON, L.J. I am prepared to assume, as did my Lord and the judge, that the proceedings were instituted without authority, because no argument has been addressed to this court on the effect of the agreement of May, 1949. Similarly, I do not propose to say anything about the question whether the defendants are disabled by reason of the delay which has taken place, for the simple reason that Mr. Shelley has not been called upon to argue upon that point. I, like my Lord, would rest my judgment on the presence of ratification. If the law is correctly set out in the passage of Buckley on the Companies Acts (12th ed.), p. 169, to which my Lord has referred, this case is not in essence different from the ordinary case in which someone, acting on behalf of the company or purporting to act on behalf of the company, issues a writ at his peril and subsequently obtains the necessary support of the company to that action. In my view, it is impossible to argue that proceedings instituted without authority are, in the technical sense of the word, a nullity; and the cases referred to on that page of Buckley indicate the contrary.

Mr. Shelley, however, has founded an argument particularly on two cases in which the word "nullity" was used. In the first case, *Adams* v. *London Improved Motor Coach Builders* (20) the question was whether a plaintiff who had given no written retainer to his solicitors was entitled to judgment in the action against the defendant with costs; and it was in that case that Atkin, L.J., said (21): "if the defendants had been successful in "their contention that there was no employment by the plaintiff "of the solicitors, the result would be that the action would be "a nullity; it would be brought in the name of a plaintiff who "had given no authority to bring an action for him; and the "defendants would have the right to have the proceedings stayed, "and I presume to have the usual order that the solicitors pay "the costs of both parties". The Lord Justice was clearly applying himself to the case before him and not considering whether the proceedings would be, in a technical sense, a nullity, because, if there was really a nullity, there would be nothing to stay.

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(20) [1921] 1 K. B. 495.

(21) Ibid. 503.

The same observation applies to *Reynolds* v. *Howell* (22), where Blackburn, J., said: "How can we say that we ought to "impose terms on staying these proceedings, which, if the action "went on further, would be a nullity?". That he did not regard the proceedings as, in the technical sense of the word, a nullity is clear from the final passage in his judgment, in which he expressly adverted to the possibility of ratification of the attorney's act by the plaintiff after action brought. Mr. Shelley sought to confine that observation to the relationship between the plaintiff and his solicitor, as opposed to the relationship between the plaintiff and the defendants. I do not think that the observation can be properly so confined, and I see no difficulty in Roxburgh, J.'s view, which I think is perfectly correct, that the act of the liquidator in this case has been sufficient to ratify such defect, if any, as previously existed.

For these reasons as well as for those given by my Lord, I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Payne, Hicks Beach & Co.; Osmond, Bard & Westbrook.*

B. A. B.

(22) L. R. 8 Q. B. 398, 399.

Affirmed.
[1951] Ch. 1074

In re POWER'S SETTLEMENT TRUSTS.

POWER AND OTHERS *v.* POWER.

WYNN-PARRY, J.

1951
Apr. 4.

Trustee—Appointment of additional trustees—Statutory power—Whether donee of power entitled to appoint himself—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 36, *sub-s.* 6.

Sub-section 6 of s. 36 of the Trustee Act, 1925, provides: " . . . (*a*) the person or persons nominated for the purpose of "appointing new trustees by the instrument, if any, creating the "trust; or (*b*) if there is no such person, or no such person able "and willing to act, then the trustee or trustees for the time being; "may, by writing, appoint another person or other persons to be an "additional trustee or additional trustees . . .".

WYNN-PARRY, J.

1951

POWER'S SETTLEMENT TRUSTS, *In re.* POWER *v.* POWER.

The words "another person or other persons" in that sub-section mean a person or persons other than the appointor. Accordingly, a donee of the power of appointing an additional trustee or trustees may not appoint himself.

In re Sampson [1906] 1 Ch. 435 followed; *Montefiore* v. *Guedalla* [1903] 2 Ch. 723 considered.

ADJOURNED SUMMONS.

A settlement dated February 22, 1939, provided by cl. 16: "The power of appointing a new trustee or new trustees hereof "shall be vested in the settlor during his life and after his death "in George [the defendant] during his life . . .".

The settlor being dead, the defendant, who was tenant for life, appointed himself as an additional trustee by a deed of appointment, dated August 15, 1950. It was not in dispute that the power contained in cl. 16 was the statutory power prescribed by sub-s. 6 of s. 36 of the Trustee Act, 1925 (1). The question asked on the summons was whether, having regard to that sub-section, the appointment of August 15, 1950, was valid and effective.

Upjohn, K.C., and *M. Berkeley* for the plaintiffs. The settlement does not contain a special power of appointment. It is the common form power conferred by statute. The question is whether the relevant statutory provision, sub-s. 6 of s. 36 of the Trustee Act, 1925, empowers a donee of a power of appointing new trustees to appoint himself. The difference in language between sub-s. 6 and sub-s. 1 of s. 36 is significant.

Sub-section 6 provides that the appointor may appoint "another person . . ."; this must mean some person other than the appointor. The word "another" connotes two persons.

It is plain, on a comparison of sub-s. 1 and sub-s. 6, that there is a difference in the class of persons who may be appointed.

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(1) By sub-s. 1 of s. 36 of the Trustee Act, 1925, the persons appointing substitutional trustees "may, "by writing, appoint one or more "other persons (whether or not being "the persons exercising the power) to "be a trustee or trustees in the place "of the trustee" ceasing to act as such, or desiring so to do.

By sub-s. 6 of s. 36: ". . . (*a*) the "person or persons nominated for the "purpose of appointing new trustees "by the instrument, if any, creating "the trust; or (*b*) if there is no such "person, or no such person able and "willing to act, then the trustee or "trustees for the time being; may, by "writing, appoint another person or "other persons to be an additional "trustee or additional trustees . . .".

By sub-s. 1 of s. 10 of the Trustee Act, 1893, the persons appointing substitutional trustees may "by writing, "appoint another person or other persons to be a trustee or trustees in "the place of the trustee" ceasing to act, or desiring so to do.

In sub-s. 1 the legislature has made it clear by the inclusion of the words in brackets "(whether or not being the persons exer-"cising the power) . . ." that the donee of the power may appoint himself.

Sub-section 6 uses the phraseology of the earlier statute, sub-s. 1 of s. 10 of the Trustee Act, 1893. It is therefore necessary to have regard to the authorities earlier than the legislation of 1925. *In re Skeats' Settlement* (2) was concerned with the construction of a special power of appointing new trustees. The construction there of the word "other" is authority for the proposition that the donee of the power cannot appoint himself. The words of that power are practically indistinguishable from the wording of sub-s. 6 of s. 36. That decision was followed in *In re Newen* (3). Kekewich, J., held in *In re Sampson* (4) that the power of appointing new trustees contained in sub-s. 1 of s. 10 of the Trustee Act, 1893, could not include the appointor himself.

Where words in a statute have been construed by the court, and the same words are used in an amending and consolidating Act, it is not permissible to say that in the new Act they mean something different from that construction. No alteration in the law was intended in sub-s. 6 of s. 36. When the legislature desired to include the appointor among the class of persons who could be appointed, as in sub-s. 1, it did so expressly. This appointment is therefore invalid.

Milner Holland, *K.C.*, and *T. A. C. Burgess* for the defendant. Section 36 must be construed as a whole. It is not possible in this court to question *In re Sampson* (4), but that decision concerned the construction of sub-s. 1 of s. 10 of the Act of 1893; that sub-section related to a different subject-matter from s. 36, sub-s. 6, of the Act of 1925, namely, the appointment of substitutional trustees. That sub-section is replaced by sub-s. 1 of s. 36, in which the appointor is expressly included in the class of persons who may be appointed a trustee.

On the plaintiffs' construction of sub-s. 6, the words "other "persons" would bear a different meaning in two sub-sections of the same section. The court ought not to construe a statute as having such an effect. That construction should not be followed because: (1.) if an appointor can appoint himself a substitutional trustee, he ought, on a common-sense view, to be able to appoint himself an additional trustee; (2.) the word

(2) (1889) 42 Ch. D. 522.

(3) [1894] 2 Ch. 297.

(4) [1906] 1 Ch. 435.

"another" in its primary meaning denotes a "second", "further" or "additional". [He referred to the Oxford English Dictionary.]

The effect of *In re Sampson* (4) must be conceded, but it is not applicable here. Sub-section 6 is new, and it should not be construed by reference to the authorities on sub-s. 1 of s. 10 of the Trustee Act, 1893, which was concerned with different circumstances. The court should hold that the defendant's appointment of himself as an additional trustee was valid.

Upjohn, K.C., replied.

WYNN-PARRY, J. [having stated the facts]:—If the only relevant statutory provision to be considered were sub-s. 6 of s. 36 of the Trustee Act, 1925, and if the matter were res integra, I should have construed it as a provision which did not exclude the donee of the power from appointing new trustees from the class of persons who could be appointed trustees, for I should have treated the phrase "appoint another person or other persons" as pointing a contrast between the person or persons to be appointed to the particular office of trustee, upon the one hand, and those who were the existing trustees, on the other hand.

It is urged that, upon that view, the words "another" and "other" must be otiose. I think that they merely add style to the language. The object of the provision is to appoint, in effect, additional trustees. The step is to appoint an additional individual, or individuals, to the office of trustee, and it would seem to me, were the matter res integra, to be straining the language to say that the persons referred to in the phrase which I have quoted were persons other than the donee of the power, or the person exercising the power under the section.

The matter, however, is not free from authority. [His Lordship read sub-s. 1 of s. 36 and continued:] It is to be observed, in the first place, as a matter of construction, that the effect of the words in brackets, "(whether or not being the "persons exercising the power)", is necessarily that the word "other" in the immediately preceding phrase, "one or more "other persons", must refer not to the person exercising the power, but the trustee in whose place it is intended to make an appointment. The words in brackets, "(whether or not being "the persons exercising the power)", were clearly deliberately included by the legislature in view of the existing state of the authorities, the effect of which was to exclude the person exercising the power from the class of persons who could be appointed trustees.

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(4) [1906] 1 Ch. 435.

The relevant cases start with *In re Skeats' Settlement* (5). That was a case involving the construction of a special power of appointing new trustees. The relevant power was (6) " to appoint " any other person or persons to be a trustee or trustees in the " place of the trustee or trustees so dying, or going to reside " abroad, or desiring to retire, or refusing, or becoming incap" able, to act . . .". Kay, J., held first that, the power of appointing new trustees being a fiduciary power, the donee of such a power could not appoint himself. With that aspect of the matter I am not concerned, but he also held that the terms of the power, with which I am concerned, require that the trustee or trustees to be appointed should be some person or persons other than the person or persons making the appointment.

In the course of his judgment on this latter point, he read the terms of the power, and proceeded (7): " . . . the question is what " is the meaning of the word ' other '. Does it mean other than " the person who is dead? If it does, it is admitted the word " is superfluous. Does it mean other than the trustee who is " retiring? There again it is quite superfluous, because the " retiring trustee would not be appointed; it would not be neces" sary or possible that he should be appointed. Does it mean " other than the trustee residing abroad or becoming incapable? " It would have some meaning in those cases, no doubt; a better " meaning than if you apply it only to the trustee who is dead " or desires to retire. But why should it not mean other than " the person making the appointment as well? I observe that " the person making the appointment may be the continuing " trustee. The continuing trustee may appoint ' any other " ' person or persons to be a trustee or trustees ', etc. In that " case, ' other ' must mean some other person than the trustee " deceased, or going abroad, or retiring, or refusing, or becoming " incapable to act, and also other than the trustee making the " appointment, that is to say, other than the appointor himself. " Or if continuing trustee only refers to the case of a trustee " being dead, still ' other ' must mean other than the continuing " trustee himself. He cannot possibly appoint himself. Well, " then, take the case of the executors or administrators of the

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(5) 42 Ch. D. 522.
(6) Ibid. 523.
(7) Ibid. 528.

"last acting trustee. Can this mean that the executors or "administrators of the last acting trustee, who are to appoint any "other person or persons to be trustee or trustees, may appoint "themselves? The more natural meaning to give to the word "'other' is to say that it must be other than the trustee to "be replaced, and the person who is replacing him by making "the appointment".

From that passage it is clear that the type of wording in sub-s. 6 involves language, the construction of which is not free from authority. That decision was followed in *In re Newen* (8). Kekewich, J., in that case, considered first the general question, to which Kay, J., had also addressed himself, and expressed a definite opinion, that, by reason of the fiduciary nature of the power, whatever might be the terms of its language, the donee must be excluded from the class of persons who could be appointed as trustee. He also dealt, however, with the question of construction, and said (9): "In the present case a different point "occurred. It seems that all the trustees appointed by the will "are dead; and the last surviving trustee appointed an executor, "who died in her lifetime. Then these two ladies were entitled "to administer the estate, and they did so; they obtained letters "of administration with the will annexed, the result being that, "either under the Act or under the will, they had power to "appoint new trustees. That power goes to the surviving or "continuing trustee or trustees for the time being, or the "executors or administrators of the last surviving trustee, which "these ladies were. They are, according to the power, to appoint "'any other proper person or persons' to be a trustee or "trustees. They appointed one of themselves, a lady, and the "two others were gentlemen. That, to my mind, was entirely "wrong. The case really comes within the decision of Kay, J., "in *In re Skeats' Settlement* (10); but, quite apart from that, "I have not myself the slightest doubt that it is wrong in "principle. Mr. Warmington gave it up on the ground, amongst "others, but sufficiently on the ground, that the power was to "appoint 'any other proper person or persons', and that you "cannot yourself be another person than yourself; that is no "doubt sufficient". Then he considered the broader aspect of the matter upon the basis that the power was a fiduciary power.

Buckley, J., however, in *Montefiore* v. *Guedalla* (11), held that there was no rule that the donee of a power to appoint new trustees was unable to appoint himself. He discussed the two cases to which I have referred, but he put the matter in this way (12): " Mr. Jessel has cited a number of cases bearing on " the point, and I have considered them with a view to seeing " whether the court has ever laid it down that the donee of a " power of appointing new trustees cannot appoint himself. I " say emphatically ' cannot ', for the question is not whether it " is improper for him to do so, but whether he cannot do so, in " the sense that he is outside the class of persons who are capable " of being appointed. I do not think the court has ever laid that " down. The first step is to look at the language of the power. " Where you find that the power is to appoint some ' other ' " person, the question may arise whether that means some person " other than the appointor. In such a case the donee of the " power may not be amongst the persons capable of being " appointed. But in the present case the word ' other ' does not " appear. The words of the power are simply ' to appoint a new " ' trustee or trustees '; so that by the language of the instrument " the executors who are the appointors are not excluded from the " class ".

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(8) [1894] 2 Ch. 297.

(9) Ibid. 308.

(10) 42 Ch. D. 522.

(11) [1903] 2 Ch. 723.

It is clear from that passage that Buckley, J., took the view that it was first necessary to construe the language of the document in question and then to see whether, as a matter of construction, the donee of the power was excluded from appointing himself.

That case was considered in *In re Sampson* (13), where Kekewich, J., had to construe the statutory power of appointing new trustees conferred by sub-s. 1 of s. 10 of the Trustee Act, 1893. [His Lordship read sub-s. 1 of s. 10 of the Act of 1893, and continued:] Kekewich, J., quoted part of the passage from *Montefiore* v. *Guedalla* (14) which I myself have quoted, and said that he proposed to take what Buckley, J., called the first step and look at the language of the power, which was, of course, contained in sub-s. 1 of s. 10 of the Trustee Act, 1893. Having referred to the power, he said (15): " What does ' another " ' person or other persons ' mean? Does it only mean some " person or persons other than the trustees who are dead or are " remaining out of the United Kingdom, or who desire to be " discharged, or refuse, or are unfit, or incapable? or does it also " mean some person or persons other than the person exercising

(12) [1903] 2 Ch. 723, 725.
(13) [1906] 1 Ch. 435.
(14) [1903] 2 Ch. 723, 725.
(15) [1906] 1 Ch. 438.

"the power of appointment? Now let us go back. The power "is given to the person nominated by the instrument, if any, "creating the trust to make the new appointment, and he is to "appoint 'another person or other persons' to be trustees. "Surely that must mean that the person appointed trustee is to "be another person different from the person or persons nominated for the purpose of appointing new trustees. If there is "no such donee expressly nominated, then the surviving or "continuing trustee—which latter includes a retiring or refusing "trustee—is to appoint 'another person or other persons' to be "trustees. It would be reducing it to absurdity to say that they "might appoint themselves, for in neither case could the person "making the appointment possibly appoint himself, because in "the one case he is already a trustee, and in the other case he "is a retiring or refusing trustee. So that it is clear that where "the appointment is made by a continuing or surviving trustee "or by a retiring or refusing trustee the words 'another person "'or other persons' must mean some person or persons other "than the person exercising the power of appointment, and it "follows that these words must bear the same meaning when "the persons exercising the power are the personal representatives of the last surviving or continuing trustee, for, whatever "the words mean, they must bear the same meaning throughout, "whether the power is being exercised by the surviving or continuing trustee or by the personal representatives of the last "surviving or continuing trustee".

I have read that passage because it shows beyond doubt that Kekewich, J., gave careful consideration to the question and careful reasons for his conclusion that, on the true construction of the power contained in sub-s. 1 of s. 10 of the Trustee Act, 1893, he thought that the effect of the phrase "may appoint "another person or other persons to be a trustee or trustees" and the use of the words "another" and "other" was to exclude the donee of the power from the class of persons capable of being appointed trustees.

That section, of course, provided for the appointment of a new trustee, or new trustees, in place of an existing trustee, and did not deal with the case of appointing additional trustees. It is clear, on that review of the authorities, why in sub-s. 1 of s. 36 of the Trustee Act, 1925, the words in brackets, "(whether "or not being the persons exercising the power)", were inserted. Having regard to that body of authority, but for the introduction of those words this court would have been bound to give to the word "other", the effect that was given to the words "another "person or other persons" in sub-s. 1 of s. 10 of the Act of 1893.

It is, however, to be observed that the power to appoint is couched, in sub-s. 1 of s. 36 of the Trustee Act, 1925, in somewhat different language. It is a power to "appoint one or more "other persons", in contra-distinction to power to "appoint "another person or other persons", which appears both in sub-s. 1 of s. 10 of the Trustee Act, 1893, and in sub-s. 6 of s. 36 of the Trustee Act, 1925.

I am faced with this difficulty: on the one hand, the force of the words in brackets in sub-s. 1 of s. 36 of the Trustee Act, 1925, leads, as I have said, necessarily to the conclusion that the phrase "other persons" refers to persons other than the trustee or trustees in place of whom the proposed appointment is to be made; on the other hand, I have the express provision in that sub-section, in the words in brackets, that the donee of the power is not to be treated as excluded from the class of persons capable of making the appointment.

In sub-s. 6 a slightly different phrase is used. The phrase is "appoint another person or other persons" instead of "appoint "one or more other persons", and there is a complete absence of any such provision as the words in brackets, "(whether or not "being the persons exercising the power)", which appear in sub-s. 1. If I could regard myself as free to do so, I should incline to the view that sub-s. 6, which relates to a different subject-matter from sub-s. 1, should be construed in the way indicated at the beginning of this judgment, and I should be inclined to regard the introduction of the words in brackets in sub-s. 1 as having been introduced there for the express purpose of displacing the rule which may be extracted from the authorities to which I have referred. On the other hand, I am faced with the difficulty that Kay, J., in *In re Skeats' Settlement* (16), and Kekewich, J., in *In re Newen* (17) and *In re Sampson* (18) (the last a case on the construction of the previous statutory power) have taken a definite view as to the effect which should be given to the phrase "another person or other persons".

It was urged upon me by Mr. Milner Holland that the decisive consideration should be that, although the same words appear in sub-s. 1 of s. 10 of the Trustee Act, 1893, as in sub-s. 6 of s. 36 of the Act of 1925, the words in sub-s. 6 have an entirely

(16) 42 Ch. D. 522.

(17) [1894] 2 Ch. 297.

(18) [1906] 1 Ch. 435.

different purpose from those in sub-s. 1 of s. 10 of the Act of 1893. Much as I would like to accede to that argument, I cannot feel that it is sound. It is true that there is a different purpose; in the one case the appointment is to be made in substitution for a person ceasing to be a trustee for one or a number of reasons, while in the other case, sub-s. 6, the appointment is that of an additional trustee; but in each case there is the previously existing position to be considered: in the first case the vacancy in the trust and in the second the intention to appoint an additional trustee. There exists in each case, therefore, a situation in which the phrase "another person or other "persons" has to be construed.

When I add to that the circumstance that, in sub-s. 1 of s. 36, there is the express provision represented by the words in brackets, with the utmost of reluctance I feel driven to the conclusion that, at any rate so far as this court is concerned, I ought not to give to the phrase "appoint another person or other "persons to be an additional trustee or additional trustees" a meaning different from that which was given to the same words in sub-s. 1 of s. 10 of the Act of 1893 by Kekewich, J., in *In re Sampson* (18). That is a decision which has stood without any judicial criticism since 1906.

It may be said to represent a capricious result that, whereas, when there is a vacancy, the defendant in this case can appoint himself a trustee; when there is not a vacancy he cannot do so. That appears to me, unfortunately, to be the result of the language of the Act, and it appears to me that that result can only be avoided by either an amendment of the Trustee Act, 1925, or as a result of a review by a higher court of the reasoning underlying the cases to which I have referred, and particularly *In re Sampson* (18).

For those reasons I feel constrained to declare that the deed of appointment of August 15, 1950, was invalid and ineffective on the ground that, on the true construction of sub-s. 6 of s. 36 of the Trustee Act, 1925, the defendant had no power to appoint himself to be an additional trustee of the settlement.

Declaration accordingly.

Solicitors: *Collyer-Bristow & Co.; Woodcock, Ryland & Co., for Preston & Redman, Bournemouth.*

I. G. R. M.

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(18) [1906] 1 Ch. 435.

PEARLBERG *v.* MAY.

C. A.

[1949 P. 1209.]

1951
Apr. 9, 10, 11.

Evershed, M.R., Jenkins and Hodson, L.JJ.

Vendor and purchaser—Specific performance—Purchaser remaining in possession—Delay in completion—Purchase money—Payment into court—Interest payable after lodgment.

Where under a contract for the purchase of real estate which provides for the payment of interest on the purchase money not paid on the day fixed for completion, the purchaser, being in possession before completion, is directed, in accordance with the practice settled by *Greenwood* v. *Turner* [1891] 2 Ch. 144, to lodge the purchase money in court as an alternative to giving up possession, that lodgment does not absolve him from the obligation to pay interest at the contract rate.

Decision of Harman, J., ante, p. 104, affirmed.

Appeal from Harman, J. (1).

By two contracts dated November 24, 1948, which for the purpose of the action were treated as one, the plaintiff, Mrs. Pearlberg, agreed to purchase from the defendant, Jonathan May, a property known as the Cams Hall Estate, Fareham, Hampshire, for 33,925*l.*, and she paid deposits amounting to 3,392*l.* 10*s.* The contract took the form of printed particulars of sale which included special conditions, by one of which the property was sold subject to the National Conditions of Sale (14th ed.).

By special condition 3 it was provided: " (*a*) The date fixed " for completion is January 12, 1949. The balance of the pur- " chase money (credit being given for the deposit of 10 per cent. " payable on the sale) is to be paid on that day, and if not so paid " will carry interest at 5 per cent. until payment, or the vendor " at his option shall take the rents and profits of the property " down to the actual date of completion ". Paragraph (b) provided that the deposit should be paid to the vendor's agent.

The National Conditions of Sale (14th ed.), so far as relevant, provide: " 5 (1.) If from any cause whatever (save as hereinafter " provided) the purchase shall not be completed on the day fixed " for completion the purchaser shall pay interest on the remainder " of his purchase money at the rate provided by the Special " Conditions . . . until the purchase shall actually be completed. " . . . (3.) . . . if the delay arises . . . from any cause other " than the neglect or default of the purchaser, and if the

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(1) Ante, 104.

"purchaser (not having been let into possession of the property) "places the remainder of his purchase-money (at his own risk) at "interest on a deposit account . . . or on any security which the "purchaser may select, and gives written notice thereof to the "vendor or his solicitor . . . the vendor shall from the time of "such notice be entitled to such interest only as shall be actually "produced by such deposit or security. . . . 6 (1.) If the purchaser is let into possession of the property before the actual "completion of the purchase, then, as from the date of his "taking possession and until actual completion of the contract "or until he gives up possession to the vendor, the purchaser "shall (i) pay interest on the remainder of the purchase money "at the rate of 4 per cent. per annum".

The date for completion was postponed by agreement until May 10, 1949, the purchaser paying a further 10,000*l.* on account of the purchase money. She was let into possession on January 12, 1949, and had remained in possession ever since. She failed to complete on May 10, 1949, and, notice having been given by the vendor of his intention to resell the property in accordance with condition 23 of the National Conditions of Sale, the purchaser issued the writ in this action for specific performance and an injunction to restrain resale.

The purchaser in her statement of claim alleged that since May 10, 1949, she had always been ready to complete but that the vendor was in default by reason of his failure to give vacant possession. She alleged that she had not been given possession of a certain part of the property. By way of defence and counterclaim the vendor also asked for specific performance, alleging default on the part of the purchaser.

On June 9, 1949, immediately after the delivery of the statement of claim, the vendor moved the court for an order upon the purchaser to pay into court the balance of the purchase money and interest, amounting to 20,832*l.* 7*s.*, or, alternatively, that the action should be dismissed. The motion was not in the ordinary form in such a case, in that it did not ask that the purchaser should lodge the purchase money in court or go out of possession. It was, however, treated as though that had been its object. It was supported by an affidavit alleging that the purchaser had been let into possession of the property on January 12, 1949, and had so remained ever since.

The purchaser did not file any evidence on the motion, and on June 21, 1949, an order was made in these terms: "Let "the [purchaser] on or before July 5, 1949, lodge in court

"20,832*l.* 7*s.*, being the unpaid balance of the purchase money "and interest to June 9, 1949 (together with interest on the "principal sum of 20,532*l.* 10*s.* at 4 per cent. per annum from "June 10, 1949, to the day of lodgment) for the freehold pro-"perty known as Cams Hall, Fareham, in the county of "Southampton, and land adjoining thereto in the said writ "mentioned. And in default of the [purchaser's] so lodging "the said sum within the time aforesaid let the [purchaser] on "or before July 5, 1949, deliver up to the [vendor] possession of "the said property". It was agreed that the rate of 4 per cent. mentioned in this order in respect of the period from June 10 to July 5 was a slip for 5 per cent.

The purchaser having abandoned her contention that she had not been given possession of the whole of the property, the parties were agreed that no matters now remained in dispute in the action except the question whether interest was payable on the balance of the purchase price from the date of payment in to the date of completion.

That question came before Harman, J., for decision. He held that lodgment of the balance of the purchase money in court did not absolve the purchaser from her obligation to pay interest on that balance at the contract rate until completion. The purchaser appealed. (The vendor died shortly before the appeal was heard and the action was continued against his personal representatives.)

Pennycuick, K.C., and *I. S. Warren* for the purchaser. It is contended that, as from the date of payment into court of the balance of the purchase money, it became in equity the property of the vendor so that no interest remains payable by the purchaser under the terms of the contract pending the actual completion of the purchase. The purchase money in equity is the property of the vendor, just as the land purchased is in equity the property of the purchaser. It was therefore for the vendor to obtain the investment of the money in court so as to secure interest at least corresponding to the interest of 5 per cent. otherwise payable by the purchaser under the contract.

Harman, J., took the contrary view—that the money paid into court was paid by way of security. The only authority for that, on which he relied, was *Humphries* v. *Horne* (2). But under the old law it was recognized as a payment in for the benefit of

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(2) (1844) 3 Hare 276.

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the vendor. It is true that both sides could have applied for investment of the money paid into court, but it is contended that the mistake in not doing so was the vendor's. [They referred to *Shaw* v. *Foster* (3).]

When regard is had to the old authorities starting with *D'Oyley* v. *Countess of Powis* (4), it appears that the view of the court was that the deposit belonged to the vendor: see also *Roberts* v. *Massey* (5); *Clarke* v. *Wilson* (6); *Gibson* v. *Clarke* (7); *Burroughs* v. *Oakley* (8). The principle laid down in these cases is that a purchaser cannot retain possession of the property being sold and withhold the purchase money, although a special bargain can be made: see *Dixon* v. *Astley* (9); *Cutler* v. *Simons* (10); *Bradshaw* v. *Bradshaw* (11). Other cases exhibiting the same principle are *Smith* v. *Lloyd* (12); *Bramley* v. *Teal* (13); *Wickham* v. *Evered* (14); and *Gell* v. *Watson* (15). In all these cases and also in *Tindall* v. *Cobham* (16); *Small* v. *Atwood* (17) and *Brown* v. *Newall* (18), the same principle is applied. *Humphries* v. *Horne* (19), on which Harman, J., relied, is distinguishable, as there is no statement in that case that the purchaser was in possession and the statement that the purchase price was paid into court by way of security is contrary to all earlier authorities. Other cases supporting the old view are *Burroughs* v. *Browne* (20); *Pope* v. *Great Eastern Ry. Co.* (21); and *Lewis* v. *James* (22).

The modern form of treating the payment into court by the purchaser as a deposit was first settled in *Greenwood* v. *Turner* (23): see also *In re Cassano and Mackay's Contract* (24). On the whole, there is no real ground for departing from the well settled practice by which money paid into court by a purchaser let into possession before completion is the property of the vendor, and there is no ground for making the purchaser pay interest in respect of it.

Cross, K.C., and *Dudley Collard* for the vendor's personal representatives. The purchaser is liable to pay interest at the contract rate on the balance of the purchase money which was paid into court. It is clear that the vendor could not have had the money so paid in paid out to himself without the purchaser's consent. The purchaser could not have prevented interest from running on the balance of the purchase money by paying it to a stakeholder. There is no particular quality in payment into court which makes this a case different from that where payment is to an ordinary stakeholder. Apart from authority, there is no logical distinction between payment into court and payment to a third party as stakeholder. Here the purchaser is in default. If her contention is right, a vendor who seeks the protection of a *Greenwood* v. *Turner* (25) order loses his right to interest at the contractual rate. In substance payment into court is the price a purchaser pays to be allowed to remain in possession. If the purchaser had gone out of possession, interest at the contractual rate of 5 per cent. would have continued to run. In *Humphries* v. *Horne* (26) Wigram, V.-C., rejected the contention that payment into court amounted to payment to the vendor.

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(3) (1872) L. R. 5 H. L. 321.
(4) (1786) 1 Cox 206.
(5) (1807) 13 Ves. 561.
(6) (1808) 15 Ves. 316.
(7) (1813) 1 V. & B. 500.
(8) (1815) 1 Mer. 52.
(9) (1816) 1 Mer. 133.
(10) (1816) 2 Mer. 103.
(11) (1817) 2 Mer. 492.
(12) (1815) 1 Madd. 83.
(13) (1818) 3 Madd. 219.
(14) (1819) 4 Madd. 53.
(15) (1825) 2 Sim. & St. 402.
(16) (1835) 2 Myl. & K. 385.
(17) (1838) 3 Y. & C. 105.
(18) (1837) 2 Myl. & Cr. 558.
(19) 3 Hare 276.
(20) (1852) 9 Hare 609.
(21) (1866) L. R. 3 Eq. 171.
(22) (1886) 32 Ch. D. 326.
(23) [1891] 2 Ch. 144.
(24) [1920] W. N. 7.

The advantage of the *Greenwood* v. *Turner* (25) order is that the vendor gets security. The court, however, in making such an order is not modifying the contract. There is a distinction between a deposit which is part payment and payment into court. Can it be said that when the balance of the purchase money has been paid into court the purchaser has discharged his part of the contract? It is submitted not.

Pennycuick, K.C., in reply. The question is whether money paid into court is a security for the payment of the purchase money or a payment of the balance of the purchase money. The authorities throughout refer to payment in as being a payment of the purchase money. It is submitted that that is the true view and that the effect of payment in is to transfer the moneys paid in from the purchaser to the vendor. The equitable interest in the purchase money is transferred from the purchaser to the vendor. There is no unpaid balance of purchase money on which interest can run. The vendor becomes in equity the owner of the money in court and he must bear any loss of interest occasioned by such payment in. The question is one of law, and has nothing to do with the conduct of the parties.

EVERSHED, M.R. Harman, J. (27), pointed out (and it is a curious fact) that, though there has been a great number of

(25) [1891] 2 Ch. 144.

(26) 3 Hare 276.

(27) Ante, 104.

what are commonly known to practitioners in the Chancery Division as *Greenwood* v. *Turner* (28) orders, the particular question which this case raises never appears to have been before the court since those orders became settled.

The question can be put thus: where a purchaser of property is put upon election either of giving up possession or of paying into court the amount of the purchase price then remaining due. does that order (if the second alternative be accepted) have the effect, if the sale goes through, of discharging the purchaser, from the date of the payment into court, from any contractual obligation there may be to pay interest until actual completion on the balance for the time being remaining unpaid of the purchase price? That is the question, and, as Mr. Pennycuick has rightly put it, it depends essentially on the further question: is payment into court of the balance of the purchase price such a payment as to discharge the purchaser as though for this purpose he had paid it to the vendor or his agent?

The judge came to the conclusion that such an order did not have the effect for which the purchaser here contends, and I will say at once that I think that he rightly so held. But the matter has been very fully argued here, and it is proper, and certainly due to Mr. Pennycuick, that I should state my reasons for adhering to the judge's conclusion.

[His Lordship stated the facts and continued:] The order makes no specific reference to the effect, if any, that it has on the contract as to interest after payment in. It is indeed inherent in Mr. Pennycuick's argument that it should not do so, because (according to him) payment into court involves for this purpose a discharge of the purchaser.

Furthermore, as Mr. Pennycuick observed, there is no specific reference in the order to the payment being merely a security for the due performance thereafter of the contract for purchase. I therefore think it clear that the problem is one of law, to be determined on the language, and having regard to the ancestry, of the *Greenwood* v. *Turner* (28) form of order, what is its legal effect so far as this matter is concerned.

But I will first refer specifically to the contract, so far as it relates to interest. The contract took the form of a printed particulars of sale, including certain special conditions. The first of those special conditions was as follows: "The property is sold "subject to the National Conditions of Sale (14th ed.) so far as

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(28) [1891] 2 Ch. 144.

"they are not varied by or inconsistent with these conditions". No. 3 stated: "(a) The date fixed for completion is January 12, "1949".—We can treat that as having been altered to May 10, 1949.—"The balance of the purchase money (credit being given "for the deposit of 10 per cent. payable on the sale) is to be paid "on that day, and if not so paid will carry interest at 5 per cent. "until payment or, the vendor at his option shall take the rents "and profits of the property down to the actual date of completion". Paragraph (b) provided that the deposit should be paid to the vendor's agent.

There is no doubt to my mind what is the effect of that provision. The vendor did not adopt the option of taking the rents and profits, and it therefore followed that if the matter rested on the special conditions alone the purchaser was bound, if for any reason completion did not take effect on the date suggested, to pay, in addition to the balance of the purchase price (that is to say the total sum less the deposit), interest at 5 per cent. a year on the balance from the day fixed down to the actual completion. That was a legal obligation on the purchaser and a legal right in the vendor. It was, however, qualified in some measure by the National Conditions of Sale which were made part of the contract, and in particular by para. 5 of those conditions.

That condition reads: "(1.) If from any cause whatever (save "as hereinafter provided) the purchase shall not be completed on "the day fixed for completion the purchaser shall pay interest on "the remainder of his purchase money at the rate provided by "the Special Conditions . . . from that day until the purchase "shall actually be completed. . . . (3.) And provided also that, "if the delay arises from the state of the title or from any cause "other than the neglect or default of the purchaser, and if the "purchaser (not having been let into possession of the property) "places the remainder of his purchase-money (at his own risk) "at interest on a deposit account with any bank within twenty "miles of the office of the vendor's solicitor or on any security "which the purchaser may select, and gives written notice "thereof to the vendor or his solicitor, then in lieu of the interest "or rents and profits payable to or receivable by the vendor as "aforesaid, the vendor shall from the time of such notice be "entitled to such interest only as shall be actually produced by "such deposit or security".

Condition 5 (3.) qualifies the wide terms as to interest in the special conditions, but it is a somewhat limited qualification. It provides that in certain circumstances a purchaser may determine his or her obligation to pay interest at 5 per cent. by placing the money on deposit or by investment in a security; but he or she may only take advantage of that privilege, first, if the delay in completion is not attributable to any neglect or default on his or her part, and, secondly, if he or she is not in actual possession. It is quite plain in this case that the necessary conditions which would enable the purchaser to take advantage of that qualification were both absent. In the first place, the delay was due to neglect or default of the purchaser, and in the second place she was in possession. Therefore, when, on June 9, this application was made, and when, on June 21, the order was made, the position was that the purchaser was under a legal obligation under the contract to pay interest at the rate of 5 per cent. on the unpaid balance of 20,532*l.* 10*s.* until completion, and she remained under that obligation until completion, unless the vendor's right was somehow or other taken away.

I have put the matter in that form deliberately, because I think that it would be surprising if the result were, as Mr. Pennycuick suggests, to take that right to interest away from the vendor—from a vendor, be it observed, who was not in default but who was seeking protection for himself, or to compel the defaulting purchaser to perform her bargain; and I go further and say that it would be wrong to conclude that the contractual right was taken away from the vendor unless that result plainly emerges from the order when properly construed in the light of authority. Therefore I regard it as being the court's duty not to say that that contractual right at law is taken away, unless beyond reasonable doubt that result follows from the form which the transaction took.

Before I come to the main point—and it is one capable of short statement—I will say something on what I have called the ancestry of this form of order.

Greenwood v. *Turner* (30) was decided in 1891. The headnote is as follows: "Where a purchaser of real estate fails to "complete his contract by payment of the balance of his pur-"chase money by the stipulated day, but, being in possession on "that day, retains possession thereafter without paying interest "or rent, the court will not, on a motion by the vendor in an "action for specific performance, order him to pay the balance "of purchase money into court without giving him the option "either of retiring from possession on a certain day or of paying

(30) [1891] 2 Ch. 144.

"the balance into court on that day, with interest from the day "fixed by the contract for completion, even though the pur-"chaser is in possession under the contract and has made no "objection to the vendor's title; but that option will not be given "if the purchaser has done anything to prejudice the value of the "property as a security for the balance".

Kekewich, J., had his attention drawn to some of the older authorities from which this rule of practice of the court has emerged, and there is no doubt that since 1891, where a vendor moves for an order against a purchaser that he should give up possession, or, as in this case, moves for an order that he should have the action dismissed unless the purchase money is paid, the court adopts this form of order, giving to the purchaser the option either of paying the purchase money into court, with interest to date, or of going out of possession.

In the course of his judgment Harman, J., referred to an additional provision, which is in some cases added to these orders, to the effect that, if the purchaser elects to go out of possession, he must pay into court the interest on the unpaid balance up to the specified date. That addition was criticized by Astbury, J., in *In re Cassano and Mackay's Contract* (31), and is criticized by Harman, J. I can well appreciate the grounds of the criticism, but, since the addition was not made in this case, I think it better that I should say no more about it. It may be that the question will arise hereafter for determination. It is sufficient for me to say that in this case Roxburgh, J., did not add that rider to his particular order, and, so far as I know, there is no compelling reason for the court to do so. Whether in any particular case it is proper to do so is a matter with which we are not now concerned.

Mr. Pennycuick has most carefully directed our attention to what I think are the cases which constitute the ancestry of this form of order, and it is clear that this ancestry can be traced to more than one type of case. There is first of all the case in which the purchaser has no contractual right to possession. Such instances, I think, constitute the bulk of the earlier cases particularly associated with Lord Eldon as Lord Chancellor, who decided a great number of them. In that kind of case, if the purchaser, being in possession otherwise than under his contract, was unable or unwilling to complete, he was put upon election of paying the balance of the purchase money into court or going out.

(31) [1920] W. N. 7.

To take one example, in *Morgan* v. *Shaw* (32) it was said it is against conscience that the purchaser should have both the property and the purchase money.

The second class of case is perhaps a refinement of the first. It is the type of case in which there was a right to possession by virtue of the contract. Still the result may be the same, if the purchaser's behaviour on the property, though he is there by right under the contract, is to deteriorate its value. On the other hand, if what the purchaser has done has been to ameliorate the property, then such an order will not, or may not, be made, because, as was said in *Bramley* v. *Teal* (33), the vendor's security is increased. But where the purchaser has let down the property, it may even be that no option will be given. That was so in *Pope* v. *Great Eastern Ry. Co.* (34). There a railway company, having contracted to purchase property, went into possession and turned the tenants out. The company allowed unauthorized persons to enter on the property and to remove the houses piece by piece. In those circumstances, no option was given to the company to give up possession; they were ordered to pay the balance of the purchase price into court.

There is, I think, a third distinct class of case which has contributed to the form of the order now made. It arose from the conflict in the jurisdictions of the common-law courts and the courts of equity—cases in which a vendor sought to enforce his legal rights but the purchaser obtained or sought an injunction from the court of equity to restrain the vendor from exercising his legal right. In those cases, as a condition of obtaining that injunction, the purchaser was put on terms; for example, was put to the option (as illustrated in this type of order) either of paying into court the purchase price, or whatever other sum of money the vendor was seeking to recover, or of going out of possession. That was the condition of his obtaining a stay of the vendor's legal action. That last class of case is important when one comes to examine some of the authorities, because it is illustrated by one case which caused me a little difficulty, namely, *Small* v. *Attwood* (35), referred to by Wigram, V.-C., in *Humphries* v. *Horne* (36). That latter case was much relied on, I think rightly, by Harman, J., and it will be necessary for me to refer to it and to *Small* v. *Attwood* (35).

(32) (1816) 2 Mer. 138, 141.
(33) 3 Madd. 219.
(34) L. R. 3 Eq. 171.
(35) 3 Y. & C. 105.
(36) 3 Hare 276.

First, however, so much seems clear from an examination of the numerous authorities: with the one exception of *Humphries* v. *Horne* (36) this particular point never appears to have come for consideration before the courts at all. Language is used of a somewhat general character. I have already referred to the formula used by Lord Eldon, L.C., in *Morgan* v. *Shaw* (37): " . . . it is " against conscience that he should be allowed to keep his purchase " money and to retain possession also"; and in *Burroughs* v. *Oakley* (38), he spoke of the money being taken into the court's " own keeping". But since the particular point with which we are concerned was not before the court, I should be most reluctant to say that those observations ought to be taken as concluding the matter. And in the end it comes down to this question: is the effect of a payment into court to put an end to the contractual obligation to pay interest on the purchase money so paid because it operates as a discharge of the purchaser in respect of the purchase price? In other words, is the meaning of the order that the purchase money brought in is, subject to possible defeasance in certain events, in equity the vendor's money? Mr. Pennycuick has said boldly—and his assertion is none the worse for that—that no other possible meaning can be given to the order; that when a vendor contracts to sell land, then in equity, subject to defeasance, the property passes to the purchaser; and so, when the purchase money is segregated and appropriated to the contract, as it is when paid into court, the equitable interest in the money similarly passes to the vendor.

I do not agree with that argument. I do not think that any of these general observations in the cases can fairly be said to constitute a pronouncement one way or the other on the point, although I will say at once that I do think that the judges who made those orders, in ordering the payment into court, were concerned—and here I am consciously following Lord Eldon, L.C.'s phrase in *Burroughs* v. *Oakley* (39) about taking the money into the court's keeping—with providing a security for the vendor to which they thought him entitled because he was not only out of his money but out of his property too. *Bramley* v. *Teal* (40) lends support to that view.

Small v. *Attwood* (41) deserves further consideration. It is a complicated case, but the facts may, sufficiently for this purpose, be stated thus: a purchaser had made a bargain to buy certain mines, and he had become liable to pay certain instalments of interest. Those instalments did not themselves carry interest. He sought to get out of his bargain, alleging that the vendor had defrauded him, and proceedings were instituted. Meanwhile the obligations as to those instalments of interest were accruing, and two orders had been made: first, as a term of the vendor's not suing at law each time, the purchaser was given liberty to pay the instalments into court, and about seven instalments were so paid in. As the sums began to mount up and the time passed, a further order was made suspending any further payments of instalments, fourteen instalments being so suspended. The purchaser's action came to hearing and he was held entitled to succeed, the court finding that he had been defrauded. The result was that the instalments which had been paid into court were paid out to him.

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(36) 3 Hare 276.
(37) 2 Mer. 138, 141.
(38) 1 Mer. 52, 54.
(39) 1 Mer. 52, 54.
(40) 3 Madd. 219.
(41) 3 Y. & C. 105.

When many years had passed, the vendor obtained his revenge, for the House of Lords reversed the earlier finding and held that he had not defrauded the purchaser, who, accordingly, was not entitled to get out of the contract. That created a difficult situation, and *Small* v. *Attwood* (41) was the decision of Lord Abinger, sitting in the Court of Exchequer, giving effect to the direction of the House of Lords. The problem arose, who was entitled to receive the interest or dividends which the instalments which had been paid into court had earned while they were there? The argument for the purchaser by his counsel, Mr. Knight Bruce, was that all the purchaser was liable to do was to pay the actual amount of the instalments according to the contract, and he pointed out that if the sums paid into court had fallen in value, then the vendor would be entitled to say, "You must pay the "full amount of the instalments". But the court rejected the argument, and at first reading it seemed to me to lend some support to Mr. Pennycuick's case, for the contrary opinion taken by the court seemed to have proceeded upon the view that the payment into court of those instalments must be treated as payments to the vendor and beneficially his. But, on further examination, I think that the answer which Mr. Cross put forward should be accepted.

Lord Abinger said (42): "It appears to me, therefore, that "the investment and the accumulations were clearly made in "this case for the benefit of Mr. Attwood [the vendor]. If they

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(41) 3 Y. & C. 105.

(42) Ibid. 139.

"had fallen short by a fall in the price of the funds, as Mr. "Knight Bruce put it, of the aggregate amount of all the "instalments due to him, he might have said that he was not "sufficiently paid. I will not give a definite opinion upon that "subject; but it is quite consistent with my opinion as to the "reverse of the case, for the court to have said to Mr. Attwood "that they could not deprive him of any remedy he had at law "to recover the balance, and upon this plain principle—that the "plaintiffs having, by their injunction, prevented Mr. Attwood "recovering the money at law, and having brought the money "into court, could not bind him to take less than the amount "whenever they paid it, which, by being brought into court, they "had admitted he was entitled to".

I think that amounts to this: the court thought that those payments into court must be treated as having been paid for the benefit (as it turned out) of the vendor, because he was the winner; as having been paid, therefore, for the benefit of whichever litigant was ultimately the victor. That conclusion, however, had nothing to do with any contractual right which might exist in addition and belong to either party. As the judge pointed out, if insufficient had been paid into court, there would have been nothing inconsistent with the decision in saying that the vendor would have been entitled to recover what he was entitled to at law; and so, as Mr. Cross observed, if there had been a legal right to interest at a specific rate and the dividends which the instalments had earned did not amount to that specific rate, there would have been nothing in the order to prevent the vendor from suing in addition for the unpaid amount of his contractual interest. That that is the true view is borne out by the interpretation put upon that case by Wigram, V.-C., in *Humphries* v. *Horne* (43).

Humphries v. *Horne* (43) was relied upon, as I have said, by Harman, J., as being an authority which strongly supported Mr. Cross's case and which he thought therefore assisted him to the conclusion at which he arrived. The headnote states: "A purchaser, complaining that his conveyance did not comprise the "whole of the property which he had contracted for, filed his bill "for a conveyance of the remainder and obtained an injunction "restraining the vendor from suing him for the purchase-money, "part of which was afterwards ordered to be paid into court to "abide the event of the suit. The bill"—that is the purchaser's

(43) 3 Hare 276.

complaint—" was dismissed. Held, that the vendor was entitled "to the residue of the purchase-money, and the interest upon "it, to the time of payment, although the purchase-money in "court had not been laid out, and no interest therefore had "accrued thereon".

The case is shortly reported. The report is defective in that it does not appear in terms, although I think it must follow, that under the contract there was a right to some specific interest on the balance of the purchase money. A sum of 337*l.* odd was paid into court, the purchaser wrongly contending that the conveyance which he had received did not comprise all the property.

When the matter had been tried it was held that the purchaser was wrong. The question then arose whether the vendor could claim the contractual interest on this sum which had been lying in court pending the decision. Wigram, V.-C., said (44): "In order to show that the original right of the vendor "to interest upon his purchase-money was altered, the plaintiff "has relied upon a supposed rule of practice, that, where "purchase-money is paid into court, in a suit for specific performance, it becomes, without more, a payment to the vendor. "The case of *Gell* v. *Watson* (45) shews, that, if the vendor "had applied to have the money laid out, the rise or fall of the "funds would have been at his risk—a risk which I think in "such circumstances he was not obliged to incur: *Roberts* v. "*Massey* (46). Then, is he to lose his interest? This is not "the case of a deposit by a purchaser whilst the vendor is "making out his title, but a retainer by the purchaser whilst he "is wrongfully asserting a claim which ultimately fails. In "such a case justice requires that I should consider the payment "into court as the price of an injunction, and made for security "only; and that I should place the defendant in the same "situation he would be in by proceeding upon the judgment. I "must either do this, or order the money out to the plaintiff "and dissolve the injunction". Then he said that *Small* v. *Attwood* (47) supported that view.

In the course of his judgment Harman, J., laid considerable emphasis upon the fact that the purchaser was there in possession; so that it was a parallel case. I think myself that the purchaser probably was in possession, because the headnote makes reference to the fact that a conveyance had been made to him. There is, however, this criticism which Mr. Pennycuick made of the judge's judgment, that it does not seem to have been, and I do not think it was, an essential part of the judgment in *Humphries* v. *Horne* (48), that the purchaser was in possession. The decision was based on the type of case where, as a condition of obtaining an injunction against the exercise of a legal right, a purchaser is put upon terms; and in that case the terms were payment into court. Although the judge may perhaps have over-emphasized, or wrongly emphasized, the point of the purchaser's being in possession, that criticism does not affect the validity of his adoption of *Humphries* v. *Horne* (48) as an authority in support of his conclusion. For the reasons given, I think that Wigram, V.-C., in taking *Small* v. *Attwood* (49) as supporting his conclusion, must have interpreted Lord Abinger's judgment as I have done. Therefore in that case, which was decided more than a hundred years ago and, so far as I know, has never been questioned, there is authority to which this court should pay respectful attention, to say the least. Although it does not bind us, I think it right in principle.

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(44) 3 Hare 276, 279.
(45) 2 Sim. & St. 402.
(46) 13 Ves. 561.
(47) 3 Y. & C. 105.

Before I conclude what I have to say on the argument which Mr. Pennycuick has put forward, I should mention *Gell* v. *Watson* (50), referred to by Wigram, V.-C. (51). In point of brevity it is everything the harassed practitioner might desire. The report states: "Vendor and purchaser. Purchase money "paid into court is the property of the vendor. The Vice-"Chancellor ruled that, where a purchaser pays into court a sum "of money on account and in part of the purchase money, it is "the money of the vendor who is to take the chance of the rise "or fall of the stocks". If that is to be taken at its full significance, it obviously does lend strong support to the principle which Mr. Pennycuick has made the foundation of his argument; but I observe that Wigram, V.-C., said that the report must be qualified to this extent, that, as appears in Mr. Sugden's Law of Vendors and Purchasers of Estates (14th ed.), p. 640, the investment was made, in truth, at the request of the vendor; in other words, he asked to have a particular investment made; and from that fact it seems not unnatural to infer that he was told, when the investment was made, that since it was made at his request he must take it for better or for worse. I therefore agree with the Vice-Chancellor that it cannot be treated as authority for so broad a proposition as at first sight it seems to postulate.

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(48) 3 Hare 276.
(49) 3 Y. & C. 105.
(50) 2 Sim. & St. 402.
(51) 3 Hare 276, 279.

Those are the authorities, and I have given my reasons for thinking that they do not constitute or contain a ruling of the courts, by which we must abide, that payment into court in such circumstances as is contemplated by this order is equivalent to payment to the vendor so as to be a quittance of the purchaser. Mr. Pennycuick is entitled to say that, apart from any authority, no other possible meaning can be put upon the order than that what has to be paid into court is not a sum of money equivalent to the purchase price but is the purchase price or that part of it which remains unpaid; and he says that if the purchase price is paid into court, then, by application of the rule of equity that that must be treated as done which ought to be done, in equity it goes to the vendor and must therefore be a quittance of the purchaser.

I cannot accept that view. On looking at the order and considering its ancestry, I do not think that such a thing was in the contemplation of those who started this convenient practice. The court is doing no more than to take the money into its keeping to abide the result of the action. Both the purchaser and the vendor may fairly say they have equitable interests in it. I certainly do not think it right to say that the vendor has such a paramount equitable interest in the fund as to make it equivalent to the type of equitable interest a purchaser has in the land which the vendor has agreed to sell to him.

My brother Jenkins, at the end of Mr. Pennycuick's reply, asked what would happen if, for some reason, after payment in the contract went off altogether; and Mr. Pennycuick was forced to say that, apart from some court rate of interest which the payer-in would get back, any interest on the sum invested would go to the vendor; in other words, it would be wrong to deprive him of the equitable interest which, on that view of it, he acquired by virtue of payment in. I cannot think that that is right.

I will not repeat illustrations, but others were given in the course of the argument. I am unable to accept, either as a matter of principle or as one of authority, that such a payment in is, in truth, a quittance of the purchaser. It is conceded that payment into a deposit account could not be such a quittance, unless it were paid as part of the purchase price and accepted as such; and I cannot think that it would be right to draw such a conclusion from an order made at the suit of the vendor against a purchaser in default, where what the vendor is seeking to do is to protect himself from further risk and to put upon the purchaser some kind of screw, if I may use that phrase, so that the purchaser is compelled either to proceed and get on with the contract or to give up the property and enable the vendor to regain possession.

Therefore, after so long a journey through the authorities, I come back to the way in which Harman, J., put the matter, with which I entirely agree.

"The cases", he said (52), "as it seems to me, throw no "direct light on the subject. It is true that the principle on "which these orders are made is that it is unjust for the pur- "chaser to have both the property and the purchase money; and "it is argued from this that what is paid is in fact the unpaid "balance of the purchase-money, and that lodgment of this sum "discharges the payer from all liability in that respect so that "there is no balance of the purchase money on which interest is "leviable. It is said that there is no hardship on the vendor who "chose to take this course knowing that the money would earn "only the court rate of interest henceforward, and further, that "it would be an injustice if the purchaser, being out of her "purchase money, must still pay interest upon it.

"I find these arguments persuasive but not decisive. It "seems to me that there is nothing in that which has happened "to vary the contract which provides for interest at 5 per cent. "on the purchase money until actual completion, an event which "has not yet occurred. It is true that the money lodged in court "was calculated by reference to and is in the order described as "the balance of the purchase money, and it has been so described "ever since these orders were made; but it appears to me that "in fact the contractual amount of the purchase money and "interest up to the date of lodgment is merely the measure by "which the court judges the just obligation of a purchaser who "wishes to retain possession pending settlement of his dispute". I think that that is a right conclusion, and that therefore this appeal ought to be dismissed.

JENKINS, L.J. I agree. I am content to adopt the reasons given by Harman, J., and those of my Lord without adding any further grounds of my own, which I think would involve repeating what has already been said.

(52) Ante, 104, 110.

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Hodson, L.J. I agree; and I would like to put my assent in the same form as that adopted by my brother Jenkins.

Appeal dismissed.

Solicitors: *Warren & Warren; Curwen, Carter & Evans, for Biscoe-Smith & Blagg, Portsmouth.*

B. A. B.

Danckwerts, J.
1951
Apr. 19.

In re ADAMS, Decd.
SURSHAM *v.* FARQUHARSON.

[1951 A. 430.]

Will—Husband and wife—Legitimacy—Gift of trust fund for life and to lawful child or children of beneficiary living at his death—Separation of beneficiary and wife—Birth of children to wife after separation—Decree of nullity of beneficiary's marriage owing to his incapacity—Marriage of wife to putative father of children—Whether children lawful children of beneficiary—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 4; *Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 9.

A testatrix, who died in 1924, by her will created a trust fund in favour of her son N. for life, and of "his lawful child or children "living at his death" after his death. There was a gift over "if "my said son shall die without leaving a child living at his death" in favour of the testatrix's daughter.

In 1937 N. married one F. In May, 1938, they separated. In May, 1939, F. gave birth to a son, and to daughters in 1940 and 1942. The son was registered as the child of F. and of one W.; the daughters were registered as the children of F. without reference to paternity.

In August, 1947, the marriage of N. and F. was annulled on the ground of N.'s incapacity. In September, 1947, F. married W.; thereupon the children's births were re-registered, F. and W. being registered as the parents. In 1950 N. died.

By s. 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, (in force at the death of N., but since replaced by s. 9 of the Matrimonial Causes Act, 1950): "Where a decree of nullity is "granted in respect of a voidable marriage, any child who would "have been the legitimate child of the parties to the marriage if it "had been dissolved, instead of being annulled, on the date of the "decree shall be deemed to be their legitimate child notwithstanding "the annulment".

On the hearing of a summons taken out for the determination of the question whether the trust fund passed to the infants as the "lawful children" of N., or whether the gift over took effect,

Held, that the infants took no benefit under the will, as they would not have been held to be the children of N., if his marriage "had been dissolved, instead of being annulled".

In re Bromage [1935] Ch. 605 considered.

Semble, the language of s. 4 has no such retrospective effect as would cause difficulties in connexion with the provisions of the Legitimacy Act, 1926, and with the decision in *Newbould* v. *Attorney-General* [1931] P. 75, which indicates that a marriage annulled for incapacity is retrospectively annulled.

ADJOURNED SUMMONS.

The testatrix, who died in 1924, by her will, made in 1921, constituted a trust fund, styled "Norman's trust fund", the income of which, after certain events which in due course happened, was to be paid to her son Norman for life. On his death the trustees were directed to pay the fund, both capital and income, "to his lawful child or children living at his death". If he should die "without leaving a child living at his death", the fund was to be paid to the testatrix's daughter, the first defendant.

In 1937 Norman married one Freda. In May, 1938, they separated. On May 7, 1939, Freda gave birth to a son, and to daughters in 1940 and 1942. The son was registered as the child of Freda and one W., but the birth certificates of the daughters contained no information as to their paternity. The three infants were also defendants to the summons.

In August, 1947, a decree absolute was made annulling the marriage of Norman and Freda on the ground of Norman's incapacity. The following September Freda married W.: thereupon the births of the three infant defendants were re-registered pursuant to the provisions of the Legitimacy Act, 1926, as the children of W. and Freda, on the footing that they were legitimated by the marriage of their parents. In March, 1950, Norman died without having re-married.

This summons was taken out for the determination of the question whether, in the events which had happened, Norman's trust fund was payable to the testatrix's daughter or to the infant defendants.

Buckley for the trustees.

Maurice Berkeley for the daughter. It was held in *Newbould* v. *Attorney-General* (1) that a decree of nullity grounded on incapacity is retrospective in effect, and is tantamount to a declaration that no marriage ever took place. Accordingly, Norman must be regarded as never having been married, and can never have had " lawful children ", or " children ", which must mean lawful children in the present context.

Rink for the infants. It is submitted that by virtue of s. 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, which was in force at Norman's death, but has been replaced by s. 9 of the Matrimonial Causes Act, 1950, the infants must be deemed to be the legitimate children of Norman. This section was enacted in order to meet certain hard cases which had arisen in which persons who were undoubtedly the offspring of the parties concerned had been bastardized by a subsequent decree of nullity, e.g., where there had been artificial insemination, or intercourse before marriage.

[DANCKWERTS, J. The section does not appear to be retrospective: the words are not " where a decree of nullity is or has " been granted ".]

It would be a strange result if the section were held not to cover the particular hard cases which it was designed to remedy. The evidence is not sufficiently strong to rebut the presumption of legitimacy of children born during the subsistence of the marriage. In *In re Bromage* (2), where the presumption was rebutted, the evidence was stronger. In any event, the decision in these proceedings will not affect the status of the children under the Legitimacy Act, 1926.

Berkeley in reply. Section 4 is not, on the face of it, retrospective. The argument for the infants sets up the proposition that each of them is the legitimate child of two fathers. The facts in evidence clearly show that these infants would not have been held to be the legitimate children of Norman's marriage if it had been dissolved instead of being annulled.

DANCKWERTS, J. [after stating the facts]. In *Newbould* v. *Attorney-General* (3) it was held that a final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the effect of the decree amounts to a declaration that there is no marriage. The contract of marriage may be impeached and declared null and void if there was incapacity to implement it, notwithstanding that in certain cases the right to complain to the court may be lost by reason of the conduct of the party complaining. Accordingly, it was held, in a case where a marriage had been annulled for that reason, that s. 1, sub-s. 1, of the Legitimacy Act, 1926, applied and the restriction contained in sub-s. 2 of that section did not apply.

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(1) [1931] P. 75.
(2) [1935] Ch. 605.
(3) [1931] P. 75.

Those provisions are as follows: s. 1, sub-s. 1: " Subject to " the provisions of this section, where the parents of an illegi" timate person marry or have married one another, whether " before or after the commencement of this Act, the marriage " shall, if the father of the illegitimate person was or is at the " date of the marriage domiciled in England or Wales, render " that person, if living, legitimate from the commencement of " this Act, or from the date of the marriage, whichever last " happens ".

By sub-s. 2: " Nothing in this Act shall operate to legitimate " a person whose father or mother was married to a third person " when the illegitimate person was born "; and accordingly it was held in *Newbould* v. *Attorney-General* (4) that, where at the date of the birth of the child in question there was a marriage that was subsequently annulled through incapacity, there was in effect not a marriage for the purpose of that sub-section, and that the two persons who were supposed to be married were not in fact married at all, and that s. 1, sub-s. 1, of the Act was therefore effective.

So far it would appear that the three infant defendants are not the children of Norman and have no claim, therefore, under the will of his mother; but on December 16, 1949, a date which was before the date of the death of Norman, the Law Reform (Miscellaneous Provisions) Act, 1949, came into force. [His Lordship read s. 4.] This section has been replaced by s. 9 of the Matrimonial Causes Act, 1950, as from January 1, 1951, in terms which, to all intents and purposes, are exactly the same. Therefore Mr. Rink, for the three infants, felt compelled to argue that they are to be regarded, by virtue of this section, as the legitimate children of Norman and, therefore, became entitled under the will to succeed to Norman's trust fund in equal shares.

The result, if that be right, is very odd because it is quite plain that before the passing of the Act of 1949 they were, as the children of Freda and her second husband, made legitimate by the subsequent marriage of their parents, and they became therefore the legitimate children of that subsequent marriage. Now it is said, notwithstanding that, that they are the legitimate children of Norman whose marriage was annulled on the ground of incapacity.

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(4) [1931] P. 75.

It seems to me that a very strange result would follow if I were to apply s. 4 so as to upset the arrangements which have taken place and which appear to be entirely satisfactory to the parties concerned, and to upset what appears to be a happy and satisfactory family. It seems to me that I am not bound to reach that result. In the first place, there appears to be nothing in s. 4 of the Act of 1949 which has a retrospective effect. The section does not say that, where a decree has been granted in the past, the children shall always be deemed to have been the legitimate children of the parties. Therefore it may well be that the section has no such retrospective effect as will cause any difficulty in the present case in connexion with the provisions of the Legitimacy Act, 1926.

But there is another ground, perhaps a more satisfactory ground, on which to decide this case. By s. 4, where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage, if it had been dissolved, is to be legitimate; that is to say, if there had been a divorce, instead of a decree of nullity; and it seems to me, on the facts of the present case, that, in the case of a divorce, the children would not have been Norman's legitimate children. It would have been open to Norman to contend, and indeed I think he would have had a very real grievance if he had not been allowed to contend, that they were illegitimate, the father being someone else. On the facts of this case, it seems quite plain that the three children in question were not the children of Norman at all.

In some respects the facts appear to be rather stronger than those in *In re Bromage* (5), for in that case the husband and wife, who had separated, had four children before the date of the separation, whereas in the present case Norman's marriage was annulled on the ground of incapacity, and he never married again; which is some indication that he would not be likely to have a child.

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(5) [1935] Ch. 605.

DANCKWERTS, J.

1951

ADAMS, DECD., *In re.* SURSHAM *v.* FARQUHARSON.

Secondly, the form of the registration of births of the children in question is entirely consistent with their not being Norman's children and quite inconsistent with their being his children. The evidence that the parties separated in May, 1938, is not impugned in any way, and I must accept it as being an accurate statement of the facts.

Therefore, it seems to me that, on the facts of this case, the three infant defendants cannot be considered to have been the children of Norman Adams; and, therefore, they are not entitled to any rights under the will of his mother. Accordingly, I will make an order authorizing the trustees to distribute and deal with Norman's trust fund upon the footing that Norman Adams died without leaving any lawful child living at his death.

Order accordingly.

Solicitors: *Bolton, Jobson & Yate-Lee; Simmonds, Church, Rackham & Co.; A. F. & R. W. Tweedie.*

F. R. D.

In re DUFF'S SETTLEMENT; NATIONAL PROVINCIAL BANK LD. *v.* GREGSON AND OTHERS.

[1950 D. 2214.]

HARMAN, J.

1951 *Mar.* 8; 21.

Company—Share premium account—Reduction—Payment to trustee—Whether capital or income—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 56.

The effect of s. 56 of the Companies Act, 1948, is that money paid out of a share premium account, being a repayment to shareholders made as a result of an order on a petition under that section, is to be treated as capital, and not income, as between the persons entitled to the income of a trust fund and the remainderman.

Since the coming into force of the Companies Act, 1948, the observations of Lord Russell of Killowen in *Hill* v. *Permanent Trustee Company of New South Wales, Ld.* [1930] A. C. 720 require modification.

ADJOURNED SUMMONS.

The plaintiff bank, as the trustees of several settlements, were the registered shareholders of 33,947 1*l.* shares in a company

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

known as Highfields (Ceylon) Ld. From time to time the company allotted certain of its shares at a premium, and, in accordance with s. 56 of the Companies Act, 1948 (1), the aggregate of the premiums was transferred to a share premium account, which in 1950 stood at 254,645*l*. 12*s*. 6*d*.

In 1950, the company passed a special resolution to pay out of the share premium account 2*s*. 6*d*. in respect of each of the fully paid shares. The reduction was sanctioned by the court on March 27, 1950. In pursuance of that resolution about 4,000*l*. was paid to the bank in respect of the trust share holding.

The bank took out this summons to have determined whether that sum should be treated as capital or as income as between the persons entitled to the income under the settlements and the remaindermen.

J. V. Nesbitt for the bank.

R. H. Walton, for the daughters and widow of the settlor, the persons entitled to the income of the fund. The sum paid to the trustees out of the share premium account is prima facie income of the fund, for the company is not in liquidation and capital can only be returned to the shareholders in pursuance of an authorized reduction of capital. The principles stated by Lord Russell of Killowen in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (2) are applicable. Before the Act of 1948, it was well settled that sums received by a company as a premium on the allotment of shares were not to be treated as capital paid up on the shares, but ranked as profits and were distributable to the shareholders as dividends. That is shown by *Drown* v. *Gaumont-British Picture Corporation Ld.* (3). It is submitted that the Act of 1948 has not made any essential difference in the character of share premiums but has merely provided a new procedure for distribution of moneys in a share premium account. The procedure is exactly the same as that provided for money returned on a reduction of capital. For purposes of distribution, the money is therefore to be treated as capital, but that does not mean that it is capital.

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(1) Companies Act, 1948, s. 56, sub-s. 1: "Where a company issues "shares at a premium, whether for "cash or otherwise, a sum equal to "the aggregate amount or value of "the premiums on those shares shall "be transferred to an account, to be "called 'the share premium account', "and the provisions of this Act "relating to the reduction of the "share capital of a company shall, "except as provided in this section, "apply as if the share premium "account were paid up share capital "of the company".

Sub-s. 2: "The share premium "account may, notwithstanding any"thing in the foregoing subsection, "be applied by the company in pay"ing up unissued shares of the com"pany to be issued to members of "the company as fully paid bonus "shares, in writing off (a) the pre"liminary expenses of the company; "or (b) the expenses of, or the com"mission paid or discount allowed "on, any issue of shares or deben"tures of the company; or in pro"viding for the premium payable "on redemption of any redeemable "preference shares or of any deben"tures of the company".

Sub-s. 3: "Where a company has "before the commencement of this "Act issued any shares at a premium, "this section shall apply as if the "shares had been issued after the "commencement of this Act".

(2) [1930] A. C. 720, 730.

If, however, it is held that when s. 56 of the Act of 1948 came into force, the share premium account became capital in the hands of the company, it is submitted that it does not follow that it is capital in the hands of the trustees. The trustees still hold the shares representing the trust fund unimpaired. In *Inland Revenue Commissioners* v. *Reid's Trustees* (4), Lord Simonds stated that the test in such cases was whether the shares remained intact. If they did, it could not be said that capital had been returned to them. [He referred also to *In re Doughty* (5); *In re Sechiari* (6); and *In re Harrison's Will Trusts* (7).]

Lightman for the persons interested as remaindermen. The money paid to the trustees is capital of the fund. With the leave of the court the company has reduced its capital on the ground that it is in excess of its wants. The sum so distributable is capital both in the hands of the company and the trustees. Before the Act of 1948, the share premium account was money which would have been available for distribution as a dividend; but it was not in fact a profit, and the Act of 1948 is intended to prevent companies from paying away as dividends, sums which are in the nature of capital. After the Act of 1948, shareholders have a right to insist that the share capital (including the share premium capital) be kept intact—except in so far as the Act expressly authorizes specified payments of a capital nature to be made out of the share premium fund.

If the money is capital in the hands of the company, it is capital for the purposes of the trust. Statements by the directors of the company as to the nature of the payment are not, of course, material.

The share premium account has been capitalized by the Companies Act, 1948. In *Hill* v. *Permanent Trustee Company*

(3) [1937] Ch. 402.
(4) [1949] A. C. 361, 371.
(5) [1947] Ch. 263.
(6) (1950) 66 T. L. R. (Pt. 1) 531.
(7) [1949] Ch. 678, 683.

of New South Wales Ld. (8), Lord Russell of Killowen observed that if a company capitalized profits (which of course before capitalization would rank as distributable income), the money would acquire a capital nature and would only be distributable by means of an authorized reduction of capital. The same principle applies where the capitalization is effected by the legislature.

It is not correct to say that the investments held by the trustees as the trust fund are unimpaired after the return of this money. Before the transaction, they held shares of a certain nominal value representing a " bundle of rights ", including the right to have the share premium account maintained. The repayment means that that " bundle of rights " has been considerably reduced.

All the cases cited must be regarded as having been modified by the Act of 1948. The share premium account is now capital and, if part of it is paid over to the trustees, it must be held by them as capital for the benefit of the remaindermen.

Cur. adv. vult.

March 21. HARMAN, J., reading his judgment, stated the facts and continued:—It is argued for those interested in income that s. 56 of the Companies Act, 1948, made no alteration in the nature of the sums received by companies as premiums on the allotment of their shares. It is well known that before the Act of 1948 these sums ranked as profits available for payment of a dividend, as indeed is shown by the decision of Clauson, J., in *Drown* v. *Gaumont-British Picture Corporation Ld.* (9), where the headnote reads: " There is no principle of law which prevents " a company from paying dividends out of assets representing " premiums received on the issue of shares ". It is argued that the only effect of s. 56 is to make the process of distribution subject to the sanction of the court. It was pointed out that s. 56, sub-s. 2, allows the premium account to be used for certain limited purposes, for instance the paying up of bonus shares, and writing off certain expenses. It is also pointed out that s. 56, sub-s. 1 causes the reduction provisions of the Act to apply " as " if the share premium account were paid up share capital of the " company ". This must mean, it is said, that the account, though to be treated in this respect as paid up capital, is not in

(8) [1930] A. C. 720.

(9) [1937] Ch. 402.

fact capital, but remains in the company's hands, money available, subject to the limitations imposed by the section, for distribution as dividend.

It was also argued for those interested in income that, whatever the share premium account might be in the hands of the company, moneys made distributable out of it were income in the hands of the recipient, and it was pointed out that this is often so in cases where a company returns to its shareholders a capital profit on which neither the company nor the recipient shareholder will have to pay income tax because of its capital nature. Nonetheless, it is now well settled, and has been since the celebrated case of *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (10), that this is the law. Compare *In re Doughty* (11), and for a striking example recently, *In re Sechiari* (12).

Lord Russell in delivering the opinion of the Privy Council in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (13) made certain observations which might be taken if read out of their context as favourable to the views put forward by those interested in income, but neither the learned judge nor anyone else who has dealt with this subject has considered s. 56 or the new type of asset which has been created by it, and it seems to me that if that section be held in mind certain modifications of the principles laid down in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* may be required. For instance, the first two points laid down by Lord Russell (13) were as follows: "(1.) A limited company when it parts with moneys "available for distribution among its shareholders is not concerned "with the fate of those moneys in the hands of any shareholder. "The company does not know and does not care whether a share"holder is a trustee of his shares or not. It is of no concern to a "company which is parting with moneys to a shareholder whether "that shareholder (if he be a trustee) will hold them as trustee "for A absolutely or as trustee for A for life only. (2.) A limited "company not in liquidation can make no payment by way of "return of capital to its shareholders except as a step in an "authorized reduction of capital. Any other payment made by "it by means of which it parts with moneys to its shareholders "must and can only be made by way of dividing profits. "Whether the payment is called 'dividend' or 'bonus', or any

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(10) [1930] A. C. 720.
(11) [1947] Ch. 263.
(12) 66 T. L. R. (Pt. 1) 531.
(13) [1930] A. C. 720, 730.

" other name, it still must remain a payment on division of profits ". Later he says (14): " There is no decision in the courts " of this country which justifies the view that a person beneficially entitled in remainder to shares in a limited company, is " entitled to any interest in profits lawfully distributed during the " lifetime of the tenant for life by a company not in liquidation, " and such a view is, their Lordships think, contrary to principle ".

It will be observed that the moneys mentioned under point (1.) are moneys available for distribution among the shareholders and that does not apply to moneys standing to the credit of the share premium account. Again, the authorized reduction of capital mentioned in point (2.) is a reference, I think, to share capital, but it is no longer true that there is not any means other than a reduction of share capital of parting with moneys to shareholders except by way of dividing profits. Section 56 in fact supplies a new way, exactly analogous to, but not the same as, the reduction of share capital. Section 56 is a novelty which seems to me to create a new class of capital of a company, not being share capital it is true, but not being distributable as income any more than any capital asset. It seems to me that, on a winding up, the surplus moneys in the share premium account would be returned to the shareholders as capital, and that so long as the company is a going concern, these same moneys can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the same conditions under which any capital asset can reach the shareholders' hands.

I must refer shortly to the well-known case of *In re Bates* (15), a decision of Eve, J., which has received the highest approval. The judge there says: " In this state of affairs it "—that is the money with which the judge was concerned—" was a fund which " the company could treat as available for dividend and could " distribute as profits, or having regard to its power to increase " capital could apply to that purpose by, for example, increasing " the capital, declaring a bonus and at the same time allotting to " each shareholder shares in the capital of the company paid up to " an amount equivalent to his proportion of the bonus so declared. " Unless and until the fund was in fact capitalized it retained its " characteristics of a distributable profit, and on the authority of " the passages which have been read from Lord Herschell's speech

(14) [1930] A. C. 720, 733.

(15) [1928] Ch. 682, 687.

"in *Bouch* v. *Sproule* (16), the only method by which a company with power to increase its capital can capitalize such "a fund is to increase its capital by an amount equivalent to "the sum sought to be capitalized. No such procedure was "adopted here, and in my opinion no change in the character "of the fund was brought about by the company's expressed "intention to distribute it as capital. It remained an uncapitalized surplus available for distribution, either as dividend or "bonus on the shares, or as a special division of an ascertained "profit derived, not from the trading of the company, but from a "fortunate appreciation in value of some or other of its capital "assets, and in the hands of those who received it it retained the "same characteristics."

The fund here was not a fund which the company could treat as available for dividend or could distribute as profits, though it could, it is true, declare a bonus and apply the money to paying up the bonus shares. These would, however, become a capital asset. It is true also that the share premium account itself represents a profit in the sense that the company got more for its shares than their nominal value. Nevertheless this is not *distributable* profit, and in my judgment the observation of Lord Russell in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (17), which I have read, needs modification if one reads it having in mind s. 56.

It was further argued that the return of this money to the shareholders did not reduce the share capital and therefore could not be a reduction of capital, and, if not that, must necessarily be the payment of a dividend. I do not think that this dilemma now exists. A share in a company, as was pointed out for those interested in capital, has been described as " a bundle of rights ", and one of those rights since the passing of the Act of 1948 has been to maintain the share premium account inviolable except to the extent to which it may be distributed by virtue of s. 56. It follows in my judgment that, when the share premium account is reduced in accordance with the section, there has been a reduction in the value of every share and it is therefore right to say that there has been a reduction of capital, though it is not share capital. The section has in fact produced a novel type of capital distributable only by the same process as any share capital and having, in my judgment, both in the hands of the company

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(16) (1887) 12 App. Cas. 385, 399. (17) [1930] A. C. 720, 733.

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and in the hands of those who receive it as a result of a reduction petition, the quality of capital.

Declaration accordingly.

Solicitors: *Slaughter & May; Peake & Co.*

DANCKWERTS, J.
1951
May 2.

THE ABBEY MALVERN WELLS LD. *v.* MINISTRY OF LOCAL GOVERNMENT AND PLANNING.

[1950 A. 1530.]

Town and Country Planning—Charity—Development charge—Exemption—Lands held by company controlling school for girls—Company entitled to make profits and to declare dividends—Share capital held by educational trust—Profits and assets of company not to be applied otherwise than for the promotion of the work and efficiency of the school or for the advancement of the education of girls—Whether lands held on charitable trust or for charitable purposes—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 85, *sub-ss.* 1, 2.

A school for girls was conducted for a number of years by three sisters, who, in 1926, formed the plaintiff company to take over the school, the shareholders being two of the sisters and a brother. In 1933, by virtue of certain alterations in the articles of association and of the contemporaneous execution of a trust deed, the ownership of the issued share capital and the control of the company became vested in a board of trustees, and so remained on July 1, 1948, the "appointed day" under the Town and Country Planning Act, 1947.

Under the memorandum and articles, as amended, the company had power to make profits and to distribute dividends, but the articles also provided that the affairs of the company should be managed by a council; that the council should consist of the trustees for the time being of the trust deed whether shareholders or not; that the members of the council should receive no remuneration except a stated sum for expenses; that the council should exercise all powers not required to be exercised in general meeting, and should fix the fees to be paid for tuition.

The trust deed was made between the two sister shareholders of the first part, a number of substantial persons, as trustees, of the second part, and the company of the third part. It recited that the founders desired to establish an educational trust, and that "with "a view to promoting the educational work and efficiency of the "said school" they intended to effect the transfer of the issued shares to the trustees, to be held on the trusts thereinafter provided.

The deed then provided that the shares were to be "held on trust "for the benefit of the school and all dividends and other moneys "derived therefrom shall be dealt with in such a manner as the "trustees in their discretion shall think advisable with a view "to promoting the educational work and efficiency of the school"; that the voting rights in respect of the shares were to be exercised as the trustees should consider advisable "for the purpose of promoting the educational work and efficiency of the school", and, in particular, to ensure that the council should always consist of the trustees, and that the dividends or moneys received from any shares issued in the future should be applied as above; that if the school should be closed, and the previous trusts determined, the shares and property and moneys representing them should be held on trust "to deal with the same in such manner for the advancement "of the education of girls as the trustees in their absolute discretion "shall determine".

At all material times the company occupied certain freehold and leasehold land on which the school buildings and playing fields were situated. The company applied to the Minister of Town and Country Planning (as he was then styled) for a ruling under s. 92 of the Town and Country Planning Act, 1947, that the land so occupied was land to which s. 85, sub-ss. 1 and 2 of the Act applied, so as to be exempted from payment of development charges. The Minister having decided adversely to the company's claim, on the hearing of a summons by way of appeal from his decision:—

Held, (1.) that the land was occupied by the company for the educational purposes of the school; (2.) that the trusts of the trust deed were charitable; (3.) that control of the company was held by trustees who were bound by the trust deed; so that (4.) the property and assets of the company could only be applied to the charitable purposes of the trust deed. Accordingly, the company's interest in and user of the land were charitable, and fell within the exempting definitions of the section.

Oxford Group v. *Inland Revenue Commissioners* [1949] W. N. 343; [1949] 2 All E. R. 537, and *In re Girls' Public Day School Trust Ld.*, ante, p. 400 distinguished.

In re French Protestant Hospital, ante, p. 567 applied.

ADJOURNED SUMMONS.

This summons was taken out by the plaintiff company by way of appeal from a decision of the Minister of Town and Country Planning (as he was then styled) under s. 92 of the Town and Country Planning Act, 1947, in which the Minister held that certain land held and occupied by the company was not land to which the provisions of s. 85, sub-s. 1, of the Act applied, so as to be exempted from liability for the payment of development charges (1).

The plaintiff company was incorporated on December 31, 1926, with a nominal capital of 30,000*l.*, and an issued capital of 13,152*l.* It was formed in connexion with a school which had been carried on for a number of years by three sisters called Judson. Originally the issued share capital was held by Miss Florence Judson, Miss Alice Judson, and a brother, William Judson. On November 23, 1933, a deed of trust was executed and the shares were transferred to the trustees of that trust deed. On the same date the articles of association were altered in certain respects.

The objects for which the company was established, as stated in the memorandum of association, included the following: "(a) To acquire, develop, extend, and carry on the school at "Malvern Wells, in the county of Worcester, hitherto conducted "by Florence Judson, Margaret Judson and Alice Judson, and "known as The Abbey, Malvern Wells, and all boarding-houses, "hostels, schools and other enterprises carried on in connexion "therewith either at Malvern Wells or elsewhere in the United "Kingdom or abroad, . . . (b) Generally to establish and carry "on schools, boarding-houses, hostels and institutions with the "object of providing a liberal education for girls and sound "religious training. (c) To purchase, take on lease, or agreement "of tenancy or otherwise acquire school buildings, boarding-"houses, dwellings for teachers or other persons employed in the "business of the company, recreation grounds and other build-"ings or lands and such copyrights, books, stationery, fittings, "furniture and other things as may be necessary and convenient "for the educational business of the company".

After a number of clauses of a common type, cl. (n) provided: "To accept and hold as trustee or otherwise and deal with any

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(1) Town and Country Planning Act, 1947, s. 85, sub-s. 1: "This "section applies to land an interest "in which is held on charitable trusts "or for ecclesiastical or other chari-"table purposes of any description if "the land, as distinct from the rents "and profits thereof, is used in any "manner (including use in a manner "involving the beneficial occupation "of the land by any person) for or in "connexion with the purposes for "which the said interest is held, and "not otherwise . . .". Sub-s. 2: "No "payment shall be made under Part "VI of this Act in respect of any such "interest as aforesaid in land which, "on the appointed day, is land to "which this section applies; and no "development charge shall be payable "under Part VII of this Act in res-"pect of any operations carried out "on such land by the person entitled "to any such interest for or in con-"nexion with the purposes for which "that interest is held or in respect "of any use of the land by that "person for those purposes".

"funds, grants, pensions, legacies and endowments and to "undertake any trusts which it may seem expedient to the "company to undertake for assisting or furthering the general "objects of the company"; by cl. (p): "To do all such other "lawful things as the company may deem incidental or conducive "to the attainment of the above objects or any of them".

Of the articles of association, art. 3 provided: "The affairs "of the company shall be managed by a council".

Article 64, as amended on November 23, 1933, provided: "The council shall consist of the persons who are for the time "being the trustees of a trust deed dated November 23, 1933, "and made between Florence Judson and Alice Judson of the "first part, the several persons whose names are set out in the "Schedule thereto as parties of the second part, and the company "of the third part. Accordingly the present trustees of the said "trust deed are the present members of the council, and every "person who hereafter becomes a trustee of the said trust deed "shall ipso facto become a member of the council".

Article 65 provided that no share qualification was necessary for a member of the council. Article 66 prohibited the members of the council receiving remuneration for their services, except a sum of five guineas as expenses. By art. 67: "The council "may in the management of the affairs of the company exercise "all such powers of the company as are not by law or by these "articles required to be exercised by the company in general "meeting, subject, nevertheless, to any regulations of these "articles or any special provisions as to the management and "regulation of the school therein contained and to the provisions "of any statute and to such directions, not being inconsistent "with the aforesaid regulations or provisions, as may be prescribed "by the company in general meeting". By art. 68: "The "office of a member of the council shall be vacated:—(*a*) If he "for any reason ceases to be a trustee of the said trust deed . . .". By art. 74: "The company in general meeting may declare "dividends to be paid to members in proportion to the amounts "paid up on their shares. No dividend shall be payable except "out of the profits of the company, and no dividend shall carry "interest against the company".

By art. 89: "The annual sums and other fees to be paid for "the tuition of each pupil by her parent or guardian or for the "boarding and maintenance of such pupil during the continuance "of such pupil at any school or hostel shall be fixed by the

" council and shall be paid to the treasurer or other proper officer " in advance or otherwise by such periodical payments as the " council may direct . . .". At all material times substantial fees were charged for tuition.

The trust deed referred to in the articles was executed on November 23, 1933, and was made between Florence Judson and Alice Judson, of the first part, a number of persons of substantial position, some of whom were connected with education, of the second part, and the company, of the third part. The recitals, after referring to the carrying on of the school before the incorporation of the company, to the incorporation of the company in 1926, and to the facts as to the issue of the capital, continued: " The founders being desirous of establishing an educational trust " in order to secure that the said school shall henceforth be carried " on under the guidance of a body of persons interested in the " education of girls and with a view to promoting solely the " educational work and efficiency of the said school intend forthwith to transfer or cause to be transferred the said thirteen " thousand one hundred and fifty-two ordinary shares in the " company into the names of the present trustees or of some of " them (not being less than three in number) to the intent that " the said shares shall be held upon the trusts and with and " subject to the powers and provisions hereinafter contained ".

By cl. 2: " The said shares when transferred as aforesaid shall " be held upon trust for the benefit of the school and all dividends " and other moneys derived therefrom shall be dealt with in such " manner as the trustees in their discretion shall think advisable " with a view to promoting the educational work and efficiency " of the school ". By cl. 3: " The said shares shall be held in " the names of the trustees or of such of their number (not being " less than three) as the trustees shall from time to time appoint. " All voting rights attached to the said shares shall be exercised " in such manner as the trustees in their discretion shall from " time to time consider advisable for the purpose of promoting " the educational work and efficiency of the school; and without " derogating from the generality of the foregoing provision it is " hereby declared that if the trustees shall think it desirable for " the purpose aforesaid the said voting rights may from time to " time be exercised with a view to effecting such alterations in " the memorandum and articles of association of the company " as the trustees shall think advisable (including if the trustees " consider it desirable the insertion of provision to the effect that " no dividends shall be paid on any of the shares in the company "and that in the event of a winding up of the company no part "of the assets of the company remaining after payment of the "debts and liabilities of the company and the costs of liquidation "shall be applied otherwise than for the advancement of the "education of girls)". By cl. 4: "Provided that the said voting "rights shall be exercised so as to procure (*a*) that the council "shall as soon as practicable consist of the present trustees, "(*b*) that the council shall thereafter consist of the trustees, and "(*c*) that it shall not be necessary for a member of the council "to hold any share qualification". The provisions of this clause were carried out.

By cl. 5: "Provided also that the trustees shall secure either "that no shares in the capital of the company are hereafter "issued or that if any shares in the capital of the company are "hereafter issued no dividends or other moneys derived therefrom "shall be applied in any manner other than for the purpose of "promoting the educational work and efficiency of the school". There followed various clauses, including one prohibiting remuneration for acting as a trustee, on similar lines to art. 66.

By cl. 11: "If the school shall for any reason cease to be "carried on the trusts hereinbefore declared shall thereupon "determine and upon the determination of the said trusts the "trustees shall thenceforth hold the said shares and any property "and moneys representing such shares or derived therefrom upon "trust to deal with the same in such manner for the advancement of the education of girls as the trustees in their absolute "discretion shall determine".

Upjohn, K.C., and *Sir Norman Touche* for the plaintiff company. Section 85, sub-s. 1, envisages a case where land is not held strictly on a charitable trust, but is held for a charitable purpose. Here, the land is held by the plaintiff company; having regard to the memorandum and articles only, it is held mainly for a charitable purpose, i.e., education, though not wholly so, as there is power to declare dividends.

But the memorandum and articles must be read in conjunction with the trust deed, and the result is that the land must be deemed to be held wholly for a charitable purpose. The decision in *In re Girls' Public Day School Trust Ld.* (2) shows that "charitable purpose" is something wider than a strict charitable trust: that case is distinguishable, in that there was power to pay dividends to individual shareholders. Here, all dividends and profits must be applied to the educational purposes of the school.

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(2) Ante, 400.

Under the articles and the trust deed the plaintiff company is wholly owned and controlled by the members of the council, who are bound by the terms of the deed, which are plainly wholly charitable.

[Danckwerts, J. I had before me a similar case very recently in *In re French Protestant Hospital* (3), where a question arose as to the duties of persons controlling an incorporated charity. I held that regard must be had to the substance of the matter, so that the corporators, though not technically trustees, must be regarded as being in a fiduciary position as they wholly controlled the charitable corporation; with the result that they could not properly alter the by-laws of the charity so as to entitle themselves to receive remuneration.]

It is submitted that the same view should be taken in the present case: when the substance of the matter is examined, it is found that the property and assets of the plaintiff company must be applied by the council for a purpose which is wholly charitable, and not otherwise.

Denys Buckley for the defendant Ministry. The company has power under the memorandum and articles to make profits and declare dividends, in the same way as the company in *In re Girls' Public Day School Trust Ld.* (4). In that case, as in this, there were non-charitable objects, but the fact that the shareholders voluntarily waived their claims to dividends did not make the whole of the objects charitable: here the adoption of a similar policy by means of a trust deed is equally immaterial.

It is not the land, but the shares, which are held on trust by the trustees: the land is held by the company, which can operate freely under its memorandum and articles.

Assuming that the powers of the company are limited by the trust deed, the purposes of the Abbey School are not charitable; an educational establishment is not charitable unless tuition is free or at reduced fees.

Further, by cl. 2 of the trust deed the trustees may apply the dividends in such manner as in their discretion they think advisable; accordingly, the decision as to their application depends upon the discretion of the trustees and not upon the purposes of the deed: the court will not embark upon inquiries as to what

(3) Ante, 567.

(4) Ante, 400.

trustees think advisable, and provisions of such a nature are non-charitable: see *Oxford Group* v. *Inland Revenue Commissioners* (5).

Upjohn, K.C., in reply. The *Oxford Group* case (5) is easily distinguishable in that the governing body of the company concerned was not subjected to the provisions of a trust deed; the case has no relevance when the directors are trustees.

It is a startling proposition that a school which charges full fees is thereby not a charity; that may have been the law originally, but, if so, it has long ceased to be so: see *Attorney-General* v. *Earl of Lonsdale* (6), where a school for the sons of gentlemen was held to be charitable.

It is fallacious to look only at the memorandum and articles; all the relevant facts, including the trust deed, must be taken into account. It then appears clearly that the company and its assets can be operated only in a charitable manner. It is not legitimate to consider the possibility that the trustees on the council may, at some indefinite time after the appointed day, commit a breach of trust.

DANCKWERTS, J. The effect of s. 85, sub-s. 1, is that two conditions must be fulfilled. First, the use of the land must be for or in connexion with the purposes for which the interest is held; and, secondly, the interest in the land must be held on charitable trusts or for charitable purposes of some description.

So far as the memorandum and articles are concerned, it is clear that the company as formed, and as altered, has the power to make profits and to distribute dividends.

The effect of the trust deed is that the trustees are plainly to operate the powers which they possess as the holders of the shares so as to prevent the company being operated for private profit, so that the profit, if any, must be reapplied for promoting the educational work of the school.

The material date is the appointed day under the Act, July 1, 1948, and it is necessary, therefore, to consider what was the situation at that particular time. The land in question, which is partly freehold and partly leasehold, was in fact used for the purpose of the building and grounds of the school; and, therefore, if the school be a charitable educational institution, there seems to be no doubt that the second limb of the sub-section, which

(5) [1949] W. N. 343; [1949] 2 All E. R. 537.

(6) (1827) 1 Sim. 105.

refers to use, is satisfied, because the land is used for and in connexion with the purposes of the school, and not otherwise.

The second condition which has to be satisfied is that the interests in question are held on charitable trusts or for charitable purposes.

It is admitted by Mr. Upjohn, for the plaintiffs, that as the memorandum and articles of association, taken by themselves, permit a profit-making enterprise, they alone would not satisfy the conditions of the section; but he relies upon the combination of the memorandum and articles and the trust deed. I propose, therefore, to deal first of all with the trust deed, because unless it appears on its provisions that the plaintiffs are a purely charitable body with a charitable trust or purpose, their contentions must fail.

The provisions of the trust deed were attacked by Mr. Buckley, for the defendant, in two principal ways. He first of all referred to cl. 2, which provided that the dividends and other moneys received from the shares shall be dealt with in such a manner as the trustees in their discretion shall think advisable, with a view to promoting the educational work and efficiency of the school. He said that that provision took the matter outside the ambit of a charitable trust, because the decision rests, not upon the purposes laid down by the trust deed, but upon the discretion of the trustees: it was therefore something which the court could not regulate, and it was not therefore a matter which satisfies the definition of a binding charitable trust,

He referred to *Oxford Group* v. *Inland Revenue Commissioners* (7). In that case one of the grounds upon which the Court of Appeal refused to declare that the plaintiffs, a company limited by shares, were a purely charitable body was that one of the powers given to the company by its memorandum was in terms, as he alleges, similar to those of cl. 2 in the present case. The provision in question was: "To do all such other things as "are incidental or the association may think conducive to the "attainment of the above objects or any of them". It seems to me that that case is distinguishable in two ways. First of all, it seems to me that Mr. Upjohn is right when he points out that in that case there was a company not limited by any trust deed as to its directors or governing body in any way, but generally unfettered to exercise the powers conferred by its memorandum. Therefore, it was plain that matters which were in the discretion

(7) [1949] W. N. 343; [1949] 2 All E. R. 537.

of the company could not be regulated by the court. In the present case the power is to be exercised by trustees, and the court can regulate trustees and the manner in which they exercise their power; accordingly, in my view, in that respect the *Oxford Group* case (7) is distinguishable.

There also seems to be a distinction in language, because cl. 2 provides for the application of dividends and other moneys to promote the educational work and efficiency of the school, and it is merely the manner which is left to the discretion of the trustees; in other words, they may choose one or another manner or method of applying the money, but the application must be for, and they are compelled to apply to the Minister with a view to, promoting the educational work and efficiency of the school. Therefore, it seems to me that the *Oxford Group* case (7) really does not assist in deciding the present question.

The other attack made by Mr. Buckley upon the charitable nature of the trust deed was of a more general nature and was, in my view, rather a startling proposition. The proposition, put shortly, was this: that an educational trust or an educational purpose is not charitable, unless it be for the promotion of education for persons who pay less than the full value of the services which they receive. That seems to me a proposition which might at one time have been acceptable to the courts, but it is several centuries out of date. The Statute of Elizabeth, which of course is regarded as the foundation of most charitable principles considered by the courts, refers to the maintenance of schools of learning, free schools and scholars and universities, and also refers to the education of orphans, and at the beginning of the eighteenth century it was held that a school must be a free school if it is to be within the statute. That view had been definitely abandoned by the nineteenth century, as is made clear by the observation of Leach, V.-C., in *Attorney-General* v. *Earl of Lonsdale* (8), where he said: " The institution of a school for " the sons of gentlemen is not, in popular language, a charity; " but in view of the Statute of Elizabeth, all schools for learning " are so to be considered "; which indicates that all schools of learning are to be considered charities, unless they exist purely as profit-making ventures such as certain preparatory schools, and those institutions known sometimes as " cramming establishments ".

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(7) [1949] W. N. 343; [1949] 2 All E. R. 537.

(8) 1 Sim. 105, 109.

Therefore, it seems to me that as the whole purpose of this deed was to secure the education of girls at the Abbey School on a non-profit-making basis, the trusts are plainly of a charitable nature and that the requirements of s. 85 are so far satisfied.

The next question is: can it be said that the property, which is vested technically in the company, is held upon charitable trusts or for charitable purposes? The strength of Mr. Buckley's case in this respect rests upon the fact that it is not the trustees who own or hold the property; they hold the shares only, and he says, accepting for the sake of argument, that the trusts of the trust deed are charitable, that they are trusts only of the shares, not of the land; and for the purpose of the section it is the trusts of the land which are material. I think that Mr. Upjohn is quite right when he says that it is wrong to treat these two documents, the memorandum and articles of association and the trust deed, as if they were entirely divorced from each other, and that regard must be had to the facts of the case.

The first fact is that this company is an artificial person. It is just as much, though formed under the Companies Act, an artificial person as a corporation formed by statute or by Royal Charter or in any other manner. It is certain, that if it is a person which exists in the eyes of the law, it is not a physical entity, and can only operate by means of human beings. Therefore, one must ascertain the persons who operate the company and see what their position is. A similar question arose in a case before me a short time ago, *In re French Protestant Hospital* (9). That case was concerned with the remuneration of trustees; technically the trustee was a corporation formed by Royal Charter, but I found that it was controlled by a body of persons called the governor and directors, and when considering whether the governor or directors ought to receive remuneration, I held that I must look at the substance of the matter, and see who really controlled the situation. I held, accordingly, that the governor and directors were just as much in a fiduciary position and in the position of trustees as the corporation itself.

It seems to me in the present case that one is entitled, and indeed bound, to look at the constitution of the company to see who in fact is in control. When I do so, I find that the company is controlled entirely by a body called a council, a body of persons; and I find by the articles that that body of persons must

(9) Ante, 567.

be the trustees of the trust deed, and that the trust deed is in fact specifically referred to in art. 64. Therefore, while the company theoretically has the power to apply its property and assets for the purpose of making profits and devoting the resulting profit to the distribution of dividends among the members, when I proceed to inquire who are the persons who regulate the operations of the company, I find that they are not free persons unrestricted in their operations, but are the trustees of the trust deed, who may only act in accordance with the provisions of that deed, may only use the property of the company in a particular way, and must not make use of the assets of the company for the purpose of a profit-making concern. I find that they are strictly bound by the trusts of the trust deed, and that those trusts are charitable trusts.

In my view, therefore, while the property of the company is held nominally subject to the terms of the memorandum and articles of association, in actual fact the property is regulated by the memorandum and articles, plus the provisions of the trust deed; and, therefore, the company is restricted in fact in the application of its property and assets and may only apply the property and assets for the charitable purposes which are mentioned in the trust deed.

That fact, in my view, distinguishes this case from *In re Girls' Public Day School Trust Ld.* (10) recently heard before Roxburgh, J. In that case there were preference shareholders who could obtain substantial benefits under the terms of the memorandum and articles of the company in question; but in fact by exercising a self-denial, which appears to have been entirely voluntary on their part, they did not in fact exercise their rights for their own profit, but merely carried on the concern in question as an educational establishment. It does not appear, moreover, that there was anything to prevent the shares in question being acquired by any person; so that some avaricious person might, if he had been so disposed, have acquired shares and exercised his rights to carry on the school and the company, as a profit-making concern.

That is not so in the present case: the trustees by their trust deed are prohibited from doing any such thing. They only hold the shares as trustees; they may only control the company as trustees; and I am not prepared to consider that the trustees might be capable of committing a breach of trust, as Mr.

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(10) Ante, 400.

Buckley invited me to do. It seems to me I must look upon them in their situation as regulated by the trust deed, and upon the footing that they carry out their duties as required by that deed. In my view those duties confine them to charitable purposes and therefore, as the company is controlled in that way, the property of the company is held either upon charitable trusts or for charitable purposes.

There will accordingly be a declaration that s. 85 applies to the interest of the plaintiff company in the land in question.

Declaration accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly; Treasury Solicitor.*

F. R. D.

C. A.
1951
Apr. 25.

Evershed, M.R., Jenkins, L.J., and Morris, J.

In re BLECKLY, DECD.
BLECKLY AND OTHERS *v.* BLECKLY.

Will—Construction—Gift in futuro "upon trust, for all or any the "children or child of . . . who shall attain . . . twenty-one years if "more than one in equal shares"—Time for ascertaining class—Rule of convenience.

By his will a testator gave the whole of his estate to his son absolutely. By a codicil, he gave to his executors 10,000*l.* "upon trust "to invest . . . and to pay the income thereof" to his daughter-in-law, the son's wife, "during so much of her life as she shall remain "the wife or widow of my said son". Subject to that interest the executors were to hold the 10,000*l.* "upon trust for all or any the "children or child of my son . . . who shall attain the age of "twenty-one years if more than one in equal shares". The testator died in 1925. In 1927 the marriage of the son to the wife mentioned in the codicil was dissolved. They had had no children. The son married again, and of that marriage there was issue two children. One of those children lived only a few days. The other, a daughter, born in March, 1929, had now attained twenty-one years and was the defendant to this summons.

The defendant contended that she was absolutely entitled to the 10,000*l.* fund. Harman, J., held that the class of beneficiaries was not closed, and that the fund was not distributable. On appeal by the defendant:—

Held, that the rule in *Andrews* v. *Partington* (1791) 3 Bro. C. C. 401 applied, and that, accordingly, the entire fund was payable to the defendant.

In re Emmet's Estate (1880) 13 Ch. D. 484, and *In re Chartres* [1927] 1 Ch. 466 considered.

Mainwaring v. *Beevor* (1849) 8 Hare 44, and *Armitage* v. *Williams* (1859) 27 Beav. 346 distinguished.
Decision of Harman, J., [1951] W. N. 161, reversed.

APPEAL from Harman, J. (1).

The testator, Herbert Sanderson Bleckly, by his will dated April 8, 1924, gave the whole of his residuary estate to his son, Herbert Allis Bleckly. By a codicil made the same day the testator provided as follows: "I give to my executors free of "duty the sum of 10,000*l.* upon trust to invest the same . . . "and to pay the income thereof to my daughter-in-law Gette "Bleckly the wife of my son Herbert Allis Bleckly during so "much of her life as she shall remain the wife or widow of my "said son and so that during the period of her marriage to him "the same shall be for her separate use without power of "anticipation Subject to the interest of my daughter-in-law "therein my executors shall hold the said sum of 10,000*l.* and "the investments for the time being representing the same and "the future income upon trust for all or any the children or "child of my son Herbert Allis Bleckly who shall attain the age "of twenty-one years if more than one in equal shares as tenants "in common".

The testator died on February 20, 1925. At the date of the codicil the testator's son Herbert Allis Bleckly was married. There had been no children of his first marriage, which was dissolved on April 11, 1927. On April 19, 1927, the son married Georgina Bleckly. There had been two children of that marriage, a son who died six days after his birth, and the defendant, Teresa Bleckly, who was born on March 7, 1929, and who had attained the age of twenty-one years. The son was fifty-seven years of age and his wife upwards of fifty years of age.

This summons was taken out by the trustees of the testator's will and codicil asking whether the investments representing the legacy of 10,000*l.* were now held on trust for the defendant absolutely.

Harman, J., held that the rule in *Andrews* v. *Partington* (2) should not be extended. To apply it to this case would be to defeat the testator's intention that any child of the testator's son who attained twenty-one years should share in the legacy. He held that the class of beneficiaries was not closed, and the fund not distributable. The defendant appealed.

Wigan for the defendant. The authorities establish that the

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(1) [1951] W. N. 161.

(2) (1791) 3 Bro. C. C. 401.

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BLECKLY, DECD., *In re.* BLECKLY *v.* BLECKLY.

rule in *Andrews* v. *Partington* (2) must be applied to any case which falls within it. The rule is that where there is a bequest of an aggregate fund to children as a class and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and the children coming into existence after that period are excluded.

The rule applies in four different classes of case. The first is where there is a gift to all the children of A, when all the children of A living at the testator's death take. The second is that where the gift is to all the children of A, subject to a prior life interest in B. In that case all the children in existence at B's death take: *Ellison* v. *Airey* (3). The third case is that where there is a gift to the children of A who attain twenty-one years. In that case all the children born before the first attains twenty-one years take: *Andrews* v. *Partington* (4); *Whitbread* v. *Lord St. John* (5). The fourth case is that where the gift is to the children of A who attain twenty-one years, subject to a prior life interest in B. In that case all the children take who are in existence before the later of the two events occurs: *In re Emmet's Estate* (6). The application of the rule always defeats the intention. It is not sufficient to say of a general rule that it has not before been applied to this particular case under consideration: if an exception is to be made to the general law there must be a ground for making it: see per North, J., in *Dunn* v. *Flood* (7). If the rule is not applied in this case, an illogical exception will be created to the general principle. In *In re Chartres* (8) the rule was applied where there was a power of appointment. The authorities show clearly that this rule exists. In Jarman on Wills (7th ed.), pp. 1665, 1667, reference is only made to the first and second class of case. There is no suggestion of any exception to the general rule in the present class. The only exception is where it is necessary to prevent a gift failing.

The rule is one of convenience to enable a distribution to be made. *Haughton* v. *Harrison* (9) shows that the gift will not fail if no object is in being at the date of the death of the tenant for life. *Armitage* v. *Williams* (10) is not an exception to the general rule: that decision turned on the special words of the will.

(2) (1791) 3 Bro. C. C. 401.
(3) (1748) 1 Ves. Sen. 111.
(4) 3 Bro. C. C. 401.
(5) (1804) 10 Ves. 152.
(6) (1880) 13 Ch. D. 484.
(7) (1883) 25 Ch. D. 629, 633.
(8) [1927] 1 Ch. 466.
(9) (1742) 2 Atk. 329.
(10) (1859) 27 Beav. 346.

Shebbeare for the trustees. This rule defeats the testator's intention, and it should not be extended. It is not a rule of law which is applicable independently of the intention. It is sometimes called a rule of administration. It is more generally called a rule of construction. It is submitted that the testator here did not intend that it should apply.

EVERSHED, M.R. The question is whether, having regard to the facts of this case, the so-called rule in *Andrews* v. *Partington* (11) applies so that the defendant, Teresa Bleckly, is indefeasibly entitled to the money representing a legacy bequeathed by the testator's codicil. The judge came to the conclusion that the facts were such as to exclude the application of this rule. He observed, justly, that the rule is artificial, designed to defeat what would, at first sight, appear to be the intention of the testator, and moreover has been the subject of adverse comment by judges, particularly, to take a modern instance, by Astbury, J., in *In re Chartres* (12). In those circumstances, the judge thought that he was not shackled by the rule, and, being free to construe the words of the codicil according to their ordinary meaning, he reached a conclusion adverse to the defendant. I have been persuaded by the argument of Mr. Wigan to a different result, and I hope that I shall not be thought disrespectful to Harman, J., for whose opinion on such a matter as this I have a high regard, if I express my reasons at once and do not reserve my judgment. The matter, after all, falls within a relatively small compass, and, having arrived at my conclusion, right or wrong, I think it best for me to give my judgment immediately.

[His Lordship referred to the facts, and continued:] For the purpose of considering the application of the rule in *Andrews* v. *Partington* (13), and leaving aside for the moment the significance of any special language operative to exclude it if otherwise applicable, the terms of the gift may conveniently be stated thus: there was a gift for a limited interest in income to B, and, subject to it, a gift of corpus to the children of A on attaining the age of twenty-one years. The circumstances which have rendered this case unusual and outside the direct scope of any reported decision arise out of the subsequent events: in April, 1927, that is, some two years after the death of the testator, the marriage between his son and his daughter-in-law was dissolved. In the same

(11) 3 Bro. C. C. 401.
(12) [1927] 1 Ch. 466.
(13) 3 Bro. C. C. 401.

month, the son married his present wife. The first Mrs. Bleckly is still alive, but there was no issue of that first marriage. Of the second marriage there has been issue one daughter, the defendant, who was born on March 7, 1929, and is now therefore over twenty-one. No other children have been born save one boy, born before the defendant, who lived only for a few days. The defendant's father is now of middle-age, in the fifties, and his present wife is also about fifty. It may therefore be regarded as unlikely, especially after so long an interval, that they should have themselves any more children. But there is the possibility that by death or otherwise their marriage should terminate and that thereafter the son should marry a third time and have by a third wife further children. It is the claim of the defendant that her interest in the legacy would be unaffected and undiminished by any further children that her father might by subsequent marriage or otherwise have; for, it is argued, the rule in *Andrews* v. *Partington* (13) has now closed the class capable of taking under the codicil, and she is the only qualified member of that class. There being no one else directly concerned, Mr. Shebbeare for the trustees has assisted the court by suggesting the contrary view and supporting the judgment of Harman, J. Mr. Shebbeare says that, though it is true this rule is well established, it is not enthusiastically applied in any case, and that the circumstance which is essential for its application is that when the first marriage was dissolved, that is, when the limited interest of B (reverting to my simple statement of the problem) ceased, there should be some person in existence capable of taking under the gift of corpus; and that in the absence of such a person, there is, on the authorities, no warrant for the application of the rule. To apply it here would be to extend its scope, and that is not a course which the court should adopt.

The matter turns on this one circumstance, that there was in this case a gap between the cesser of the limited interest when the first Mrs. Bleckly ceased to qualify as the recipient of the fund, and the birth of the defendant. It is conceded as being now well established by authority that if—and again I refer to the simple statement of the problem—a child of A had come into existence during the subsistence of the limited interest in favour of B, there would be no escape from the application of the rule, so that the first child so coming into existence who attained twenty-one would acquire an interest incapable thereafter of being diminished. The question is: in logic, or on other grounds, is the result the same though the first member of the class to take corpus did not come into existence until after the determination of the interest of B?

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(13) 3 Bro. C. C. 401.

I mention one small matter before I state the reasons for my conclusion, and it is this: in the course of his judgment the judge observed that, on the dissolution of the first marriage the first Mrs. Bleckly ceased to be the wife of Herbert Bleckly. But he went on to say that she therefore could not ever become his widow. I do not desire to express any final view upon a highly improbable set of circumstances, but I would reserve this question: suppose that hereafter, Mr. Herbert Bleckly's present marriage having terminated, he re-married the first Mrs. Bleckly and that she then survived him. She would at least have a case for saying that she was then his "widow". I am not concerned with the question whether that would affect the operation of the codicil and the possibility does not affect the answer to the question we have to determine, which is whether the defendant has now acquired an indefeasible interest in the corpus of the fund not capable of being diminished. It may, however, affect the form of order proper to be made, and the possibility illustrates a point made by Mr. Wigan that, if the judge is right, to the disrepute of the rule will be added a strange caprice as regards its application. Mr. Wigan thus emphasized his point. He said that if the facts had been slightly different, and the interest of the life tenant B had not been terminable on dissolution of the marriage but had been terminable upon some other event, then, if the defendant had been born before the termination, the rule would have applied, but if she had been born a year or two later when Mr. and Mrs. Bleckly, her parents, were a year or two older, the rule would not (according to my judgment) have applied and it would be necessary to hold up the final distribution until the death of her father. I add this, that if by remarriage the first Mrs. Bleckly could become and became the son's widow within the meaning of the codicil, then, when her interest ceased at her death, it would be plain that the person who was entitled to the corpus had come into existence long before that event; and it might be, therefore, that by the event of remarriage the situation would be reversed and *Andrews* v. *Partington* (14), having been excluded, would become once more applicable. I express no view on those matters, save to say that the consideration of this not

Harman J's ?

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(14) 3 Bro. C. C. 401, 403.

wholly fanciful state of affairs seems to me to illustrate possible caprice, if the judgment appealed from be right, in the application or non-application of the rule.

I state this matter of general significance: the rule may or may not be regarded as in all respects sensible, but if it be firmly established, and if there be no escape from its application to facts corresponding to those in *Andrews* v. *Partington* (14), in this court, at any rate, then it seems to me that it should be, I do not say extended, but applied logically and made, whatever its disrepute as a rule, coherent. I think, with all respect to the judge, that, if its application were excluded here, it would have to be upon the mere ground that the facts in this case differed in this one respect from the facts in the cases to which *Andrews* v. *Partington* (14) admittedly applies, and that therefore, notwithstanding any correspondence in other respects between the two classes of case, the court ought not to apply the rule here.

The rule is thus stated conveniently in Hawkins on Wills (3rd ed.), p. 96: " Where there is a bequest of an aggregate fund " to children as a class, and the share of each child is made " payable on attaining a given age, or marriage, the period of " distribution is the time when the first child becomes entitled to " receive his share, and children coming into existence after that " period are excluded ". Prima facie, if that rule be correctly stated, it covers this case. The argument to the contrary therefore depends upon finding some exception or qualification to it. *Andrews* v. *Partington* (14) was a decision of Thurlow, L.C. In that case there was a gift of residue to all the children of A to be paid at twenty-one, or, in the case of daughters, on earlier marriage. There was no previous limited right or interest. Thurlow, L.C., in his judgment, which is very shortly reported, said (14): " . . . where a time of payment was pointed out, as " where a legacy is given to all the children of A when they shall " attain twenty-one, it was too late to say, that the time so pointed " out shall (not) regulate among what children the distribution " shall be made. It must be among the children in esse at " the time the eldest attains such age. He said he had often " wondered how it came to be so decided, there being no greater " inconvenience in the case of a devise than in that of a marriage " settlement, where nobody doubts that the same expression " means all the children ". The report of the judgment is not rendered more helpful by the circumstance that the word " not " appears in brackets, and it seems open to some doubt whether it was or was not used. But, whether it was or not, it is clear that the Lord Chancellor said this, to paraphrase his words: " Where " a legacy is given to all the children of A when they shall attain " twenty-one, then the distribution will be among the children " in esse at the time the eldest attains such an age ". Lord Thurlow, L.C., expressed his wonder at the origin of the rule.

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(14) 3 Bro. C. C. 401, 403.

In truth it seems clear that the rule is founded upon *Ellison* v. *Airey* (15), decided by Hardwick, L.C., some forty years earlier. It is plain that a rule of such antiquity cannot be lightly discarded or whittled away, and it is also, prima facie, undesirable to introduce into it undue refinements which are apt to cause difficulty to persons who wish to regulate their affairs according to their understanding of the law applicable in cases of this character.

I do not propose to refer to all the cases which Mr. Wigan cited. I content myself by a brief reference to *In re Emmet's Estate* (16) and to Astbury, J.'s decision in *In re Chartres* (17). *In re Emmet* (16) was nearly 100 years later than the founding authority of *Andrews* v. *Partington* (18). It is plain that the rule was then treated as thoroughly well established. My reference to it is for two passages from Sir George Jessel, M.R.'s judgment. He said (19): " There has, however, been established a rule of " convenience, not founded on any view of the testator's inten- " tion, that since when a child wants its share it is convenient " that the payment of the share should not be deferred, it shall " be made payable by preventing any child born after that time " from participating in the fund ". That language was used in reference to the affirmation by him of the rule. It is spoken of as a rule of convenience, but it is to be noted that the convenience is not a mere administrative convenience, that is, in order to give the trustees an early quittance of their responsibility: it is a rule of convenience of this character: a child who has attained twenty-one years, and has therefore qualified, might have a sense of injustice if he or she were made to wait, perhaps a very long time indeed, to enjoy his or her patrimony because of the possible remarriage of his or her father and the possible birth long afterwards of further children to share in the fund.

Such a state of affairs might be fairly thought undesirable from everybody's point of view. That is the basis of the rule, which entitles it to this blessing to be set against the disrepute which it is said to have earned, that it is founded on an intention on the part of the court not to make persons in the position in which the defendant finds herself wait for a long period of time and perhaps give rise between her and her own father to a situation not wholly free from embarrassment.

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(15) 1 Ves. Sen. 111.
(16) 13 Ch. D. 484.
(17) [1927] 1 Ch. 466.
(18) 3 Bro. C. C. 401.
(19) 13 Ch. D. 484, 490.

In *In re Chartres* (20) Astbury, J., was obviously disinclined to apply the rule, and the circumstances lent some force to his disinclination. In that case there was a gift to the children of A at twenty-one years, subject, however, to a power of appointment in A amongst such children. A released his power of appointment, so that the children of A then became absolutely entitled at twenty-one years. There was only one member of that class, and he had long since attained twenty-one years and had died, appointing A his personal representative. The effect, therefore, of the application of the rule by that strange concatenation of events was that A was able, as personal representative, to get payment of the fund which was given to his son. The judge, who carefully analysed the rule and the cases in which it had been applied, felt himself forced nevertheless to accede to the application.

I have derived great assistance from Mr. Wigan's formulation of four types of case which are material for consideration. The first class is where there is a gift to all the children of A, that is to say, a gift to such class without any intervening life or limited interest and without any qualification as to age or otherwise. The second class is the same as the first, but with the interposition of a life or other limited interest, for example, a gift to B for life and then to the children of A. The third class is the one precisely covered by *Andrews* v. *Partington* (21) itself, a gift to the children of A on attaining twenty-one years. The last class (to which it is conceded, prima facie, the same rule also applies) is a gift to B for life, and subject thereto to the children of A, who attain twenty-one years. The argument against Mr. Wigan proceeds by analogy from the first two to the second two. In each of the first two, the class of persons entitled is limited to those members of the class in esse at the death of the testator or on the determination of B's limited interest (as the case may be), and is not enlarged by letting in children born thereafter; for it is the policy of the law that the persons entitled should be ascertained as early as possible. But taking class one (a gift simpliciter to all the children of A), what if the testator dies, and there are no such persons then in existence? Similarly, in the case of a gift to B for life and then to the children of A, what if B dies, and again there are no persons in existence claiming as the children of A? In either case the gift must fail altogether, unless you can in that event treat the class as still alive so as to comprehend children born thereafter, such children being then capable of making the gift effective.

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(20) [1927] 1 Ch. 466.

(21) 3 Bro. C. C. 401.

It is to be noted that neither class one nor class two is within the statement of the rule in Hawkins on Wills (3rd ed.), p. 96. But it is said that analogous principles should apply. If, therefore, we consider classes three and four and suppose that at the material date there were no children in existence capable of taking under the gift of corpus, the question arises whether you should adopt the same practice as with classes one and two and say that in that event all children thereafter coming into existence should be entitled to come in and qualify. I have given my reason for suggesting that in classes one and two you must allow after-born children to qualify, for otherwise the gift must wholly fail.

It seems to me that there is no such necessity in classes three and four. Take the first and simpler class, the case in *Andrews* v. *Partington* (21) itself, a gift to the children of A on attaining twenty-one. That is, on the face of it, defined as a gift to all persons of that class who attain a particular age; and, if the rule is that the class is closed when the eldest attains that age, there appears on the face of it to be no reason to qualify it or to seek to make an exception to it, merely because at the testator's death there are no children in existence. In other words, it seems to me that in that case the non-existence of members of the class at the testator's death does not logically have any relevance to the application of the rule.

The same is equally true of the fourth class, the class with which we are here concerned. You could, no doubt, make another rule, or an exception to the general rule, no less artificial than the general rule, and say that the rule in *Andrews* v. *Partington* (21) was limited in its application to cases in which on the death of the testator or the cesser of the prior interest (whichever was the relevant date) there were in existence some members of the class ultimately to take, and that in other cases all children whenever born were entitled to qualify. That is something which can be intelligibly and simply stated, but I can find no basis for it in the authorities which have been cited. The cases and the passage from Mr. Vaughan Hawkins' book (3rd ed.), p. 96, give no indication of any such qualification to the rule, and there seems to me to be no reason in logic for it.

There is, therefore, in my judgment, no sensible ground for saying that in this particular case the rule in *Andrews* v. *Partington* (21) does not apply, though it would admittedly have applied had the defendant been born during the pendency of the prior life or other limited period.

The question is obviously doubtful, and for that reason very understandably the trustees brought the matter to the court. There is no decision on all fours with the facts of this case in the books. Moreover, in Jarman on Wills (7th ed.), pp. 1665, 1666, it is stated to be a matter of doubt whether in events such as have occurred here the rule does apply. We have, with the assistance of counsel, examined the cases referred to in the note to the text, and I do not think that they provide any direct authority for the view that in such circumstances as exist here the rule ought not to be applied. This much, however, should be stated. Although this rule is called a rule of convenience, and it may sometimes have been referred to as a rule of law, I think that Mr. Shebbeare was right in suggesting that it is in truth a rule of construction. It may be artificial, it may be said to defeat the apparent intention of the testator, but it is a rule of construction and must, therefore, give way to the language of the will in question if the language is sufficiently clear to displace it. That the application of the rule or any analogy to it can be displaced by appropriate language emerges from *Mainwaring* v. *Beevor* (22), which was followed in *Armitage* v. *Williams* (23). That was the case of a gift to a class on attaining twenty-one years, and at the relevant date, namely, the death of the testator, no members of the class existed. It was therefore a case in class three of Mr. Wigan's classification, but analogous to this case in that there was no member of the family alive at the relevant date. Sir John Romilly, M.R., decided the case on the special language of that will, which, he said, brought it within the authority of *Mainwaring* v. *Beevor* (22), not itself a case to which the *Andrews* v. *Partington* (24) rule would otherwise have applied; and he thought that, having regard to the special language used, the class of persons to take must be kept open until there was no possibility of its membership being increased. That is the nearest case which appears in the books to the present, though it is, because it turned on the special language used, different in essentials from this case. But I repeat that, if the language of the will so requires upon its fair construction, then the rule must give way to the language. On the other hand, the rule being now more than 200 years old (if the authority of *Ellison* v. *Airey* (25) be taken as the right terminus a quo) the will must be read in the light of the existence of the rule, and it is clear that merely stating that the class to take is " all or any " the children of A on attaining twenty-one years will not be sufficient without more to exclude the application of the rule. If the testator added words of emphasis indicating that all members of the class to participate at whatever date they might be born, the result might well be otherwise. Appreciating, however, as I fully do, the prima facie significance which the reader would attach to the words used by the testator in this codicil, nevertheless I do not think them sufficient, in the light of the rule, to negative its application if otherwise upon an appropriate comprehension of the rule it is applicable.

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(21) 3 Bro. C. C. 401.

(22) (1849) 8 Hare 44.

(23) (1859) 27 Beav. 346.

(24) 3 Bro. C. C. 401.

I have sufficiently stated the matters to which we have been referred. For the reasons which I have given, the rule ought to be applied in this case. To exclude it would be, whatever the disadvantages of the rule and however insensible its origin, to give it another effect, namely, to make it incoherent and capricious in its effect. With all respect, therefore, to the judge, I think that the defendant ought to succeed and that the class of persons to take under the codicil is now closed.

JENKINS, L.J. I agree. The rule in *Andrews* v. *Partington* (26) is a somewhat battered veteran, but it still remains on its feet after upwards of 200 years. Many judges have expressed their disapprobation of it and their reluctance to apply it. Nevertheless, it has over very many years been regarded as a rule so well established that it must be followed in cases to which it is properly applicable. In this particular case the question of its application arises in this way.

[His Lordship stated the facts and continued:—] The relevant circumstances, therefore, in relation to the rule in *Andrews* v. *Partington* (26), are that whereas at the date when the prior interest determined there was no member of the class in existence, a member of the class was subsequently born and has lived to attain a vested interest. It is to be observed that, as the testator's son Herbert is still alive, the class is, of course, one which is susceptible of increase. The question is whether, in those circumstances, the rule comes into operation, so as to make the entire fund immediately payable to the defendant on the ground that the class closed upon her attaining the age of twenty-one years. In my judgment, notwithstanding the view which the judge formed to the contrary, the answer to that question should be "Yes". I think that this result follows from the rule as enunciated in Hawkins on Wills (3rd ed.), p. 96, and from its application in accordance with the reason underlying it. It must be remembered that the rule, however distasteful and however artificial it has been held to be, is nevertheless not a merely arbitrary rule. It is a rule founded on reason, and the reason underlying it has been clearly stated by Sir George Jessel, M.R., in *In re Emmet's Estate* (27), in the passage to which my Lord has referred. The essence of the reason, as appears from that passage, is this (28): "There has, however, been established "a rule of convenience, not founded on any view of the testator's "intention, that since when a child wants its share it is con-"venient that the payment of the share should not be deferred, "it shall be made payable by preventing any child born after that "time from participating in the fund".

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(25) 1 Ves. Sen. 111.

(26) 3 Bro. C. C. 401.

As to the actual terms of the rule, I may perhaps be forgiven for referring again to the relevant passages in Hawkins on Wills (3rd ed.), p. 96, where the rule is thus stated: "Where there is a "bequest of an aggregate fund to children as a class, and the "share of each child is made payable on attaining a given age, "or marriage, the period of distribution is the time when the "first child becomes entitled to receive his share, and children "coming into existence after that period are excluded". Applying that simple formulation to the present case, the first child who had become entitled to receive any share was the appellant and, in the events which happened, she became so entitled on her attaining the age of twenty-one years, the prior interest in the income having previously determined. Prima facie, therefore, that was the period of distribution, and no child subsequently coming into existence would be entitled to share. But the formulation of the rule obviously requires some qualification when it is, as here, applied in relation to a gift in remainder. Mr. Hawkins thus refers to that type of case, at p. 97:—"If the gift be in remainder after a life interest, as a "bequest to A for life and after his decease to the children of B "payable at twenty-one, the period of distribution is the later of "the two events to which payment is postponed: thus, if a child "attains twenty-one in the lifetime of A, children born afterwards "in A's lifetime are admissible; and if at the death of A no child "has attained twenty-one, children born after A's death before "the first child attains twenty-one are admissible".

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(27) 13 Ch. D. 484.

(28) Ibid. 490.

Applying that formulation of the rule to the present case, at the death of A, the equivalent to which event for the present purpose is at the dissolution of the marriage between Herbert and Gette, no child had attained twenty-one years because there was no child in existence. After that event, children born after A's death, or, in the present case, after the dissolution of the marriage, before the first child attains twenty-one years are admissible. The defendant was a child born after the event corresponding to A's death in this formulation of the rule and was not merely a child born before the first child attained twenty-one years but was herself the first child to attain twenty-one years. The date of her attainment of twenty-one years therefore became the period of distribution, as being the later of the two relevant events, as matters turned out; and it would appear to follow that, according to the rule as applied to gifts in remainder, she became exclusively entitled.

But it is said that there is an exception to the rule which excludes its application to the present case. The rule would admittedly take effect as stated in Mr. Hawkins' book if, at the termination of the prior interest, there had been some potential member of the class in existence. Then, ex concessis, the rule as stated at p. 97 would apply and the class would close on the attainment of twenty-one years by the first child to attain that age. But in the present case there was no member, or potential member, of the class in existence at the date when the prior interest determined. It is said that this circumstance excludes the rule. Treating the rule, as I have said it ought in my view to be treated, as a rule based on reason and not a mere arbitrary rule, I cannot see any justification for that exception. If the reason and justification for the rule are as stated by Sir George Jessel, M.R., in *In re Emmet's Estate* (29), it must be equally right to apply it whether the first member of the class to attain twenty-one years came into existence before or after the termination of the prior interest. In whichever order those events happened, the period of distribution must still be the same and the administrative difficulties and inconveniences if the rule is excluded must also be the same. Therefore, I would not, for my part, admit this exception unless there were some authority clearly enjoining me to do so.

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(29) 13 Ch. D. 484.

On the authorities the matter seems to me to stand thus: we have been referred to no case in which the rule has been applied where the order of events was as I have stated it here, that is to say, where the first member of the class only came into existence after the termination of the prior interest. On the other hand, we have been referred to no case which has treated that circumstance as excluding the application of the rule to the case of a gift to a class at twenty-one after a life interest. As my Lord has said, a doubt is thus expressed in Jarman on Wills (7th ed.), p. 1665: "Where the gift is to the children of A on attaining "twenty-one, and no child of A is in existence at the testator's "death, it is doubtful whether all the children of A who attain "twenty-one will be entitled, or only those who are in existence "when the eldest attains that age"; and a similar doubt is thus expressed in Theobald on Wills (10th ed.), p. 236: "It seems "doubtful whether, if there are no children at the testator's "death, all would be admitted whether born before or after the "eldest attained twenty-one". Both passages, it seems, actually refer to the case of an immediate gift to a class at twenty-one years, where there is no member or potential member of it in existence at the death of the testator. I should add, and I think that this is really what has given rise to the doubt, that is naturally entertained by the trustees in this case, this passage in Jarman on Wills (7th ed.), p. 1667: "The law on the subject does "not seem to have been clearly settled in Mr. Jarman's time, "but he considered that on principle, notwithstanding some "apparently adverse authority, the rule applicable to bequests "of personal estate is that 'a bequest to A for life, and after his "'death to the children of B, is not defeated by the non-existence "'of an object at the death of A, but will take effect in favour of "'all the subsequently born children as they arise'. The "correctness of the rule thus stated is clearly established". That passage, which, as I understand it, is intended to refer to the case where the attainment of twenty-one years is not a necessary qualification for membership of the class, is supported by a statement to similar effect in Theobald (10th ed.), p. 235.

I think that there is a distinction between the case of a gift to A for life with remainder to the children of B simpliciter, and a gift to A for life with remainder over to the children of B who attain the age of twenty-one years. In the former case, the only period of distribution marked out by the will is the termination of A's life interest. Obviously, in the event of there being no children of B in existence at the death of A, that period of distribution cannot be applied, for the result of so doing would be to defeat the gift completely. In those circumstances, I think it may necessarily follow that the matter is at large and that, whether it be convenient or not, the class is thrown open to admit all after-born children. But in the case of the present type, equivalent for the purposes of the rule to a gift to A for life, with remainder to the children of B who shall attain the age of twenty-one years, the position is different. The period of distribution there marked out by the testator is, as is said in the passage in Hawkins on Wills (3rd ed.), p. 97, to which I have already referred, the later of the two events, that is to say the death of A, the taker of the prior interest, or the attainment of twenty-one by the first of the children of B to attain that age. There is therefore, in my view, no ground for not applying the rule in that type of case merely because the first child of B is not born until after the death of A, or, as in the present instance, the previous determination of A's interest.

For these reasons, in addition to those given by my Lord, although I confess to some sympathy with the learned judge, I do not think his dislike for the rule should have led him to exclude it in this particular case. In my judgment, this is a case where, on the language of the will and in the events which have happened, the rule, according to the reason on which it is based, whatever one may think of the soundness or sufficiencies of the reason, ought to have been applied by the learned judge and, accordingly, I think that this appeal should be allowed.

MORRIS, J. I agree with the conclusions which have been expressed and also with the reasons which my Lords have assigned for them.

Appeal allowed.

Solicitors:—*Bower, Cotton & Bower, for Slater, Heelis & Co., Manchester.*

B. A. B.

ROX-
BURGH, J.

1951
Mar. 7.

In re L—— (INFANTS).

Justices—Practice—Infant—Maintenance order—Application to vary —Justices' refusal to adjudicate—Validity—" More conveniently " . . . dealt with by . . . High Court "—Guardianship of Infants Act, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 3.

By the proviso to s. 7, sub-s. 3, of the Guardianship of Infants Act, 1925, no appeal lies from an order whereby a court of summary jurisdiction refers an application under the Guardianship of Infants Acts, 1886 and 1925, to the High Court on the ground that the matter can " more conveniently be dealt with by the High " Court . . . ".

The word " application " in that proviso includes an application to vary an original order.

APPEAL from Tisbury and Mere justices.

The appeal was argued in camera, but judgment was given in open court.

By an order dated June 10, 1948, the justices awarded the legal custody of two infant children to their mother, and ordered the father to pay a weekly sum of 15*s*. each for their maintenance.

On January 25, 1951, the mother applied to the same court to vary the order by increasing the amount paid for the children's maintenance. The justices considered that that matter was one which could " more conveniently be dealt with by the High " Court ", and refused to make an order, referring the application to the High Court under the proviso to sub-s. 3 of s. 7 of the Guardianship of Infants Act, 1925 (1). The wife appealed against that refusal.

G. G. MacDonald for the wife.

T. A. C. Burgess for the husband.

ROXBURGH, J. The original order was made under s. 5 of the Guardianship of Infants Act, 1886, as amended by s. 3 of the

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(1) Guardianship of Infants Act, 1925, s. 7, sub-s. 3: " Where on an " application to a court of summary " jurisdiction under the Guardianship " of Infants Act, 1886, as amended " by this Act, the court makes or " refuses to make an order, an appeal " shall, in accordance with the rules " of court, lie to the High Court: " Provided that, where any such " application is made to a court of " summary jurisdiction, and the court " considers that the matter is one " which would more conveniently be " dealt with by the High Court, the " court of summary jurisdiction may " refuse to make an order, and in " such case no appeal shall lie to the " High Court ".

Guardianship of Infants Act, 1925: it could not have been made under the Act of 1886 alone. Section 3 of the Act of 1925 provides that, where the court under that section as amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable. Sub-section 4 of s. 3 provides that any such order may, on the application either of the father or of the mother of the infant, be varied or discharged by a subsequent order. Section 7, sub-s. 3, is in the following terms: [His Lordship read the sub-section and the proviso and continued:]

It has been submitted by Mr. MacDonald that "any such "application" in that proviso means any application for an original order; but, in my judgment, it cannot mean that. In the body of sub-s. 3 "application" must include an application to vary an order, and the "order" must include an order varying an original order. Otherwise there would be no appeal from an order varying an original order, and Mr. MacDonald does not contend that that is the position. Accordingly, his argument could only succeed if the court were prepared to give to the words "application" and "order" a different meaning in the proviso from the meaning which they must bear in the sub-section to which the proviso is attached. That would be very difficult. I do not say that it would be impossible; but here there is, in my opinion, nothing at all to suggest that the proviso is limited to original orders.

The other suggestion which Mr. MacDonald made was that this is a matter over which the High Court has no jurisdiction, but I cannot accept that submission.

Once a reference to the High Court has been made under the proviso to s. 7, sub-s. 3, it seems to me quite clear that the Chancery Division would have power under s. 3, sub-s. 4, to vary or discharge, by a subsequent order, the original order made by the petty sessional court. That being so, the effect of the proviso to s. 7, sub-s. 3, is, in my judgment, quite clear: the justices were entitled to consider that the "matter", that is to say, the application to vary the original order, was one which would more conveniently be dealt with by the High Court. They plainly did consider that it was, because they have said so both in the order and in the note of the proceedings which has been furnished to me; and accordingly they refused to make an order.

That being so, "no appeal shall lie to the High Court". I cannot consider whether the grounds which led them to their conclusion were good or bad. They reached that conclusion, and that, in my judgment, is an end of the matter.

Mr. Burgess has shown me that it is not surprising to find such a provision, having regard to the provisions in the Act of 1886 for which it was substituted. Moreover, I see no difficulty in the future. This matter can well be determined in the Chancery Division. An originating summons will be more expensive; but that is doubtless a matter which the justices did not think sufficiently serious to lead them to a different conclusion.

In the circumstances I have no option but to dismiss this appeal.

Appeal dismissed.

Solicitors: *Peacock & Goddard, for Farnfield & Nicholls, Warminster; Kingsford, Dorman & Co., for S. A. L. Weeden, Brighton.*

I. G. R. M.

C. A.
1951
Apr. 19, 20.
Evershed, M.R., Jenkins, L.J., and Morris, J.

C. & M. MATTHEWS LD. *v.* MARSDEN BUILDING SOCIETY.

(*In re* THE STATUTORY TRUSTS DECLARED BY S. 105 OF THE LAW OF PROPERTY ACT, 1925, AFFECTING THE PROCEEDS OF SALE OF NO. 20 WOODLEY AVENUE, FINCHLEY.)

[1950 C. 4155]

Mortgage—Moneylender—Sale by first mortgagees—Claim to surplus proceeds of sale by second mortgagees—Second mortgagees moneylenders—Payments to second mortgagees more than twelve months in arrear—Whether claim based on statutory trust maintainable—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 105—*Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 13, *sub-s.* 1.

In 1933 a borrower mortgaged a freehold house to the defendants, a building society, to secure 725*l.*, repayable by monthly instalments. In January, 1940, he borrowed 40*l.* from the plaintiffs, who were registered moneylenders, at 82½ per cent. a year interest on a promissory note and on the security of a second mortgage of the house. This sum also was repayable by monthly instalments. In

September, 1940, the borrower died owing 600*l.* to the defendants and 32*l.* to the plaintiffs. No further payments in discharge of the debts were made. At the end of 1949 the defendants sold the house, and, after satisfying their principal debt, interest and costs, they had 412*l.* as surplus proceeds of sale.

Section 105 of the Law of Property Act, 1925, provides that the proceeds of sale held by a mortgagee, after meeting the expenses of sale and his principal, interest and costs, "shall be paid to the "person entitled to the mortgaged property, or authorized to give "receipts for the proceeds of the sale thereof".

The Moneylenders Act, 1927, s. 13, sub-s. 1, provides that no proceedings by a moneylender for the recovery of a loan or for the enforcement of a security shall lie, unless the proceedings are instituted within twelve months of the accrual of the cause of action.

On the hearing of a summons taken out in 1950 by the plaintiffs for payment to them by the defendants under the statutory trust created by s. 105 of the Law of Property Act, 1925, of the surplus proceeds of sale, or, alternatively, of 182*l.*, being the amount of principal and interest then due:—

Held, that the summons, though in form a proceeding to enforce the statutory trusts under s. 105 of the Act of 1925, was in effect a proceeding for the recovery of the money due to the plaintiffs brought more than twelve months after the last payment and therefore barred by s. 13, sub-s. 1, of the Act of 1927; for any proceedings should be regarded as proceedings for the enforcement of a security within the meaning of s. 13 of the Act of 1927 if they asserted a right to payment of the amount secured or to payment of the fund subject to the security; and the right was one which could only be asserted by setting up a title under the mortgage. Moreover, the plaintiff moneylenders, as persons whose claim was statute-barred, in the sense that they could not bring any kind of action to enforce it, could not properly be described as persons entitled to the mortgaged property or authorized to give a receipt for the proceeds of the sale. The defendants must lodge in court the surplus money.

In re Thomson's Mortgage Trusts [1920] 1 Ch. 508 distinguished.

Quære, what the position would be with regard to the plaintiffs' subsisting debt if representation of the borrower were taken out subsequently and the representatives applied for payment out of the sum in court.

Decision of Harman, J., ante, p. 378, affirmed.

Appeal from Harman, J. (1).

In 1933 one Martin mortgaged No. 20 Woodley Avenue, Finchley, to the defendants, Marsden Building Society, to secure a loan of 725*l.*, the principal and interest being repayable by monthly instalments. On January 29, 1940, he borrowed from the plaintiffs, C. & M. Matthews Ld., who were registered moneylenders, 40*l.*, with interest at 82½ per cent. a year, repayable by monthly instalments of *5l.*, on a promissory note and a second mortgage by legal charge of the house.

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(1) Ante, 378.

In September, 1940, the debtor died. No representation was taken out in respect of his estate and no further payments were received by either the plaintiffs or the defendants in respect of their loans, of which *32l.* was then owing to the plaintiffs and *600l.* to the defendants.

In 1949 the defendants, having obtained leave under the Courts (Emergency Powers) Act, 1943, sold the house, and, after payment of the costs of the sale and the discharge of the principal, interest, and costs due under the first mortgage, and costs, there remained in their hands *412l.* as surplus proceeds of sale. The plaintiffs, as second mortgagees, claimed that sum, but the defendants were unwilling to make any payment to the plaintiffs, on the grounds that the transaction of the loan might be deemed to be harsh and unconscionable, and that the plaintiffs' right of recovery was barred by s. 13 of the Moneylenders Act, 1927 (2).

On September 21, 1950, the plaintiffs took out a summons asking for the enforcement of the statutory trusts declared by s. 105 of the Law of Property Act, 1925 (3), and claiming *412l.*, or, alternatively, 182*l.*, the sum due to them at date, allowing for a reduction of interest to 48 per cent. from the date of the death of the debtor.

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(2) Moneylenders Act, 1927, s. 13, sub-s. 1: "No proceedings shall lie for "the recovery by a moneylender of any "money lent by him after the commencement of this Act or of any "interest in respect thereof, or for "the enforcement of any agreement "made or security taken after the "commencement of this Act in "respect of any loan made by him, "unless the proceedings are commenced before the expiration of "twelve months from the date on "which the cause of action accrued: "Provided that (*a*) if during the "period of twelve months aforesaid "or at any time within any subsequent period during which proceedings may by virtue of this proviso "be brought, the debtor acknowledges "in writing the amount due and gives "a written undertaking to the moneylender to pay that amount, proceedings for the recovery of the "amount due may be brought at any "time within a period of twelve "months from the date of the "acknowledgment and undertaking; "(*b*) the time limited by the foregoing provisions of this section for "the commencement of proceedings "shall not begin to run in respect of "any payments from time to time "becoming due to a moneylender "under a contract for the loan of "money until a cause of action "accrues in respect of the last payment becoming due under the contract; . . .".

(3) Law of Property Act, 1925, s. 105: "The money which is received "by the mortgagee, arising from the "sale . . . shall be held by him in "trust to be applied by him, first, in "payment of all costs, charges, and "expenses properly incurred by him "as incident to the sale . . . and "secondly, in discharge of the mortgage money, interest, and costs . . . "and the residue of the money so "received shall be paid to the person "entitled to the mortgage property, "or authorized to give receipts for "the proceeds of the sale thereof".

Harman, J., held that the proceeding was barred by the limitation provisions of s. 13 of the Act of 1927, and ordered the defendants to pay the surplus money into court. The plaintiffs appealed.

A. L. Figgis for the plaintiffs. This claim arises out of s. 105 of the Law of Property Act, 1925, and the plaintiffs are entitled under it to the residue of money realized by the defendants on the sale of the mortgaged property after satisfying their rights as first mortgagees. Harman, J., decided that, having regard to s. 13 of the Moneylenders Act, 1927, the plaintiffs were debarred from recovering the money due to them as such; and that that was so notwithstanding s. 105 of the Act of 1925. It is contended that the plaintiffs could have given a good receipt under s. 105. They are entitled to be repaid and then to hold the balance for whoever may be entitled.

This claim receives support from *In re Thomson's Mortgage Trusts* (4). It was there held that a second mortgagee taking proceedings against the first mortgagee under the Act of 1925 was not bringing suit for the recovery of interest charged on land within the meaning of s. 42 of the Real Property Limitation Act, 1833 (5). It is in truth an action by a beneficiary. *Young* v. *Clarey* (6) is distinguishable in that there has been nothing here to extinguish the plaintiffs' title. It is true that the interest sought to be charged here exceeded the rate of interest permitted by the Moneylenders Act, 1927, s. 10, but the plaintiffs are content to receive interest at 48 per cent. as from the death of the mortgagor. In any case the plaintiffs are entitled to receive the balance remaining in the hands of the defendants. True, s. 13 of the Moneylenders Act, 1927, imposes a bar to a moneylender's claim to recover money lent by him and interest on it in conditions of time applicable here.

[*Lipton (B.) Ld.* v. *Mackintosh* (7) and *Thorne* v. *Heard* (8) referred to.]

It is contended here that no attempt is being made to enforce the contract of loan. All that is claimed is payment from the defendants of the balance of the sale money remaining in their hands. It could not be said that this was an attempt to enforce the contract.

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(4) [1920] 1 Ch. 508.
(5) 3 & 4 Will. 4, c. 27.
(6) [1948] Ch. 191.
(7) [1930] 2 Ch. 202.
(8) [1894] 1 Ch. 599.

[Evershed, M.R. A creditor whose right to recover is barred is in the position that he cannot enforce his right.]

Provided that he remains a mortgagee, he remains a person entitled to give a receipt and therefore entitled to recover from the defendants.

E. G. Wright for the defendants (directed by the court, under R. S. C., Ord. 16, r. 46, to represent the estate of the mortgagor, as no representative could be found). The rights of the plaintiffs have been wholly barred by s. 13 of the Moneylenders Act, 1927; and in the circumstances they are not entitled to benefit under s. 105 of the Law of Property Act, 1925. *Thomson's* case (9) is distinguishable. See also *Cohen* v. *J. Lester Ld.* (10). As representing the mortgagor's estate, the defendants have a right to hold the balance of the purchase-money as against the plaintiffs having regard to s. 13 of the Act of 1927. [He referred to *Mills Conduit Investment Ld.* v. *Leslie* (11).]

A. L. Figgis in reply.

Jenkins, L.J. [after stating the facts and reading the Moneylenders Act, 1927, s. 13, sub-s. 1:—] There was no acknowledgment within proviso (*a*) of s. 13, sub-s. 1, during the relevant period of twelve months, so that proviso is not relevant to the present proceedings, except that it was pointed out in the course of argument that it differs from the statutory provision as to acknowledgment applicable, for instance, to the case of an ordinary simple contract debt, in that the acknowledgment here in question, in order to be effective, must apparently be given within the relevant period of twelve months. Proviso (*b*) is the material one, and it is common ground that under that proviso the cause of action in respect of the loan under the promissory note arose very much more than one year before September 21, 1950, when this summons was issued.

The position, therefore, is that the plaintiffs are precluded by sub-s. 1 of s. 13 from bringing any proceedings for the recovery of the sum lent to the debtor or any interest in respect of it, or for the enforcement of any agreement or security taken in respect of the loan, because the period of twelve months from the date on which the cause of action accrued has long since expired.

(9) [1920] 1 Ch. 508.
(10) [1939] 1 K. B. 504.
(11) [1932] 1 K. B. 233.

That is plainly the case, and it would not be disputed so far as an ordinary action against the debtor's personal representatives was concerned—an action simply claiming payment of the money. It is in effect conceded that this would also apply in regard to any proceedings to enforce the security constituted by the second charge, so far as those proceedings took the form of proceedings to enforce the mortgage against the deceased debtor's estate—that is to say, proceedings such as proceedings for foreclosure.

There is, however, the question, to which I must return, whether the present proceedings are proceedings to enforce the security at all; and, if they are, whether, being proceedings brought, not against the mortgagor, but against the first mortgagees, they are proceedings founded on a separate and independent cause of action which, if it were the relevant cause of action for the purposes of s. 13, sub-s. 1, might only be said to have accrued on October 22, 1949, or perhaps on the date on which notice was received by the plaintiffs that the money representing the surplus proceeds of sale was in the hands of the defendants.

It is contended for the defendants, especially in their capacity as the persons appointed to represent the estate of the debtor, that, in view of s. 13, sub-s. 1, the present proceedings will not lie, and the question in the case is whether that contention is well-founded or not. On the other side, reliance is placed on s. 105 of the Law of Property Act, 1925, the section regulating the disposal of the surplus proceeds of sale in the hands of a mortgagee after he has sold in exercise of his statutory power of sale and paid himself his principal, interest and costs. [His Lordship read the section.]

The judge held that these proceedings, although in their amended form an application by the plaintiffs for execution of the statutory trusts affecting the proceeds of sale, were, nevertheless, proceedings for the enforcement of the security consisting of the second mortgage within the meaning of s. 13, sub-s. 1, of the Moneylenders Act, 1927. He further held that the plaintiffs' claim to the residue of the money failed, because, in view of the operation of that section, they could not be described as persons entitled to the mortgaged property so as to be able to enforce the title in a court of law. It was, in effect, on those two grounds that he dismissed the summons.

His decision has been attacked by Mr. Figgis, for the plaintiffs, in an argument which has two branches: first, he says that these are not proceedings to enforce the security at all, but merely proceedings for execution of the trusts affecting the surplus proceeds of sale. Secondly, he says that s. 13, sub-s. 1, is an ordinary limitation section which bars the remedy but does not extinguish the right. He says, in effect, that, although the plaintiffs' security is somewhat maimed and curtailed by the operation of that sub-section, still it is a mortgage enforceable in any way open to the plaintiffs, provided only that they do not have to come to the court to have it enforced. Putting those two submissions together, Mr. Figgis contends that s. 13, sub-s. 1, places no obstacle in his way, and that the defendants should have been ordered to pay over the fund to the plaintiffs.

In making those submissions, his mainstay has been the decision of Eve, J., in *In re Thomson's Mortgage Trusts* (12). In that case the facts were somewhat complicated, but, stated in as simple a form as possible, they really come to this: there were a series of mortgages; the first mortgagee sold, paid himself the amount owing on his security, and had a surplus fund. The first mortgagee contended—and I do not think that it was disputed—that there were large arrears of interest on the second mortgage which were irrecoverable as being barred under s. 42 of the Real Property Limitation Act, 1833; and, owing to the dual interest possessed in the matter by the first mortgagee (he being apparently a sub-mortgagee of a third mortgagee), it was to his advantage if he could limit the amount payable to the second mortgagees to the amount of that principal with so much of the interest accrued thereon as was not statute barred. The form of the relevant section there in question was that no action or suit should be brought for the recovery of interest on money charged upon or payable out of land, except within the prescribed period after the right to receive the same had arisen. The prohibition, therefore, was against the bringing of an action or suit for the recovery of such interest.

The statutory provisions then in force with respect to surplus proceeds arising out of the sale of mortgaged property were contained in s. 21, sub-s. 3, of the Conveyancing Act, 1881, and were, I think, in substance the same as the provisions now appearing in s. 105 of the Act of 1925.

The effect of Eve, J.'s decision was that the proceedings before him, which took the form of a claim by the second mortgagees and their sub-mortgagee for payment out of the surplus of the amount of principal, interest and costs due under the second mortgage to the sub-mortgagee, was not an action or suit by them for the recovery of interest. His view of the matter was that this was simply a claim for the due execution of the trusts affecting the surplus proceeds; and he said (13) that, in the view he took of the statutory obligation which arose on the prior claims being satisfied, the first mortgagee's possession "must be treated as the possession of the person rightfully "entitled to have the fund handed to him", who was the sub-mortgagee of the second mortgagee; and on this footing the application "was no more to be treated as an action to recover "interest within the meaning of s. 42 than was the position for "payment out in the case of *Edmunds* v. *Waugh* (14)".

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(12) [1920] 1 Ch. 508.

Eve, J., said, further (13): "Assuming that my view of the "construction to be placed on the Conveyancing and Law of "Property Act is not sound and that Bruty"—that is, the first mortgagee—"as has been argued, is a trustee of the fund for "all subsequent incumbrancers, he is not in my opinion entitled "in the execution of the trusts mero motu, or at the instigation "of any one or more of his cestuis que trust to withhold from any "cestui que trust a fund, his title to which is unextinguished "though his right to recover it by action may be barred". Having dealt in that way with the nature of the interests of subsequent incumbrancers in a fund representing the proceeds of sale under a first mortgage, he expressed the view that, even if the first mortgagee was a trustee for all the incumbrancers, the application before him was not an action or suit within the meaning of s. 42.

Mr. Figgis very properly places strong reliance on that case. He says that here the claim concerns a trust fund in the hands of the first mortgagees which is subject to the trusts imposed by s. 105. Those trusts oblige the first mortgagee to pay the surplus over to the person entitled to the mortgaged property or authorized to give the receipts for the proceeds of sale thereof. He says that the plaintiffs are the persons so entitled and authorized, and that there is nothing in s. 13 of the Moneylenders Act, 1927, to prevent the plaintiffs' claim to this trust fund from being asserted, any more than there was, in the view of Eve, J., anything in s. 42 of the Real Property Limitation Act, 1833, to prevent the second mortgagees and their sub-mortgagee from claiming a transfer to the latter of the whole surplus,

(13) [1920] 1 Ch. 508, 513, 514.

(14) (1866) L. R. 1 Eq. 418.

notwithstanding that some part of the interest due under that mortgage was statute barred.

The arguments based on *In re Thomson's Mortgage Trusts* (15) are of considerable force; but, giving this matter the best consideration I can, and comparing the circumstances of this case with those of that case, I do not think that case should govern the decision here. The relevant Statute of Limitations in *Thomson's* case (15) prohibited an action or suit being brought for the recovery of part of the interest due under the second mortgage, and I think it relatively easy to come to the conclusion that a claim under the trust corresponding to the terms of s. 105 of the Act of 1925 to have the surplus transferred to the sub-mortgagee of the second mortgage (which is how the judge regarded the matter) would not fairly answer the description of an action or suit to recover interest. The words here are entirely different. The prohibition, so far as relevant, imposed by s. 13, sub-s. 1, of the Act of 1927, extends to any proceedings for enforcement of any security given in respect of any loan made by the moneylender. Those are very wide words, and in my judgment, as Harman, J., held, the claim of the plaintiffs, having regard to the substance of the case, was nothing more or less than a claim to enforce the security which they took in respect of the 40*l.* loan, namely, the second mortgage.

It is contended by Mr. Figgis that this is not an enforcement of the security, and that it is a proceeding purely between the second mortgagees and the first mortgagees concerning the application of the trust fund representing the surplus proceeds. That, he said, is not enforcement, which connotes some form of proceeding against the debtor or those claiming under him. He further says that what happens in a case of this kind is that the first mortgagees on behalf of themselves and all subsequent incumbrancers enforce the security by sale of the property, and thereafter the matter resolves itself simply into the proper disposal of the proceeds arising out of the enforcement. I think that that is too narrow a view. I think that any proceedings should be regarded as proceedings for the enforcement of a security within the meaning of s. 13, if they assert a right to payment of the amount secured, or to payment of the fund subject to the security, and the right is one which can only be asserted by setting up a title under the mortgage. It is plain in this case that in order to have a locus standi in the matter—in order to claim to be beneficiaries under the statutory trusts at all—the plaintiffs had perforce to found their proceedings upon the assertion that by virtue of their second mortgage they were now entitled to this balance. That, in my judgment, is enough to make the present proceedings amount, within the meaning of s. 13 of the Act of 1927, to proceedings to enforce the security.

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(15) [1920] 1 Ch. 508, 514.

Nor, in my view, can that conclusion be displaced by the contention based on *In re Thomson's Mortgage Trusts* (16), that possession by the first mortgagee as trustee is tantamount to possession on the part of the second mortgagee claiming a transfer of the fund. It seems to me that this argument really carries the matter no further, for the first mortgagee is only in possession of the fund on behalf of the second mortgagee, on the footing that the second mortgagee is the proper person to receive it. If a dispute arises, and it becomes necessary for the second mortgagee to institute proceedings in which he sets up his mortgage, in order to make out his claim that the fund is held in trust for him, then these proceedings are, in my view, proceedings to enforce his security.

In these circumstances, in the view I take, the judge was right in holding that these were proceedings for the enforcement of the second mortgage, and as such were barred under s. 13, sub-s. 1, of the Act of 1927.

As I mentioned earlier, an argument was raised by Mr. Figgis as to the date on which the cause of action arose within the meaning of s. 13, sub-s. 1, quoad the enforcement of the security. Of course, that depends upon the view taken of the nature of the proceedings under consideration. If they were proceedings of some kind other than proceedings for the enforcement of the second mortgage, then, of course, it might well be that the cause of action arose at some time other than the date on which the mortgage originally became enforceable. That, however, is prima facie the relevant date, and in my view these proceedings, although their form was, of course, dictated by the fact that before they were launched there had been a sale of the property comprised in the security, were nothing more or less than proceedings to enforce the second mortgage. I have, therefore, no doubt that the right to enforce that security arose on the occasion of the original default, and therefore far more than a year before the date of the institution of the proceedings. In my view, therefore, that argument of Mr. Figgis falls to the ground once it has been accepted that these are proceedings to enforce the second mortgage.

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(16) [1920] 1 Ch. 508.

As to the other branch of the argument, Mr. Figgis laid great stress on the contention that s. 13, sub-s. 1, was not apt to extinguish a right as opposed to barring a remedy. In that general contention I am in agreement with him. Nevertheless, I am not prepared to hold that a person whose claim is statute barred, in the sense that he cannot bring any kind of action in any court to enforce it, can properly be described as a person entitled to the mortgaged property or authorized to give receipts for the proceeds of its sale; and I think, as did the judge, that there is a real ground of distinction between this case and *In re Thomson's Mortgage Trusts* (17), in that the sub-mortgagee of the second mortgage there concerned had admittedly got something due to him, namely, his principal and some interest. The only question was, how much interest was properly payable to him. In the present case the relevant limitation has had the effect of depriving the plaintiffs of any claim at all in respect of the loan or any security for it which they can assert by any form of legal proceeding. Accordingly, the result in my view is simply this: the summons issued by the plaintiffs was a proceeding to enforce their security; but, the time prescribed by s. 13 of the Act of 1927 having run, it was a proceeding which, by the express terms of the section, did not lie and was therefore rightly dismissed.

I cannot say that I regard the result as a particularly satisfactory one, but I think that it necessarily follows from the terms of the limitation imposed by s. 13. If Mr. Figgis' contention that the plaintiffs' rights are not extinguished were accepted, the position would arise that the plaintiffs still had a debt owing to them, but a debt which they cannot recover by means of any legal process. On the other hand, the debtor's estate still owes the money, for the debt is not extinguished, although it cannot be sued for. Thus the position arrived at by the present decision is something of a stalemate. I do not propose to speculate on what may happen in the future, or decide questions in advance; but, in the event of this fund being paid into court, as I think it must be as the matter stands at present, and of a personal representative of the debtor being constituted and applying for payment out, the plaintiffs might, as it seems to me, well raise the point that, although they cannot sue for their debt, the representatives of the debtor cannot in equity claim payment of the fund out of court without first discharging the debt, on the ground that, although not recoverable by action, it is still a subsisting debt which, in equity, ought to be paid as a condition of any payment out to the mortgagor's estate, the application for that purpose being, in effect, equivalent to a claim for redemption.

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(17) Ibid.

I have no doubt that if the court took that view—and I am not saying that it would, nor am I deciding that question one way or the other in advance—the payment which would have to be made as a condition of allowing the balance of the fund to come out of court to the personal representative would be a payment arrived at after taking a fair and proper account of the amount which should be considered as justly due, having regard to any relevant provisions of the Moneylenders Acts as to rate of interest and so forth.

For these reasons, notwithstanding Mr. Figgis's very helpful argument, I cannot see my way to differ from the judge, and I think that this appeal fails.

MORRIS, J. I am of the same opinion. The debtor borrowed 40*l.* on January 29, 1940, and the rate of interest was 82½ per cent. The note or memorandum of the contract of that date recited the amount of the loan, and recited that it was granted on the security of the promissory note and of the legal charge granted by the borrower on his property at No. 20 Woodley Avenue. The note further recited that the borrower authorized the moneylenders out of the 40*l.* to deduct and retain 7*l.* 10*s.*, which was to be accepted by the moneylenders in full settlement of some earlier promissory note. Those matters might all have been relevant if the court had been considering the righteousness of this transaction.

The Moneylenders Act, 1900, s. 1, provided as follows for the re-opening of transactions: "Where proceedings are "taken in any court by a moneylender for the recovery of "any money lent after the commencement of this Act, or the "enforcement of any agreement or security made or taken after "the commencement of this Act, in respect of money lent either "before or after the commencement of this Act, and there is "evidence which satisfies the court that the interest charged in "respect of the sum actually lent is excessive, or that the "amounts charged for expenses, inquiries, fines, bonus, "premium, renewals, or any other charges, are excessive, and "that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give "relief, the court may re-open the transaction, and take an "account between the money-lender and the person sued, and "may, notwithstanding any statement or settlement of account "or any agreement purporting to close previous dealings and "create a new obligation, re-open any account already taken "between them, and relieve the person sued from payment of "any sum in excess of the sum adjudged by the court to be "fairly due in respect of such principal, interest and charges, "as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable".

By s. 10, sub-s. 1, of the Act of 1927: "Where, in any proceedings in respect of any money lent by a moneylender after "the commencement of this Act or in respect of any agreement or "security"—and I note that those words are slightly different from the words in s. 13—"made or taken after the commencement of this Act in respect of money lent either before or after "the commencement of this Act, it is found that the interest "charged exceeds the rate of forty-eight per cent. per annum, "or the corresponding rate in respect of any other period, the "court shall, unless the contrary is proved, presume for the "purposes of section one of the Moneylenders Act, 1900, that "the interest charged is excessive and that the transaction is "harsh and unconscionable, but this provision shall be without "prejudice to the powers of the court under that section where "the court is satisfied that the interest charged, although not "exceeding forty-eight per cent. per annum, is excessive".

The borrower died in September, 1940, and it is common ground that the latest date down to which any action could have been brought against the estate of the borrower for money due from the borrower has long since passed. When, in 1949, the building society, as first mortgagees, gave notice to the moneylenders of the sale of the property, certain correspondence followed. The moneylenders said that they noted that there was a substantial surplus in hand, and they asked that that surplus should be forwarded to them in order that their legal charge might be satisfied. The building society said that they did not know exactly what the surplus was then likely to be, but that they thought that it was about 400*l.*; and the moneylenders asked that they should have the surplus handed to them. The building society asked to see the second charge, and they also asked if they might have a statement showing how the amount claimed was arrived at. That statement was sent in January, 1950, showing an amount then claimed of 171*l*. 10*s*. The moneylenders claimed interest as from the date in September, 1940, down to December, 1949, not at the rate agreed, but at the rate of 48 per cent.—they had voluntarily agreed to state their interest at that figure. When the building society received the account they wrote, on January 18, that they were extremely concerned at the disclosure of the rate of interest being charged and at the large amount of interest that the moneylenders required to have paid to them, and said: " The society feel that they might leave " themselves open to serious criticism if they paid out on second " charge embodying the interest claimed in this case, and wonder " if they should not pay the moneys into court ".

In my judgment that was a very proper attitude for them to adopt. Once they had had disclosed to them the terms of this contract, it must have been apparent that there were circumstances which might call for a re-opening by the court. I mention those matters, although we did not call upon Mr. Wright to deal with any question of the re-opening of the transaction, because they indicate how the matter developed from the point of view of the building society.

The moneylenders then took proceedings in which the borrower's estate was not represented, and it was not possible for the court, had there been occasion then to re-open the transaction, to have the information before it as to the circumstances of the loan. It might well be that there would be evidence, if the matter were investigated, suggesting on the one hand that the risk was a big one, or, on the other hand, that the risk was slight. The moneylenders were claiming to be beneficiaries under the trust, but were claiming to say that they should fix the amount for which they were beneficiaries, fixing it by reference first to the contract, but then by reference to the contract as altered by them so as to reduce the rate of interest to 48 per cent. Speaking for myself, it does not seem to me that by a mere reduction of the rate to 48 per cent. they can overcome or cure the mischief which, on the face of it, the contract seems to suggest. When the proceedings were before the judge, the building society took the point that s. 13 prevented the proceedings from being brought, and once that point was taken it was for the judge to adjudicate upon it. In my judgment he came to the correct conclusion.

In *In re Thomson's Mortgage Trusts* (18) Eve, J., said that

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he did not think that the application in that case was an action or suit within the meaning of s. 42 of the Real Property Limitation Act, 1833; he said that it was "in substance" an action by a beneficiary for the execution of a trust. In my judgment the proceedings before Harman, J., were, "in substance", proceedings for the enforcement of a security taken in respect of a loan made by the moneylenders. That is also the common sense of the matter, and I am in entire agreement with the reasoning of my Lord. Those proceedings were instituted after the expiration of the date when the cause of action accrued, and I am of the opinion that the judge came to the correct conclusion.

EVERSHED, M.R. I have not found this case an entirely easy one, and, as my Lord has observed, the result may be regarded as not very satisfactory—although any regret which I may feel on that account is not unqualified by the considerations to which my brother Morris has referred in regard to the nature of this transaction, and by the fact that for a period of ten years after the borrower met his death the plaintiffs, although no doubt they were in difficulties, in fact took no step whatsoever towards realising their claim, during which period the somewhat small capital sum owing of 32*l*. had, by the incidence of interest at the more modest rate of 48 per cent. (which they had substituted for the contractual 82½ per cent.), been swollen to some six times its original dimensions.

But I agree with my brethren in thinking that the judge correctly decided the question. I have been much indebted to Mr. Figgis for the forceful way in which he has put his case. He has said that these are not proceedings to enforce the security, but to enforce in the plaintiffs' favour the statutory trusts specified by s. 105 of the Law of Property Act, 1925. Alternatively, if they are in some sense proceedings to enforce the security, the cause of action on which they are founded arose, and arose only, when the trusts specified by s. 105 became first operative—that is, when the proceeds of sale came to the hands of the defendants, events which occurred at a time such that the limitation in s. 13 of the Moneylenders Act, 1927, would not bar the plaintiffs' right.

As regards the cause of action, I am unable to accept the argument of Mr. Figgis. If, as this alternative really supposes, these proceedings are on his part in some measure an enforcement of the security, then to my mind the cause of action first arose when the right, according to the contract, to enforce the

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security first occurred, and admittedly that was at a date long outside the period allowed by s. 13.

On the question whether these are proceedings to enforce the security at all, as my Lord has observed, Mr. Figgis has much relied upon the decision of Eve, J., in the *Thomson* case (18), and particularly upon the reasoning underlying the decision that the possession there by the first mortgagees of the surplus proceeds of sale was in the eye of the law the possession of the plaintiffs as second mortgagees; but it is to my mind of the essence of that decision that the plaintiffs in that case could enforce their security, and it was for that reason, and because they were therefore within the terms of the statutory trusts, that the possession of the first mortgagees could be properly treated as the possession of the second mortgagees or plaintiffs.

That distinction, I think, was rightly noted and relied upon by Harman, J., apart from the further distinction between the language of s. 42 of the Act of 1833, with which Eve, J., was concerned, and that of s. 13 of the Moneylenders Act, 1927. Although the form of these proceedings is an application for the execution of the trusts, I think that the substance of them plainly is a proceeding to enforce a security. They are concerned with a sum of money in the hands of first mortgagees representing surplus proceeds of sale. The plaintiffs were persons who lent a sum of money to a deceased borrower. What is their interest or concern in this sum of money? What rights have they in regard to it? Surely only this, that they claim by virtue of their contract to take and satisfy themselves out of these moneys. In so far as they say that, they are, as I think, enforcing their security; and, in so far as they have to come to the court to establish that right, they are taking proceedings to enforce their security. To put it in another way, it seems to me that the only way in which the plaintiffs qualify as beneficiaries under s. 105 is on the footing that they can and do assert in the court their right to enforce the security; that is, to take and satisfy themselves out of these sums of money.

For those reasons, as well as for those stated by my Lords, I think that Harman, J., rightly concluded this matter, and that the appeal accordingly should be dismissed.

I agree with what my brother Jenkins has said in regard to possible future questions, and I say no more about them. They are matters which may hereafter arise, and the parties who will

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then be concerned may be different from those now before the court. It is, therefore, inappropriate that I should say more about them.

Appeal dismissed.

Solicitors: *M. A. Jacobs & Sons; Bentleys, Stokes & Lowless, for Jobling & Knape, Morecambe and Heysham.*

H. C. G.

1951
Apr. 16, 30;
May 28.

Romer and Harman, JJ.

In re MEADE (A BANKRUPT).
Ex parte HUMBER *v.* PALMER (TRUSTEE OF THE BANKRUPT).

[No. 13 of 1950.]

Bankruptcy—Proof of debts—Money advanced for purpose of bankrupt's business—Knowledge of intended use—Validity of proof.

A person who authorizes the use of his money for the purpose of a business cannot subsequently, on the failure of the business, prove in competition with the creditors of the business for the money so lent.

In re Beale (1876) 4 Ch. D. 246; 46 L. J. (B.) 17 followed. *Ex parte Garland* (1804) 10 Ves. 110, *Ex parte Butterfield* (1847) De G. 570 and *Scott* v. *Izon* (1865) 34 Beav. 434 considered.

APPEAL from Judge Hamilton, sitting at Northampton county court.

On February 13, 1951, the county court judge dismissed the appeal of Florence Annie Humber against the decision of the trustee of a bankrupt, one A. G. W. Meade, rejecting proof of her debt of 7,314*l.* 8*s.* 8*d.* A receiving order was made against the bankrupt, on his own petition, on October 5, 1950, and the order of adjudication was made on October 11, 1950. On November 11, 1950, the appellant swore a proof in the bankruptcy for the sum of 7,314*l.* 8*s.* 8*d.*, which she described as "the balance of money advanced and payments made for and "on behalf of the bankrupt at his request". This claim was rejected by the trustee on the ground that the appellant had allowed her money to be used in the bankrupt's business. The sum of 7,314*l.* 8*s.* 8*d.* was subsequently agreed at 7,218*l.* 15*s.* 8*d.*

On her appeal from the trustee's decision she stated in an affidavit that the various sums of money making up her debt were advanced by her or her solicitors to the bankrupt by way of loan, without control on her part as to the manner in which they were to be, or in which they were in fact, used. She admitted that she was aware that at the material time the bankrupt purchased Murcott House, Long Buckby, Northamptonshire, for use as a dwelling-house, and also for the purpose of carrying on his business as a riding-school proprietor. She said that she was not, and had not at any time been, a partner in that or any other business of the bankrupt; and that no arrangement had ever been made between herself and the bankrupt for repayment of the money by way of a share in the profits of the business.

The trustee in an affidavit in answer said that he was informed by the bankrupt that, excepting the sum of 3,250*l.* lent by a building society on a mortgage, all the money needed for the purchase of Murcott House and the setting up of a riding academy was provided by the appellant. It appeared that the whole of the sum of 7,218*l.* 15*s.* 8*d.* claimed by the appellant was spent on the purchase of the house and of horses, equipment, furniture and sundry other items necessary for the carrying on of the business of the riding academy. It further appeared that the moneys making up the sum of 7,218*l.* 15*s.* 8*d.* were paid over between June 20, 1949, and October 7, 1950, to meet the requirements of the business from time to time. No evidence had been submitted to him of any agreement between the appellant and the bankrupt for the repayment of the money, or for the payment of any interest on, or security for, the loan.

The trustee exhibited to his affidavit a brochure advertising "Murcott House. Residential Riding Academy". The appellant, although not married to the bankrupt, had been living with him as his wife for some time before his bankruptcy. The "principals" of the academy were stated in the brochure to be "Major and Mrs. G. Meade". There appeared the statements: "Students enjoy a family life under the personal supervision of "Mrs. G. Meade" and "The physical and social life of junior "students is under the careful supervision of Mrs. G. Meade". It was admitted that the "Mrs. G. Meade" there referred to was the appellant.

The trustee also exhibited a copy of the letter heading used at the academy in which the principals were described as Mr. and Mrs. G. Meade.

At the hearing before the county court judge the appellant said in evidence that the bankrupt decided on what the moneys which she advanced should be spent, and that she herself had no control over the expenditure. Her explanation of the presence of her name in the brochure was that she was looking after the domestic side of Murcott House, and would have looked after the children of less than sixteen years (had there been any) and interviewed their parents. She said that she never made any arrangement to receive any share of the profits of the academy and was not going to become a partner in the enterprise, although she thought of introducing her daughter into it if it were successful. She admitted that the whole of the sum for which she was proving in the bankruptcy was spent for the purposes of the business in the hope that it would produce profits, and that the household would be thus supported. She also said that she herself lived in Murcott House with the bankrupt, and that nothing was ever mentioned as to repayment of any of the moneys which she had advanced.

The judge said that it was obvious that the appellant was advancing moneys to the bankrupt for many purposes, including the purchase of horses for the academy as well as for the purchase of the house itself, grooms' wages, housekeeper's wages, telephone, and rates. He said that there could be no doubt that she lent or entrusted her money to the bankrupt for the purpose of his business, and that the object of putting her money into his hands was to enable him to buy the house, to furnish and equip it, and to set up and run the business with her assistance. The judge upheld the trustee's decision on the authority of *In re Beale* (1), and dismissed the appeal. This appeal was from that decision.

A. W. M. Davies for the appellant. It is admitted that the appellant made the loan. The question is whether she can rank pari passu with the other creditors, or whether she is postponed. The county court judge put her in the same position as a married woman who lent money to her husband, and who was therefore postponed by s. 36, sub-s. 2, of the Bankruptcy Act, 1914. The appellant, however, was not the debtor's wife, and that subsection does not apply.

There is nothing in the Bankruptcy Act which prevents her from being admitted with other creditors, and she is therefore entitled to rank with them for payment: see ss. 30 and 33, sub-s. 7, of the Bankruptcy Act.

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(1) (1876) 4 Ch. D. 246; 46 L. J. (B.) 17.

The county court judge founded his judgment on *In re Beale* (1). That case has not been commented on in any other reported case, but the principle which he extracted from it is too wide. That decision does not lay down that any loan made for the purpose of a person's business, and known to be used for that purpose, cannot be proved for in the liquidation of the business. If *In re Beale* (1) applied, that would involve postponement of a much wider class than is postponed either under s. 36 of the Bankruptcy Act, or sub-s. 3 (*d*) of s. 2 or s. 3 of the Partnership Act, 1890.

Ex parte Garland (2) and *Ex parte Butterfield* (3) were rightly decided on the facts there in question, but do not justify the principle alleged to exist in *In re Beale* (4). [He also referred to *In re Childs* (5).]

It is conceded that the appellant was not a partner; and she did not in fact hold herself out as such: see Williams on Bankruptcy (16th ed.), p. 227. It is not suggested that a person can compete with his own creditors, but representation of oneself as a joint principal of a riding academy is not of itself a representation that one is a partner. There was no representation by her within the meaning of s. 14 of the Partnership Act.

[He also referred to *In re Tuff* (6) and *Ex parte Tennant* (7).]

Vaughan, K.C., and *J. G. Le Quesne* for the trustee. This is not an actual gift: it is half-way between a gift and a loan; it is capital which has been lent by the appellant with her knowledge for the purpose of the business. All the cases up to and including *In re Beale* (8) show that advances for the purpose of a business, and made on the understanding of their being used in and exposed to the hazards of a business are not repayable until after the other debts. The statement in Wace on Bankruptcy (1904), p. 150, is based on that principle. The appellant was content that her money should be used for the purpose of the business, and it was her intention that she and the bankrupt should live on that business if it were successful. The payments constituted the provision of capital, and not a loan: see *Scott* v. *Izon* (9). *In re Beale* (10) and the cases there cited are all governed by the same principle.

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(1) (1876) 4 Ch. D. 246; 46 L. J. (B.) 17.

(2) (1804) 10 Ves. 110.

(3) (1847) De G. 570.

(4) 4 Ch. D. 246; 46 L. J. (B.) 17.

(5) (1874) L. R. 9 Ch. 508.

(6) (1887) 19 Q. B. D. 88.

(7) (1877) 6 Ch. D. 303.

(8) 4 Ch. D. 246; 46 L. J. (B.) 17.

(9) (1865) 34 Beav. 434.

(10) 4 Ch. D. 246; 46 L. J. (B.) 17.

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It was never intended that the appellant would ask for the return of this loan: it was intended to be permanent; and the express or implied conditions were that the money could be used successfully or lost in the course of the business. Her evidence shows that this was intended to be a joint adventure.

There were representations by her to all the world that she was a partner. She is therefore liable under s. 14 of the Partnership Act, 1890: see *Ex parte Hayman* (11). The use of the word principal clearly indicates that there were two partners.

She also represented that she was the bankrupt's wife, and she is also within s. 36, sub-s. 2, of the Bankruptcy Act, 1914. The other creditors would not have thought that they would be in competition with her in any bankruptcy. She must now make good her representation. Williams on Bankruptcy (16th ed.), pp. 225, 226, is in conflict with Wace, p. 149. See also *Ex parte Sheen* (12). It is submitted that the statement in Wace is to be preferred. [He also referred to *Ex parte Ellis* (13) and *In re Rowland and Crankshaw* (14).]

Davies in reply. *Ex parte Sheen* (15) helps the appellant. That decision envisages that a person in her circumstances can at times prove in the bankruptcy. There is no evidence that any creditor gave credit to the bankrupt because he thought that the appellant was his wife.

Cur. adv. vult.

May 28. ROMER, J., reading his judgment, stated the facts substantially as above set out, and continued:—The decision of *In re Beale* (16) was much canvassed in argument before this court, and Mr. Vaughan, for the respondent trustee, contended that that case and certain authorities which preceded it establish a proposition which is stated in Wace on Bankruptcy, at p. 150, in the following terms: "Where a person has authorized the employment of his assets in a business he cannot "prove in competition with the creditors of the business in "respect of the assets so authorized to be employed".

Before considering *In re Beale* (16) and the other cases, it would be convenient to summarize the argument on this point of Mr. Davies for the appellant. He argued that the moneys advanced by her were a loan to the bankrupt, and that having regard to the provisions of ss. 30 and 33, sub-s. 7, of the

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(11) (1878) 8 Ch. D. 11.
(12) (1877) L. R. 6 Ch. 235.
(13) (1827) 2 Gl. & J. 312.
(14) (1866) L. R. 1 Ch. 421.
(15) L. R. 6 Ch. 235.
(16) 4 Ch. D. 246; 46 L. J. (B.) 17.

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Bankruptcy Act, 1914, these moneys constitute a provable debt, ranking pari passu with the debts to the other creditors; that the only provision in the Act relating to postponement which might be regarded as relevant is s. 36, but that that section is not in fact relevant inasmuch as the appellant was not the bankrupt's wife. Indeed, counsel used s. 36, sub-s. 2, to found an argument in favour of the appellant by saying that the fact that the section specifically postpones a wife who lends money to her husband for the purposes of his business indicates that a woman who lends money for business purposes to anyone who is not her husband is not similarly postponed, for otherwise there would be no point in s. 36, sub-s. 2, at all. From these considerations Mr. Davies proceeded to the conclusion that the county court judge was wrong in acceding to the view that the bankrupt's other creditors have priority over the claim of the appellant.

The effect on this argument of *In re Beale* (16) and the earlier authorities to which Bacon, C.J., made reference in that case, must be considered.

The facts in *In re Beale* (17) are stated as follows in the Law Reports: "John Beale, a wine merchant at Sheffield, filed a "liquidation petition in 1876, under which Cooper Corbridge was "appointed trustee. In July, 1857, Beale had gone through the "ceremony of marriage with Mary Walker, a sister of his then "deceased wife, and had after that lived with her as his wife. "On August 1, 1876, Mary Walker tendered to the trustee a "proof for 3,000*l*. 'for money lent, advanced, and paid' by her "to Beale, at his request, in the year 1858. The trustee rejected "the proof, and Mary Walker applied to the county court for an "order to admit it. In support of her application she filed an "affidavit, in which she stated that in August, 1858, a legacy of "3,000*l*., to which she was entitled under the will of her father, "who had died in March, 1858, was paid by her direction to "Beale. The payment was made to him in pursuance of and in "reliance upon an agreement made between Beale and herself, "after her father's death and prior to the payment to Beale, "that the legacy should be advanced to and used by Beale in the "business of a wine and spirit merchant which he then carried "on; but that as to 2,000*l*., part thereof, he should be a trustee "of it for Mary Walker, and that a settlement to carry out the "agreement should be executed by him after the receipt of the "3,000*l*. In fact, no settlement was ever executed. Beale

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(17) 4 Ch. D. 246; 46 L. J. (B.) 17.

"made an affidavit to the same effect. The story was also "confirmed by the evidence of Henry Walker, a brother of Mary "Walker. The only evidence in opposition was that of the "trustee, who said that, though he was appointed receiver and "manager of the business of Beale immediately after he filed "his petition, and assisted him in preparing his accounts for "presentation to the first meeting of the creditors, yet nothing "was said to him about the claim of Mary Walker until after the "first meeting. The judge admitted the proof to the extent of "2,000*l*. The trustee appealed".

The judgment of Bacon, C.J., was as follows (18): "It "cannot be denied that this is a very singular case, but the "circumstances furnish an explanation of the origin of the "transaction. The respondent and the debtor were, to all "intents and purposes, married, except for the provisions of the "law of England. He being engaged in business, she, as any "good wife would have done, allowed him to have her money to "employ in his business. Stopping there, what was there wrong "in the transaction? Was not the money exposed to all the "hazards of the business? Had not the creditors of the business "a right to say that they were entitled to be paid out of the "assets in priority to the lender of the money which had been "employed in the business? That is the principle of the "decisions in *Ex parte Garland* (19), *Ex parte Butterfield* (20) "and *In re Childs* (21). The trader goes into the world and "deals with the money as part of his assets. It is said that a "trust of it was created on behalf of the lender, but that is a "trust repugnant to the first destination of the money. If there "is a surplus after paying the creditors in full, Mary Walker may "have a good equity against it, but that is her only right.

"In *Ex parte Butterfield* (22) the proof was attempted to be "made on behalf of the estate of a dead man; in the present case "it is on behalf of a living woman; that is the only distinction. "The trust set up is wholly repugnant to the original stipulation "for the loan. Mr. De Gex says that the case of *In re* "*Childs* (23) has no application to the present case. I agree "that it has no direct application, but it recognizes the principle "of *Ex parte Butterfield* (24) and *Ex parte Garland* (25). There "a man had carried on two separate businesses, a share in one

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(18) 4 Ch. D. 248.
(19) 10 Ves. 110.
(20) De G. 570.
(21) L. R. 9 Ch. 508.
(22) De G. 570.
(23) L. R. 9 Ch. 508.
(24) De G. 570.
(25) 10 Ves. 110.

"of which had belonged to his wife before he married her, and "he had entered into a covenant that the profits of her share of "that business should be for her separate use. The Lords "Justices held that on his bankruptcy there must be a separate "administration of the assets of the two businesses, and that if "there was any surplus of the husband's share of that estate in "which the wife was interested, it must go over to the other "estate. The judgment of James, L.J., is distinct. In my "opinion the principle is plain. It is not said that Mary Walker "participated directly in the profits of the business, but that the "business was in a certain sense carried on for the joint benefit "of herself and the debtor no one can doubt. The Partnership "Act of 1868 is imperative that a person who lends money to a "partnership, on an agreement that he is to receive a share of "the profits, cannot call for payment of his money until after "the creditors of the partnership have been paid in full. If that "statute has any application to this case the result is plain. "Mary Walker knew that the money was to be employed in the "business, and if she had sued the debtor while he was solvent "it would have been a sufficient answer for him to say, I have "employed the money in my business, and I have lost it all; "there is none of the 2,000*l.* left. The true principle is pointed "out by *Ex parte Garland* (25) and *Ex parte Butterfield* (26); no "proof can be admitted in respect of a trust which is inconsistent "with the application of the money which the lender has pointed "out. The order of the county court judge must be discharged, "but I think that, having regard to all the circumstances of the "case, I ought not to give the appellant any costs".

The judgment as reported in the Law Journal Reports differs in some respects from the report in the Law Reports. In the Law Journal Reports Bacon, C.J., is reported to have said (27): "These two persons were married, and though the marriage was "not legal in this country they lived to all intents as husband "and wife. . . . There is no doubt that the money must be "exposed to all the hazards of the business, and subject to the "claims of its creditors. That is the principle of *Ex parte* "*Garland* (28), of the case before Lord Cottenham,* and of *In* "*re Childs* (29). Then it is said there was a trust for the wife. "But the money had been previously advanced and subjected to

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(26) De G. 570.
(27) 46 L. J. (B.) 17.
(28) 10 Ves. 110.

* Note: *Ex parte Butterfield.*
(29) L. R. 9 Ch. 508.

"the contingencies of the business; the trust alleged is something "repugnant to the destination originally given to the fund. If "any part of the fund remained from the business there might "be a trust between the husband and wife; but that is not what "is set up". Then after referring to the judgment of James, L.J., in *In re Childs* (30) the chief judge proceeded (31): "That shews plainly that he who provides part of the capital of "a business cannot call for payment till the creditors of the "business are paid".

The judgment in *In re Beale* (32) is somewhat obscured first by the fact that the chief judge, although recognizing the invalidity in this country of the marriage between Mr. and Mrs. Beale, does seem to have treated them for some purposes as husband and wife—indeed in one passage in the Law Journal report he refers to them under that description; and secondly by his reference in the Law Reports to the Partnership Act of 1868. But having regard to the issue involved and to the arguments of counsel, I think that the true ratio decidendi of the case lies in the passage in the Law Journal report (33) that "he who provides part of the capital of a business cannot call for payment "till the creditors of the business are paid". The chief judge was clearly applying that principle to the 2,000*l*. which was in question, and rejecting the contention that the principle was displaced by the operation of the trust to which the fund had been subjected.

Ex parte Garland (34) and *Ex parte Butterfield* (35) were both cases in which a testator authorized the use in a business of a part of his general estate. In each case the authority so conferred was exercised, and on the subsequent failure of the person to whom the business was given the trustees, as representing the persons beneficially interested in the general estate, sought to prove in respect of the moneys so used in competition with the other creditors of the business. In each case the claim was rejected, Lord Eldon, L.C., according to *Ex parte Garland* (36), immediately expressing a clear opinion against it. Sir John Romilly, M.R., in *Scott* v. *Izon* (37), expressed his view as to this class of case as follows (38): "Many cases were cited to me "to prove that when a testator has authorized the employment

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(30) Ibid. 510.
(31) 46 L. J. (B.) 18.
(32) 4 Ch. D. 246; 46 L. J. (B.) 17.
(33) 46 L. J. (B.) 18.
(34) 10 Ves. 110.
(35) De G. 570.
(36) 10 Ves. 110.
(37) 34 Beav. 434.
(38) Ibid. 438.

"of his estate in trade, though the firm in which it was so "employed becomes bankrupt, no proof can be made against the "estate of the bankrupts in respect of such money of the testator "so employed. This, no doubt, is correct, but it only proves "that, as the testator's money was employed properly in this "trade and without any breach of trust, the amount so employed "could not be proved against the estate of the partners, if they "had become bankrupts, as it was not a debt of the firm but "merely capital brought into it".

In re Childs (39) lends perhaps some support to the decision of Bacon, C.J., in *In re Beale* (40), although the point in issue and decided was a distinct one, namely, that if a man carried on two businesses in different capacities (for example, one as beneficial owner and one as executor) and becomes bankrupt, the assets of each business would be separate from the other, as also would the creditors.

In my judgment the principles regulating cases where testators authorize the use of the whole or a part of the general estate in a business which is the subject of a specific disposition were rightly applied by Bacon, C.J., to the circumstances which existed in *In re Beale* (40) and should be applied to the circumstances of the present case. It seems to me impossible to regard the appellant as a creditor of the bankrupt, the person carrying on the business in respect of which she advanced moneys for the purpose of the riding academy; and unless she was such a creditor she cannot prove in competition with people who are. If she were in fact such a creditor she could have sued the bankrupt for the return of her moneys at any time before his bankruptcy. Her evidence, however, which seems to have been very frankly given, shows how remote from reality any conception such as this would be. It shows that the enterprise into which her money went was intended to provide both the bankrupt and herself with a home and with a living, and also, if it proved successful, possibly with an occupation for her daughter. She admitted that no word was ever said with regard to repayment of the sums which she advanced in furtherance of this enterprise from time to time.

The truth of the matter is that the whole foundation of Mr. Davies' argument is undermined by the realization that the moneys which the appellant advanced did not constitute, and were never intended to constitute, a loan at all. They represented her contribution to the capital of a business enterprise in which she plainly had an interest herself; and in my judgment she is no more entitled, as against the ordinary creditors of the business, to prove in respect of her contribution than the proprietor is entitled to prove in respect of his.

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(39) L. R. 9 Ch. 508.

(40) 4 Ch. D. 246; 46 L. J. (B.) 17.

I am therefore of the opinion that the judge arrived at a right conclusion, and in my judgment accordingly this appeal must fail.

As an alternative to the argument of the respondent founded upon *In re Beale* (40), Mr. Vaughan advanced two further contentions. The first one was that the appellant represented to the world that she was the bankrupt's wife and, as such, subject to the disability imposed by s. 36 of the Bankruptcy Act and cannot now be heard, as against his creditors, to say that she is not so subject. The other contention was that although she was not in fact a partner of the bankrupt, she held herself out to be a partner and for this reason also she cannot prove in the bankruptcy in competition with the general creditors of the business. Having regard to the view which I have expressed on the main point which was argued on the appeal, and on which the county court judge himself based his decision, it is not necessary for me to express an opinion on these further contentions of the trustee, and I refrain from doing so.

The appeal will be dismissed with costs.

HARMAN, J. I agree with the judgment just delivered, and I am of opinion that the rejection of the proof is clearly right when the true nature of the transaction between the appellant and the bankrupt is once appreciated. As my Lord has said, this transaction was in fact an investment by her of part of her capital in the business which the bankrupt was to carry on, and did carry on for their joint benefit. The fact that she was not a partner or sharer directly in the profits is quite irrelevant. She could not, while the business was a going concern, and would not indeed have attempted to, withdraw her investment so as to bring down the venture. If that be so, it is clear that, whatever her rights against the bankrupt may be, she cannot compete with his creditors whose debts arose out of the failure of the very business in which her money was invested. I regard this result with satisfaction: were the appellant right it would follow that a mistress would be in a better position than a wife. On the facts

(40) 4 Ch. D. 246; 46 L. J. (B.) 17.

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of this case, though s. 36, sub-s. 2, admittedly does not apply to the appellant, she is no better off than if it did.

Appeal dismissed.

Solicitors: *Parker, Thomas & Co., for J. D. Douglas & Douglas, Northampton; Wigan & Co., for Phipps & Troup, Northampton.*

I. G. R. M.

HARMAN, J.

1951

May 4.

In re PEROWNE, DECD.
PEROWNE AND ANOTHER *v.* MOSS AND OTHERS.

[1947 P. 26.]

Will—Construction—Power of appointment—" . . . according to my "wishes, for the benefit of my family"—Defective execution—Implication of gift over—Whether power coupled with a trust.

A will contained a gift by the testatrix of her estate to her husband: " Knowing that he will make arrangements for the disposal " of my estate, according to my wishes, for the benefit of my family . . . ". The purported appointment by the husband in his will was defective. A summons was taken out to determine, among other questions, whether a gift over in default of appointment was to be implied, or whether this was a mere power not coupled with a trust.

Held, (1.) That the class among whom the court would imply a gift being narrower than the class among whom the husband could have appointed, very clear words would be required in the will to imply a gift over in default of appointment.

(2.) That although the testatrix wished her husband to dispose of her estate on her behalf, her direction merely amounted to a power of distribution and was not sufficient to import a trust; and that no gift over in default of appointment could, therefore, be implied.

In re Weekes' Settlement [1897] 1 Ch. 289 and *In re Combe* [1925] Ch. 210 followed.

ADJOURNED SUMMONS.

The testatrix, Florence Ada Perowne, made her will on April 5, 1944, in these terms: " I give and bequeath unto my " dear husband all my real and personal estate of whatever " nature for his absolute benefit for life. Knowing that he will "make arrangements for the disposal of my estate, according to "my wishes, for the benefit of my family . . .".

She died on February 19, 1945. Her husband, Connop Fitzroy Stuart Perowne, by his will dated February 12, 1945, purported to appoint her estate, in the events which happened, half each to her two sisters-in-law. He died on November 16, 1948. There were no children of the marriage.

Harman, J., held that the husband took a life interest in the testatrix's estate and no more; and that the purported appointment was excessive, in that "family" did not include sisters-in-law, and that the power therefore had not been validly exercised. The question on which the case is reported was whether or not a gift over in default of appointment was to be implied, and if so in whose favour.

G. D. Johnston for the plaintiffs, personal representatives of the deceased plaintiff (husband and personal representative of the testatrix), and as such personal representatives of the testatrix.

E. M. Winterbotham for one of the next of kin. The language used by the testatrix does not suggest that anything should pass from her to anyone except her husband. The general rule that a gift over in default of appointment must be implied, does not apply here.

The husband, if he had exercised the power, could have selected persons further away than next of kin whereas the gift, if any, which is to be implied, must be limited to a narrower class—that of the statutory next of kin. [He referred to Hawkins on Wills (3rd ed.), pp. 135, 137, 138, and *Bullock* v. *Downes* (1).]

The general rule as stated in Farwell on Powers (3rd ed.), p. 528, is too sweeping. There is no rigid rule that, where a will contains a power of appointment to a class, with no gift over in default of appointment, the court will imply a gift to the class, unless the will shows that the testator intended to create a trust for that class: see *In re Weekes' Settlement* (2) and *In re Combe* (3).

This will contains no indication that the testatrix intended to create a trust for her family. *In re Llewellyn's Settlement* (4) is distinguishable. Russell, J., there held that there were sufficient words in the will to imply a gift over. That case sums up the authorities. Similarly *Wilson* v. *Duguid* (5) is distinguishable because there was a trust in default of appointment.

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(1) (1860) 9 H. L. C. 1.
(2) [1897] 1 Ch. 289.
(3) [1925] Ch. 210.
(4) [1921] 2 Ch. 281.

On the authority of *In re Weekes' Settlement* (6) and *In re Combe* (7) the court is not entitled to read into this will an intention that a gift over should be implied.

D. A. Ziegler for one of the testatrix's "family" (a nephew). On the terms of this will the prima facie rule applies. The testatrix has shown an intention that her family should benefit. The court will imply a gift in favour of objects of a power if the will shows such an intention: see *In re Combe* (8). In the form in which she puts it in her will, the testatrix makes her husband a trustee of those intentions. Therefore it is a power coupled with a trust. The will shows that she intended her husband's power of disposition to be used to benefit her family. That intention is sufficient to create a trust. There is no express authority that these words do create a trust.

J. L. Arnold for another nephew of the testatrix adopted the argument of *Ziegler*. One question is whether the court will imply a gift behind a gift to someone else, namely, a gift to her family. There is no need to go to general principles, *Cruwys* v. *Colman* (9) is authority for the division of the property among the objects of the power, where, as here, there has been no appointment, and the power is a power coupled with a trust.

The word "knowing" used by the testatrix is the kind of word which creates a power coupled with a trust.

In re Combe (10) is distinguishable: the disposition was in quite general terms, and the testator there did not intend to create a trust, as he regarded any gifts which might be made to the appointees as being the result of his son's bounty.

If the court finds that this is a power coupled with a trust, a gift over must be implied.

A. J. Bland for the testatrix's sisters-in-law, the purported appointees, and also for another nephew of the testatrix, adopted the arguments of *Ziegler* and *Arnold*.

HARMAN, J. The testatrix, as I have held, gave her husband a life interest, and a power to appoint which he failed to exercise, for he appointed to objects not within the ambit of the power. Is there now a gift impliedly to some class in default of appointment, or is this a mere power to her husband not coupled with a

(5) (1883) 24 Ch. D. 244.
(6) [1897] 1 Ch. 289.
(7) [1925] Ch. 210.
(8) Ibid. 215.
(9) (1804) 9 Ves. 319, 323, 324.
(10) [1925] Ch. 210.

trust, so that he had no duty to exercise it and the court has no duty to exercise it for him and the property will, therefore, go as on the intestacy of the testatrix?

The words used are these: "Knowing that he will make "arrangements for the disposal of my estate, according to my "wishes, for the benefit of my family after his death". The object of the wish or the trust is "my family after his death". "Family", when looked at as an object of a power, means anybody with blood relationship and is not confined to those nearest of kin or the statutory next of kin of the testator.

I find authority for that in *Grant* v. *Lynam* (11), where the side-note reads as follows: "Where a donor recommends or "directs, that the donee, at her death, shall give his personal "property to such of his family or such of his relations as she "shall think fit, the donee has a power to select the objects of "her bounty amongst his relations or family, though not within "the degree of next of kin. But if the donee does not exercise "the power, the word 'relations', or the word 'family', will be "construed 'next of kin', unless the special expressions of the "donee have a different import".

Sir John Leach, M.R., said (12): "Upon the other point, "whether the gift to John Grant is good,"—John Grant being a person in whose favour the donee of the power had purported to exercise it—"he not being one of the testator's next of kin, the "leading case is *Harding* v. *Glyn* (13), imperfectly reported in "Atkyns, but correctly referred to in other cases . . .". He then considered *Harding* v. *Glyn* (13), where there was a gift to one Henry Swindale. As reported, it did not cover the question whether the gift of a house to Henry Swindale was good or not; but Sir John Leach, M.R., having discovered from the record that the gift to Henry Swindale was established, concluded (14): "The principle, therefore, of that case is, that, where the author "of the power uses the term *relations*, and the donee does not "exercise the power, there the court will adopt the statute of "distributions as a convenient rule of construction, and will give "the property to the next of kin; but that the donee, who "exercises the power, has a right of selection among the relations "of the donor, although not within the degree of next of kin".

The donee of the power, the husband here, therefore had certain people from whom to select wider than the next of kin of the donor of the power. It would appear that, if there is to be an implication, it must be an implication in favour not of the class among which the donee of the power could scatter his bounty, but in favour of the narrower class which the court would favour, because otherwise the gift would be void for uncertainty.

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(11) (1828) 4 Russ. 292.
(12) Ibid. 296.
(13) (1739) 1 Atk. 469.
(14) 4 Russ. 297.

The question can be shortly stated: does the power here given to the husband import a trust? If it does, then, as Mr. Arnold pointed out, there appears to be conclusive authority on that question in *Cruwys* v. *Colman* (15). There, Sir William Grant, M.R., came to the conclusion that, the donee of the power having refused to exercise it in favour of her family, the court would exercise it in favour of her next of kin; but he did not find any difficulty in holding that it was a trust, for he described it in these words (16): "But all that Bridget "has said",—that was the donee of the power—"is, that she "does not think fit to exercise her power. Therefore the trust "remains unexecuted and is consequently to be executed "according to the rule of the court; that is, in favour of the next "of kin of Bridget . . .".

If, therefore, this power is one coupled with a trust, that case teaches me how to decide it; but the question, of course, is whether that is so or not. That depends, I think, on *In re Weekes' Settlement* (17) and *In re Combe* (18). Both cases are to the same effect; but between the dates of the two decisions the third edition of Farwell on Powers appeared. The editor there expressed, at p. 528, some disapproval of *In re Weekes' Settlement* (17) and was of the opinion that the rule implying a class gift in default of appointment was inflexible. Romer, J., had not thought that that was so in *In re Weekes' Settlement* (17); and Tomlin, J., agreed with that view in *In re Combe* (18). I must take it, and I think that it has been accepted by the profession since then, that this is the law: there is no rigid rule, and Farwell on Powers puts it too high.

In *In re Combe* (19), Tomlin, J., said: "The matter then "stands really in this way. Am I to approach this will governed "by an inflexible and artificial rule of construction to the effect "that where I find a power of appointment to a class not followed "by any gift in default of appointment, I am bound to imply a "gift to that class in default of the exercise of the power? Or

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(15) 9 Ves. 319.
(16) Ibid. 324.
(17) [1897] 1 Ch. 289.
(18) [1925] Ch. 210.
(19) Ibid. 216.

"ought I to approach this will for the purpose of construction "in the same spirit as I approach any other will and endeavour "to construe it and arrive at the testator's meaning by examining "the words expressly used, only implying those things which are "necessarily and reasonably to be implied?" He said that Farwell on Powers would have him take one view and *In re Weekes' Settlement* (20) would have him take the other. He then discussed *In re Hughes* (21), a decision of Sargant, J., and came to the conclusion that that decision does not quarrel with *In re Weekes' Settlement* (22). In the end he said (23): "I "therefore propose, in construing this will, to govern myself by "the principle which has been enunciated by Romer, J.". That was the principle laid down in *In re Weekes' Settlement* (24), where Romer, J., said: "The authorities do not show, in my "opinion, that there is a hard and fast rule that a gift to A for "life with a power to A to appoint among a class and nothing "more must, if there is no gift over in the will, be held a gift "by implication to the class in default of the power being exer- "cised. In my opinion the cases show"—and then he states an exception—"that you must find in the will an indication that the "testatrix did intend the class or some of the class to take— "intended in fact that the power should be regarded in the nature "of a trust—only a power of selection being given, as, for "example, a gift to A for life with a gift over to such of a class "as A shall appoint".

Where, in a marriage settlement there is a gift to such of the children as A shall appoint, or in trust for such class as he shall by writing indicate, it is very easy to assume a gift over in default, because that is the natural thing to suppose; but where the class is large and indefinite, it seems to me much more difficult to imply a gift over. It is true that Sir William Grant held that there was a trust in *Cruwys* v. *Colman* (25), but in that case there were the imperative and mandatory words, in the will, "it being my absolute desire". In *In re Combe* (26) there was a power of appointment confined to relations of the whole blood, whatever that might have meant, but that is not much more indefinite than "family", which may mean relations of the whole blood or, indeed, apparently, in certain circumstances persons having no blood relationship.

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(20) [1897] 1 Ch. 289.
(21) [1921] 2 Ch. 208.
(22) [1897] 1 Ch. 289.
(23) [1925] Ch. 218.
(24) [1897] 1 Ch. 289, 292.
(25) 9 Ves. 319.
(26) [1925] Ch. 210.

Therefore it seems to me that I must have very clear words to imply a trust here, because it follows from the artificial rule which the court has had to adopt that the persons for whom the trust, if any, is to be implied are not the persons among whom the power of selection existed. That alone makes it difficult to import a trust.

The testatrix said: "Knowing that he will make arrangements "for the disposal of my estate according to my wishes". One would guess that she knew that he was aware of her wishes and that, for some reason or other, not wishing to dispose of her estate herself, she hoped that he would do it. Then she added: "for "the benefit of my family". I cannot spell a trust out of that. It seems to me to be a mere power to distribute among a large and indefinite class of people, not the same as those in whose favour I must import a trust, if I were to do so. I do not feel able to perform that feat of mental gymnastics, and accordingly I come to the conclusion that, the husband of the testatrix having failed to exercise the power, the property subject to the beneficial interest of the husband was undisposed of and passed as on her intestacy.

Declaration accordingly.

Solicitors: *Stunt & Son; Austin J. Wright; Wray, Smith, Paterson & Co., for Lawson, Lewis & Bairstow, Eastbourne; Nutt & Oliver; Rooks, Wales, Godwin & Galsworthy.*

I. G. R. M.

In re SANDBACH, DECD.

C. A.

1951
Mar. 7, 8;
Apr. 13.

Evershed, M.R., Jenkins and Hodson, L.JJ.

[1949 S. 2362.]

Settled Land—Application of capital money—Repayment of capital of loans made in respect of improvements—Repayment of capital component of tithe annuities—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 73, *subs.* 1 (xiii), (xvi).

A tenant for life as from June, 1928, of real estate under a will paid instalments of capital in respect of loans made by the Lands Improvement Co. and charged on the settled property by order of the Minister of Agriculture and Fisheries. She also paid tithe annuities charged upon the estate in consideration of the redemption of tithe rents charged under orders made under s. 4 of the Tithe Act, 1918. She applied for recoupment of both these payments out of capital money under s. 73, sub-s. 1, paras. (xiii) and (xvi), of the Settled Land Act, 1925, respectively. Under para. (xiii) capital money is made applicable "in redemption of an improvement "rentcharge, that is to say, a rentcharge . . . created, whether before "or after the commencement of this Act, with the object of paying "off any money advanced for defraying the expenses of an improvement". Capital money is also made applicable under para. (xvi) "in the purchase of an annuity charged under s. 4 of the Tithe "Act, 1918, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent "interest".

Held, (1.) that, as under para. (xiii) capital money was only payable in redemption of an improvement rentcharge, it could not be used to recoup past payments of capital by the tenant for life.

In re Lord Egmont's Settled Estates (1890) 45 Ch. D. 395; *In re Howard's Settled Estates* [1892] 2 Ch. 233, and *In re Verney's Settled Estates* [1898] 1 Ch. 509, distinguished as having been decided under the Settled Land Acts (Amendment) Act, 1887, which authorized application of capital money not only "in "redemption" but also "in otherwise providing for the payment" of a rentcharge.

In re Lord Sudeley's Settled Estates (1887) 37 Ch. D. 123, disapproved.

Decision of Vaisey, J., ante, p. 294, affirmed.

(2.) That the payment of the capital portion of the instalments of tithe annuity as they fell due could fairly be described as "discharging" that part of the annuity which represented capital, for "discharge" in the context of para. (xvi) could not mean full discharge in relation to the annuity, confined as it was to that part of it which did not represent interest.

(3.) That the life tenant was entitled to recoupment in respect of her payments of tithe annuity, for, as recoupment to a tenant for life of his expenditure on improvements could be authorized as equivalent to payment for those improvements (on the principle which would have been applied in *In re Hotchkin's Settled Estates* (1887) 35 Ch. D. 41, but for the life tenant's failure to comply with s. 26 of the Settled Land Act, 1882), so recoupment to a tenant for life of any payment properly chargeable to capital under the Act of 1925 such as the proportion attributable to capital of an instalment of a tithe rentcharge redemption annuity properly so chargeable under s. 73, sub-s. 1 (xvi), of that Act, as construed above, should, by parity of reasoning, be capable of like authorization.

In re Howard's Settled Estates [1892] 2 Ch. 233; *In re Dalison's Settled Estate* [1892] 3 Ch. 522, and *In re Verney's Settled Estates* [1898] 1 Ch. 509, distinguished.

Decision of Vaisey, J., supra, reversed.

APPEAL from Vaisey, J. (1).

The testator, Samuel Sandbach, made his will in 1923 and died in 1928. The effect of the will so far as material was to create a life tenancy in an estate in Wales in favour of the appellant, Mrs. Mackeson-Sandbach (subject to a previous life tenancy), with remainder to her son, the infant respondent, as tenant in tail male. The trustees of the settlement for the purpose of the Settled Land Act, 1925, were also respondents.

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(1) Ante, 294.

The appellant life tenant's estate began on June 25, 1928. Subsequently she had paid, or there had been paid on her behalf or deducted from her income as tenant for life, all the instalments consisting of capital and interest in respect of certain loans made by the Lands Improvement Company to the testator or to herself, and charged on the settled property by order of the Minister of Agriculture and Fisheries. The total amount of so much of the instalments so paid as represented capital was 1,742*l.* 2*s.* 6*d.*

There had been similarly paid or deducted certain tithe annuities charged upon the estate in consideration of the redemption of the tithe rentcharges under orders made under s. 4 of the Tithe Act, 1918. Of the sums so paid or deducted the sum of 824*l.* 18*s.* was attributable to capital.

The tenant for life on May 31, 1949, took out a summons asking that the two sums might be recouped to her out of capital money subject to the settlement under the Settled Land Act, 1925, s. 73, sub-s. 1 (xiii) and (xvi), respectively (2).

Vaisey, J., held (1.) that "redemption" of a rentcharge within the meaning of sub-s. 1 (xiii) indicated a compounding for future payments and not the making of periodical payments as they became due in the past, so that recoupment of the tenant for life in respect of the improvement loans was not possible; and (2.) that the discharge of an annuity within the meaning of sub-s. 1 (xvi) signified commutation by a lump sum and not the making of separate payments as they fell due. The tenant for life appealed.

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(2) Settled Land Act, 1925, s. 73, sub-s. 1: "Capital money arising "under this Act, subject to payment "of claims properly payable thereout "and to the application thereof shall "for any special authorized object for "which the capital money was raised "wholly in one, or partly in one and "partly in another or others, of the "following modes (namely):— . . . "(xiii) In redemption of an improvement rentcharge, that is to say, a "rentcharge (temporary or permanent) created, whether before or "after the commencement of this Act, "in pursuance of any Act of Parliament, with the object of an improvement of any kind authorized "by Part I of the Third Schedule to "this Act; . . . (xvi) In the purchase "of an annuity charged under s. 4 of "the Tithe Act, 1918, on the settled "land or any part thereof, or in the "discharge of such part of any such "annuity as does not represent "interest".

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Jopling for the tenant for life. The question is whether the Settled Land Act, 1925, s. 73, sub-s. 1 (xiii) and (xvi), applies so that such portions of the annual sums paid by the tenant for life as represent capital can be repaid to her out of capital money. It is submitted that the part of the instalments paid in respect of the land improvement charges which represent capital fall within para. (xiii) as being sums paid " in redemption of an improvement " rentcharge ". These sums have been paid for the benefit of the inheritance, and it would be hard if the tenant for life has to bear them.

[He referred to *In re Knatchbull's Settled Estate* (3); *In re Lord Sudeley's Settled Estates* (4); and *In re Lord Egmont's Settled Estates* (5).]

Secondly, it is submitted that so much of the sums paid by the tenant for life in respect of the annuities as are attributable to capital fall plainly within para. (xvi) of sub-s. 1 of s. 73, as being the discharge of such part of an annuity charged under s. 4 of the Tithe Act, 1918, as does not represent interest. Para. (xvi) does not refer to " commuting " the annuity payable under the Tithe Act, 1918. There is an unfortunate difference in language between para. (xiii) and para. (xvi). Para. (xvi) applies exactly to the tithe annuities. There is no provision in the Tithe Act, 1918, for commuting a tithe annuity for a lump sum.

The only other question is whether repayment out of capital will be directed to the tenant for life after so long a period. There is no principle which should deprive a tenant for life of the right to repayment of sums spent for the benefit of capital. It would be different if these capital sums had been spent on improvements which had lost some of their value with time.

From 1887 to 1925 the payments of the tenant for life in respect of capital of improvement loans or tithe rentcharges would certainly have been recouped out of capital money. If that is not so now it is because of the change of wording in s. 73, sub-s. 1, of the Settled Land Act, 1925, as opposed to that of the Settled Land Acts (Amendment) Act, 1887.

[EVERSHED, M.R. It might be thought that the tenant for life's actions were intended to benefit the inheritance.]

There is nothing to estop the tenant for life from claiming recoupment.

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(3) (1885) 29 Ch. D. 588.
(4) (1887) 37 Ch. D. 123.
(5) (1890) 45 Ch. D. 395.

There is a fourth question whether administrative difficulties might arise in regard to recoupment. But it might be made fairly easily.

[JENKINS, L.J. Is there no statute of limitation preventing adjustment from going back over so many years?]

It is submitted not. Such a view has never been taken in the past.

F. B. Marsh for the tenant in tail in remainder. There is no power under s. 73, sub-s. 1, of the Act of 1925 providing for repayment out of capital money to the tenant for life. Section 73, sub-s. 1 (xiii), only relates to a single repayment of capital and interest. Suppose that there had been a sixty-years' rentcharge: redemption of a land rentcharge such as is referred to in sub-s. 1 (xiii) applies only to a commutation of all future payments. Redemption of a rentcharge refers to the discharge of principal, interest and costs.

[EVERSHED, M.R. If that was what was meant, I should have thought that the section would be clearer.]

May not "redemption" mean most naturally a single payment in respect of all outstanding liabilities? The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 66, contemplates a yearly payment made wholly by the tenant for life during the continuance of the charge. Therefore if the tenant for life is to be recouped this provision has to be expressly repealed. It was found to be impossible to order recoupment under the Settled Land Act, 1882.

[EVERSHED, M.R. What do you say about the Settled Land Acts (Amendment) Act, 1887, where the words "or otherwise "providing for the payment" were inserted?]

Section 66 of the earlier Act has never been repealed, and s. 73, sub-s. 1, of the Settled Land Act, 1925, accords with what was then laid down. [He referred to *In re Lord Sudeley's Settled Estates* (6) and *In re Knatchbull's Settled Estate* (7).] In the latter case it was decided that by the Settled Land Act, 1882, s. 21, sub-s. 2, it was intended that the tenant for life was to bear the expense. In *Lord Sudeley's* case (6), it was said to be possible to redeem such part of a charge as represented capital, but for a reason not adopted in *In re Lord Egmont's Settled Estates* (8), as it depended on words in the Act of 1887 which are absent from s. 73, sub-s. 1 (xiii).

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(6) (1887) 37 Ch. D. 123.

(7) (1885) 29 Ch. D. 588.

(8) (1890) 45 Ch. D. 395.

[HODSON, L.J. But the decision in *In re Lord Sudeley's* case was not disproved.]

Other authorities are *In re Howard's Settled Estates* (9) and *In re Marquis of Bristol's Settled Estates* (10), showing the limitations on recoupment: see also *In re Verney's Settled Estates* (11). The point made for the life tenant is that the result would be puzzling if she were not entitled to recoupment in full; but the true view is that, on the words of s. 73, sub-s. 1 (xiii), there can be no recoupment in respect of past payments by the tenant for life, but only in respect of sums paid after the application is made.

Again, with regard to s. 73, sub-s. 1 (xvi), which refers to the application of capital money " in the purchase of an annuity " charged under s. 4 of the Tithe Act, 1918, on the settled land " or in the discharge of such part of any such annuity as does " not represent interest ": the discharge must be in a lump sum, as was recognized in Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), p. 1103. What is charged on the settled land is the whole annuity. If it was intended to be repaid by annual payments, this should have been made clear. It is true that there is great difference in language between para. (xiii) and para. (xvi), but in neither case is the tenant for life entitled to recoupment in respect of past payments of capital.

V. M. Pennington for the trustees.

Jopling, in reply, referred to *In re Borough Court Estate* (12).

Cur. adv. vult.

April 13. JENKINS, L.J., reading the judgment of the court, stated the facts, read the relevant provisions of the Settled Land Act, 1925, and continued:—The matter came before Vaisey, J., who, by an order dated November 23, 1950, dismissed the summons, holding that the payment of the periodical sums payable in respect of the land improvement rentcharges (as distinct from paying a lump sum in discharge of all instalments due and to become due) was not " redemption " within the meaning of s. 73, sub-s. 1 (xiii), and similarly that the payment of a tithe rentcharge redemption annuity as it fell due (as distinct from commuting it for a lump sum) was not " the discharge " of such annuity within the meaning of s. 73, sub-s. 1 (xvi). From that order the tenant for life now appeals to this court.

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(9) [1892] 2 Ch. 233.
(10) [1893] 3 Ch. 161.
(11) [1898] 1 Ch. 509.
(12) [1932] 2 Ch. 39.

In order to appreciate the reasoning on which Vaisey, J.'s judgment proceeded so far as the land improvement rentcharges are concerned, it is necessary to go back to the law on this subject as it stood when *In re Knatchbull's Settled Estate* (13) was decided. At the date of that decision the only statutory provision dealing with the application of capital moneys arising under a settlement in the redemption of incumbrances affecting the settled land was the general provision contained in s. 21 (ii) of the Settled Land Act, 1882, which enabled capital money to be applied " In " discharge, purchase or redemption of incumbrances affecting " the inheritance of the settled land, or other the whole estate " the subject of the settlement, or of land-tax, rentcharge in lieu " of tithe, Crown rent, chief rent, or quit rent, charged on or " payable out of the settled land ".

The application was by a tenant for life to have certain land improvement rentcharges on the settled land discharged and paid off out of capital money arising under the settlement. The Court of Appeal (affirming Pearson, J.) held that s. 21 (ii) of the Settled Land Act, 1882, could not be taken as authorizing this transaction, having regard to the provisions of the Improvement of Land Act, 1864, and in particular s. 66 of that Act, which provides that: " Every landowner on whose land a charge shall have " been made under this Act, and every succeeding tenant for life, " tenant in tail, and other person having a limited interest in the " land so charged, shall, as between himself and the persons in " remainder or reversion, be bound to pay the yearly or other " periodical payments of such charge which shall become payable " during the continuance of his interest ". In the view of the court in *In re Knatchbull's Settled Estate* (14), s. 21 (ii) of the Settled Land Act, 1882, was not to be construed as displacing the liability as between tenant for life and remaindermen expressly provided for by the Act of 1864, and the application was accordingly refused.

The following passages from the judgments of Cotton and Fry, L.JJ., may be quoted as indicative of their views as to the meaning of the term " redemption ". Cotton, L.J., said (15): " In my opinion what is asked is not in accordance with this " section, and though these are incumbrances affecting the " inheritance, they are not incumbrances which in their nature " are capable of being discharged or being redeemed, having

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(13) 29 Ch. D. 588, 592.
(14) 29 Ch. D. 588.
(15) Ibid. 592.

"regard to this fact, that the Act under which they were created "expressly requires that they shall be paid off by instalments, "including interest and capital during a term of years, and "expressly provides that a person having a limited interest shall "pay not only the interest on the capital but also his proportion "of the capital remaining unpaid".

Fry, L.J., said (16): "The incumbrance does not provide "for any other method of discharge than by the annual payments. "Therefore there is no method of discharging it by the payment "of a capital sum. There is no power of redeeming it by the "payment of a capital sum".

Presumably to meet the difficulty raised by *In re Knatchbull's Settled Estate* (14), the Settled Land Acts (Amendment) Act, 1887, was passed some two years later, receiving the Royal Assent on August 23, 1887. The two operative sections of that Act are in these terms: "1. Where any improvement of a kind authorized "by the Act of 1882 has been or may be made either before or "after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance "of any Act of Parliament, with the object of paying off any "moneys advanced for the purpose of defraying the expenses of "such improvement, any capital money expended in redeeming "such rentcharge, or otherwise providing for the payment thereof, "shall be deemed to be applied in payment for an improvement "authorized by the Act of 1882".

"2. Any improvement in payment for which capital money "is applied or deemed to be applied under the provisions of the "preceding section shall be deemed to be an improvement within "the meaning of section twenty-eight of the Act of 1882, and "the provisions of such last-mentioned section shall, so far as "applicable, be deemed to apply to such improvement".

The next case to which reference must be made is *In re Lord Sudeley's Settled Estates* (17), which was decided on December 6, 1887. In that case a life tenant, in reliance on the Act of 1887, applied for a declaration to the effect that capital money arising under the settlement might properly be from time to time applied in the payment of the portions attributable to capital of the instalments payable in respect of certain land improvement rentcharges. At the hearing it was asked that the declaration sought by the summons might be extended to cover the whole of the instalments, interest as well as capital. In opening the summons, counsel for the applicant said: "It is not proposed to redeem "the rentcharges, but only to pay the instalments representing "capital, and this is 'otherwise providing for the payment' of "the rentcharge within s. 1 of the Act of 1887".

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(14) 29 Ch. D. 588.
(16) Ibid. 595.
(17) 37 Ch. D. 123.

Kay, J., granted the application as regards such portions of the instalments remaining to be paid as from time to time represented capital, but thought it would not be right for capital money to be applied in payment of such portions of the instalments as represented interest, as he did not think the Act of 1887 was intended, nor that it would be just, to relieve the tenant for life from his liability in that respect.

It will thus be seen that the Act of 1887 as construed in *In re Lord Sudeley's Settled Estates* (17) produced the result for which Mr. Jopling on behalf of the tenant for life contends in the present case. But the matter did not rest there, for the decision in that case, in so far as it excluded interest, was in 1890 disapproved by the Court of Appeal in *In re Lord Egmont's Settled Estates* (18). In that case a tenant for life applied for a declaration that capital money might be applied under the Act of 1887 in the redemption of certain land improvement rentcharges on terms which involved the payment of sums comprising, in addition to the outstanding balances of capital, sums by way of bonus to compensate the lender for the loss of the interest which would have been payable but for the redemption. The Court of Appeal, reversing North, J., made the declaration sought.

Lord Esher, M.R., said (19): "What then is the meaning "of s. 1 of the Act of 1887? It says that 'any capital money "'expended in redeeming such rentcharge . . . shall be deemed "'to be applied in payment for an improvement authorized by "'the Act of 1882'. Taking the words in their ordinary sense, "they must mean the money which would have to be paid for "redeeming the rentcharge—that is, the sum which the owner "of the rentcharge would accept for the redemption. It seems "to me that the proposed payment comes absolutely within the "words of the section. Was then North, J., precluded by the "decision of Kay, J., in *In re Lord Sudeley's Settled Estates* (19) "from sanctioning the proposed payment? That case was not "one of the redemption of a rentcharge. It was asked that the "trustees might pay out of capital moneys the instalments of "the rentcharge as they should become due, including, that is, "interest as well as principal. Kay, J., was of opinion that the

(18) 45 Ch. D. 395.

(19) Ibid. 399.

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"interest was a debt due from the tenant for life, and that "he could not authorize the trustees to pay it out of 'capital "'moneys'. Even if he was right in that view, it does not, I "think, affect the present case. But I will venture to say that "I think he took too strict a view of the Act of 1887. It is quite "true that what he was asked to do did not come within the "words 'redeeming such rentcharge', but I think it did come "exactly within the words 'or otherwise providing for the pay-"'ment thereof'. I could not, therefore, agree with the decision "in *In re Lord Sudeley's Settled Estates* (20), even if it governed "the present case. But I think it does not, for this is a case of "redemption pure and simple".

Lindley, L.J., said (21): "The words of s. 1 are very wide. "It is to be observed that no distinction is drawn between rent-"charges which are by the contract creating them redeemable "and those which are not; it applies to all rentcharges equally. "In the present case we are asked to apply the Act to a rent-"charge which is not redeemable by contract, so that the owner "of the rentcharge cannot be compelled to accept payment of "the loan in any other mode than that which is provided by the "agreement with him, that is, by a series of instalments extending "over a number of years. In order, therefore, to redeem the "rentcharge you must come to terms with the owner. He says, "'I am willing to be redeemed; but you must pay me, in addition "'to the balance of principal remaining unpaid, something which "'will compensate me for the loss of interest which I may "'sustain'. If he is asking for an extortionate sum the trustees, "of course, will not listen to his proposal. If they are in doubt "whether the sum demanded is a proper one, they can ask for "the opinion of the court. If only a reasonable sum is asked "by way of bonus, the money must be paid, or the rentcharge "must remain unredeemed".

With reference to Kay, J.'s decision in *In re Lord Sudeley's Settled Estates* (20), Lindley, L.J., said (22): "I think he took "too narrow a view of the section, which speaks of 'redeeming "'the rentcharge', and does not limit the redemption to that "part of the rentcharge which represents capital".

We think it is reasonably plain that Lord Esher, M.R., and Lindley, L.J., in that case regarded "redemption" in relation to a rentcharge as a transaction involving the payment of a lump sum in discharge of all instalments due and to become due in respect of the rentcharge as distinct from the mere payment of the instalments as and when they became due. We think that the observation of Lindley, L.J., at first sight inconsistent with that view, really means no more than that the "redemption" of an interest-bearing debt, including a rentcharge comprising interest on the loan as well as instalments of the capital of the loan, necessarily involves payment of interest as well as principal, so that the distinction drawn by Kay, J., between principal and interest for this purpose was ill-founded.

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(20) 37 Ch. D. 123.
(21) 45 Ch. D. 400.
(22) Ibid. 401.

It follows, if we are right in our reading of the judgments in *In re Lord Egmont's Settled Estates* (23), that in their Lordships' view the process Kay, J., was asked to authorize in *In re Lord Sudeley's Settled Estates* was not "redemption" of the rentcharges in question but was "otherwise providing for "the payment thereof" within the meaning of the Act of 1887, and, *per* Lindley, L.J., as we understand the observation quoted above, that, inasmuch as "redemption" was a process necessarily involving the discharge of interest as well as principal, there could be no ground for restricting the process of "otherwise "providing for the payment of" a rentcharge to the portions of the instalments representing capital.

From the date of the decision in *In re Lord Egmont's Settled Estates* (23) down to the coming into force of the Settled Land Act, 1925, the position, as we understand it, was that on the strength of this decision the Act of 1887 was regarded as authorizing the application of capital money in the payment of the entire instalments, as and when they became due, payable in respect of land improvement rentcharges, principal as well as interest. But, as we have said, we think this process was permissible not as "redemption" of such rentcharges but as "otherwise providing for the payment thereof", within the meaning of the Act of 1887, as construed in *In re Lord Egmont's Settled Estates* (23).

This seems to have been the view on which Stirling, J., proceeded in *In re Howard's Settled Estates* (25), as regards the instalments of the rentcharge authorized by him to be paid out of capital in that case: see also *In re Verney's Settled Estates* (26), where Kekewich, J., said of a sum paid by the tenant for life in order to secure a reduction in the rate of interest charged by certain land improvement rentcharges, and of which he sought recoupment out of capital money: "Money expended in repaying" the sum in question "will certainly not be expended in 'redeeming' the rentcharges. Redemption implies the payment of principal, interest, and costs to the mortgagees".

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(23) 45 Ch. D. 395.
(24) 37 Ch. D. 123.
(25) [1892] 2 Ch. 233.
(26) [1898] 1 Ch. 509, 512.

As appears from a comparison of the sections as set out above, s. 73, sub-s. 1 (xiii), of the Settled Land Act, 1925, which superseded the Act of 1887, is expressed in terms materially different from those of the earlier enactment, and in particular the words "or otherwise providing for the payment thereof" as an alternative to "redemption" are omitted from the new provision. Mr. Jopling invites us to hold that this change in the language has produced no change in the law save to the extent of restricting payment out of capital money of the instalments of land improvement rentcharges as they fall due to such part of the instalments as represent capital. In other words, he says, the effect of the change is simply to place the matter in the position in which it was held to be by Kay, J., in *In re Lord Sudeley's Settled Estates* (27). He argues with force that the Settled Land Act, 1925, was a consolidating enactment, and that if it had been intended to alter the law to the extent of abolishing altogether the application of capital money in paying these instalments reference would have been made to this change in s. 64 of the Law of Property Act, 1922, which on the contrary merely states various additional modes in which capital money may be applied. He also argues that a rentcharge of this character may as a matter of language accurately be described as redeemed when it has been paid off by the stipulated instalments over the prescribed period, and that accordingly the process of paying such instalments falls fairly within the term "redemption".

Perhaps the most forcible way of putting this argument is to compare a rentcharge of this character to a mortgage for a lump sum redeemable by stipulated instalments of principal and interest combined, where the payment of each instalment as it falls due is a step in the process of redemption culminating in the right to call for a reconveyance under the proviso for redemption when the final instalment is paid. Mr. Jopling has also on his side the undeniable fact that the net result as between tenant for life and remainderman is substantially the same whether capital moneys are applied in redeeming the rentcharge out and out by payment of a lump sum or in payment of the capital

(27) 37 Ch. D. 123.

portion of each instalment as it falls due, the interest portion being paid by the tenant for life. It is, therefore, difficult to discern any good reason for restricting the application of capital money to redemption out and out.

Nevertheless, we find it impossible to differ from the conclusion reached by Vaisey, J., on this part of the case. Even though the Settled Land Act, 1925, was a consolidating Act, some effect must be given to the omission of the words "or "otherwise providing for the payment thereof". The inclusion of those words in the Act of 1887 made it clear that "redemp- "tion" was not regarded as covering all modes of payment, and their omission from the Act of 1925 can hardly be regarded as enlarging the meaning of that term. We are on the whole in agreement with Vaisey, J., as to the natural meaning of "redemption" in relation to an obligation such as a land improvement rentcharge, that is to say, that it connotes a compounding of future payments as distinct from the mere payment of the periodical sums as they become due.

As appears above, we think, as did Vaisey, J., that this conclusion is reinforced by the history of the legislation, and it certainly accords with the view which appears to have been taken in the cases under the Act of 1887, to which we have referred above. We think the reference to "temporary as well as permanent" rentcharges in s. 73, sub-s. 1 (xiii), of the Act of 1925, points in the same direction. Obviously there could be no question of redeeming a permanent rentcharge otherwise than by payment of a lump sum. We should add that we think it must in any case be impossible to construe "redemption" as including payment of the capital portion only of the instalments as they fall due. As pointed out in *In re Lord Egmont's Settled Estates* (28), "redemption" involves payment of interest as well as capital. Accordingly, the real choice seems to us to lie between construing "redemption" in s. 73, sub-s. 1 (xiii), of the Act of 1925, either as including what was formerly held covered by the Act of 1887, that is to say payment as and when due of the entire instalments, principal as well as interest, or as confined to the discharge of all instalments due and to become due (principal as well as interest) by payment of a lump sum. For the reasons we have endeavoured to state, we are unable to accept the former alternative.

We now turn to the matter of the tithe rentcharge redemption annuities. The relevant provision as regards these (s. 73, sub-s. 1 (xvi), of the Act of 1925) is new, and the language is materially different from that of sub-s. 1 (xiii). The words relied on here are " or in the discharge of such part of any such annuity " as does not represent interest ", which appear as an alternative to " the purchase " of any such annuity. Vaisey, J., dealt very shortly with this question, which indeed seems incapable of any great elaboration. He said: " The words here are again " different, and the question is whether an annuity is discharged " within the meaning of that word by paying it as it falls due, " or only by commuting it for a lump sum, as is suggested in " the note in Wolstenholme and Cherry's Conveyancing Statutes " (12th ed.), at p. 1103. I think, on the whole, that the latter " is the correct view, and that as regards the 824*l*. 18*s*. 0*d*. the " application also fails ".

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(28) 45 Ch. D. 395.

For our part, we see no sufficient reason for limiting the relevant words of para. (xvi) in this way. We think the payment of the capital portion of the instalments of such an annuity as they fall due can fairly be described as " discharging " such part of the annuity as represents capital. " Discharge " in the context of s. 73, sub-s. 1 (xvi), cannot mean full discharge in relation to the annuity, confined as it is to the part thereof not representing interest. The conception of " discharge " as connoting a transaction which results in a complete quittance at one stroke with respect to a given liability thus seems hardly applicable here. Moreover it is difficult to suppose that sub-s. 1 (xvi) contemplates exclusively the somewhat peculiar transaction of " discharging " by one payment the whole of the capital while leaving the interest element outstanding. Accordingly, we are of opinion that para. (xvi) should be construed in the sense contended for by the tenant for life.

It remains to consider the question of recoupment, which is confined by the conclusions we have so far reached to the payments not representing interest made by the life tenant in respect of the tithe rentcharge redemption annuities. This question has commonly arisen with respect to the recoupment to a tenant for life out of capital moneys of sums expended by him in effecting improvements. Under the Settled Land Act, 1822, as originally enacted, there was an obstacle to such recoupment in the shape of the requirement in s. 26 to the effect that a tenant for life desiring capital money to be applied in payment for an improvement must submit for approval to the trustees a scheme for the execution of the improvement showing the proposed expenditure on it; and it was held in *In re Hotchkin's Settled Estates* (29) that, in view of this requirement, a tenant for life who had himself paid for improvements without first submitting such a scheme was not entitled to be recouped out of capital money. The law was altered in this respect by s. 15 of the Settled Land Act, 1890 (since replaced by s. 87 of the Settled Land Act, 1925), which empowered the court in proper cases to direct or authorize capital money to be applied in payment for any improvement notwithstanding that a scheme was not submitted for approval before its execution, and it is well settled that since this change in the law recoupment to a tenant for life of his expenditure on improvements can be authorized by the court, and can moreover be so authorized although the land to which the improvements relate has been sold: see *In re Lord Sherborne's Settled Estate* (30) and *In re Borough Court Estate* (31). It is true that the provisions of s. 15 of the Act of 1890 (now s. 87 of the Act of 1925) apply only to improvements and cannot therefore be relied on in the present case, but we think it reasonably plain that the court in *In re Hotchkin's Settled Estates* (29) would have found no difficulty in ordering recoupment out of capital money to the tenant for life of the payments made by him for the improvements, as in substance equivalent to a direct payment out of capital moneys for the improvements themselves, had it not been for the obstacle presented by s. 26, which was likewise confined in its application to expenditure on improvements. Prima facie, therefore, it appears to us that, if recoupment to a tenant for life of his expenditure on improvements can be authorized as equivalent to payment for such improvements, recoupment to a tenant for life of any payment properly chargeable to capital under the Act, such as the proportion attributable to capital of an instalment of a tithe rentcharge redemption annuity, properly so chargeable under s. 73, sub-s. 1 (xvi), as construed above, should by parity of reasoning be capable of like authorization. This view is borne out as regards the particular matter here in question by para. 10 (2) of Sch. IV to the Act of 1925, which makes, inter alia, s. 73, sub-s. 1, of that Act retrospective in its effect. To our minds this affords some support for the view that recoupment is permissible, as otherwise the retrospective operation contemplated by the paragraph to which we have referred could only be given a restricted effect.

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(29) (1887) 35 Ch. D. 41.
(30) [1929] 1 Ch. 345.
(31) [1932] 2 Ch. 39.

There are certain authorities with respect to land improvement rentcharges under the Act of 1887 in which the right to recoupment was negatived: see *In re Howard's Settled Estates* (32); *In re Dalison's Settled Estate* (33); and *In re Verney's Settled Estate* (34). But *In re Howard's Settled Estates* (32) (where the main question, decided in the negative, was whether the provisions of the Act of 1887 were retrospective) and *In re Dalison's Settled Estate* (33), both seem to us to have turned on the particular language used in the Act of 1887; and, although in *In re Verney's Settled Estates* (34), Kekewich, J., expressed the view that, according to what seemed to him to be the natural construction of the words "the enactment" did not "extend to "recouping the tenant for life in respect of payments already "made" the words to which he was addressing himself were again those of the Act of 1887, which are entirely different from the language of s. 73, sub-s. 1 (xiii) and (xvi), of the Act of 1925.

We have already expressed the conclusion that there has here been no "redemption" of the land improvement rentcharges within the meaning of s. 73, sub-s. 1 (xiii), so that the question of recoupment does not arise in regard to them. But suppose that the tenant for life had in fact redeemed them by lump-sum payments out of her own pocket, we think it would be a strong thing to hold that she could not have claimed recoupment of the cost of such redemption out of capital money, for such recoupment should, so far as we can see, rank as an application of capital money in redemption of the charge, just as much as recoupment to a tenant for life of the cost of improvements in fact already paid for by him or her, even on land sold in the interval, undoubtedly ranks as an application of capital money in payment for such improvements under s. 73, sub-s. 1 (iii) and s. 87 of the Act of 1925. Similarly, under s. 73, sub-s. 1 (xvi), we see no reason why an application of capital money in recouping to the tenant for life money applied by her in the discharge of the capital portion of a tithe rentcharge redemption annuity should not rank as an application of capital money in the discharge of that portion of the annuity. There may, of course, be cases in which the proper inference from the facts must be that the tenant for life intended in making the payments in question to benefit capital at the expense of income and to waive any question of recoupment. Again, there may be cases in which delay in claiming recoupment has in the particular circumstances produced a state of affairs in which recoupment could not equitably be allowed. But no such considerations enter into the present case. It is true that the period over which recoupment is sought is a long one—in fact upwards of twenty years—but nothing has happened in the interval to make recoupment inequitable. Nor can it fairly be said that the tenant for life has by her conduct waived her right to recoupment. The evidence indicates that the practice of paying the whole of the tithe rentcharge redemption annuities out of income, begun when she succeeded to the estate as an infant, has been automatically continued by her agents without any consideration of her rights in the matter. There is, we understand, ample capital money in hand for the purpose. Accordingly, finding nothing in the Act to prohibit recoupment, we think this is a case in which equity demands that the accounts as between capital and income should be adjusted by recouping to the tenant for life such of the payments referred to in the summons as she could have required the trustees to pay direct out of capital money, that is to say, the sum of 824*l*. 18*s*. 0*d*., being the aggregate of the sums paid by her " in the discharge " (according to the construction placed on that expression above) of the parts not representing interest on the tithe rentcharge redemption annuities.

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(32) [1892] 2 Ch. 233.
(33) [1892] 3 Ch. 522.
(34) [1898] 1 Ch. 509, 513.

In our judgment, therefore, the appeal should be allowed to the extent of substituting for Vaisey, J.'s dismissal of the summons a declaration to the effect that the trustees ought to recoup to the tenant for life out of capital money subject to the settlement the above-mentioned sum of 824*l*. 18*s*. 0*d*.

Appeal allowed in part.

Solicitors: *Gregory, Rowcliffe & Co., for all parties.*

H. C. G.

C. A.

1951
Apr. 20, 23;
May 11.

Evershed, M.R., Jenkins and Morris, L.JJ.

In re WEBB'S LEASE. SANDOM *v.* WEBB.

[1950 W. 1068.]

Landlord and Tenant—Easement—Demise of first and second floors of building—Advertisements on outside walls at date of lease—No implied reservation in favour of landlord—Derogation from grant.

A landlord by a tenancy agreement of 1939 let the first and second floors of certain premises to a tenant. In 1949 he granted to the tenant a twenty-one years' lease of the same premises. It was conceded by the landlord that the demise included the outer walls of the premises. At the time of the making of the tenancy agreement, and continuously thereafter, there had been on the outside walls of the premises an advertisement of the landlord's business which he carried on on the ground floor and an advertisement of a brand of matches. Danckwerts, J., held that there was an implied reservation to the landlord of the right to use, for the purpose of maintaining the two advertisements, those portions of the demised premises which were so used at the date when the term of the lease began, but that the right was confined to those two advertisements and did not extend to allowing the landlord to replace them by others or to add new ones. On appeal by the tenant:—

Held, that the general rule was that a grantor, whether by way of conveyance or lease, of part of a hereditament in his ownership could not claim any easement over the part granted for the benefit of the part retained unless it were expressly reserved out of the grant; that if the landlord intended to reserve any rights over the demised premises it was his duty to reserve them expressly, and that, as he had failed in that duty, the onus was on him of establishing the facts to prove that the case was an exception to the general rule; that the mere fact that the tenant knew at the date of the lease that the landlord was using the outer walls of the demised premises for the display of the advertisements did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them which he intended to claim or to take the case out of the general rule; that the landlord had failed to establish any sufficient ground for an implied reservation in his favour, such a reservation not being requisite for the effective enjoyment either of the premises demised or of the premises retained; that the bare circumstance that the advertisements not only were present at the date of the grant but had been continuously on the walls without objection by the tenant since the beginning of his original tenancy in 1939 was not sufficient to raise the necessary inference of an intention common to both parties at the date of the lease that the landlord should have reserved to him a right to maintain those advertisements throughout the twenty-one-year term thereby granted; that, while the facts were consistent with such an intention, that was not enough; that the landlord had to show that the facts were not reasonably consistent with any other explanation, but

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had failed to do so; and that there was accordingly no right in the landlord to use the walls in question to maintain the advertisements.

Suffield v. *Brown* (1864) 4 De G. J. & S. 185, *Crossley & Sons Ld.* v. *Lightowler* (1867) L. R. 2 Ch. 478, and *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31 followed.

Aldridge v. *Wright* [1929] 2 K. B. 117 and *Liddiard* v. *Waldron* [1934] 1 K. B. 435 considered.

Simpson v. *Weber* (1925) 133 L. T. 46 distinguished, and the observations of Salter, J., disapproved.

Decision of Danckwerts, J., ante, p. 142, reversed.

Appeal from Danckwerts, J. (1).

The defendant landlord, Sidney Webb, was the head lessee of No. 405 Foots Cray Road, New Eltham. The premises consisted of a site and building on the corner of Foots Cray Road and Avery Hill Road. The premises were in the shape of half a hexagon of which the centre and smaller side faced diagonally across the corner of the two roads. The landlord had at all material times carried on his business of selling meat, groceries and provisions on the ground floor, the entrance to his shop being on the corner side of the premises.

By a tenancy agreement of 1939 the landlord let to the plaintiff, John Sandom, the first and second floor of No. 405 Foots Cray Road for a term of three years. The agreement was a short document which contained no provision for the repair or upkeep of the exterior of the premises, no reference to the head lease and no reference to any means of access to the premises demised, such access apparently being obtained, in fact, through a door in the west side of the ground floor in Avery Hill Road. The tenant continued in occupation of the first and second floors, where he carried on a hairdressing business, under the tenancy agreement until August 11, 1949. By a lease of that date the landlord demised to the tenant "the first and second floors of "the building situate in and being No. 405 Foots Cray Road, New "Eltham". The term was twenty-one years from March 25, 1949, and the amount of the rent was substantially increased by comparison with that previously payable.

The lease contained common-form covenants, on the tenant's part and, on the landlord's part, a covenant for quiet enjoyment. All the common-form provisions were inserted without too close a regard for the precise nature of the transaction. There was in addition a covenant by the tenant not to use or permit the demised premises to be used for any purpose other than that of a hairdressing saloon without the consent in writing of the landlord first had and obtained. That last covenant constituted a new obligation on the tenant. The lease followed the tenancy agreement in omitting any reference to means of access and any reference whatever to the exterior of the premises. Thus, there was no covenant by either landlord or tenant to maintain the outer walls, but the lease did contain a new covenant by the landlord to perform and observe all the covenants affecting the demised premises " which are contained in the superior lease of " the premises " of which the premises hereby demised formed a part " dated March 25, 1949, and made between Cyril Frederick " Keen of the one part and the lessor of the other part, and on " the part of the lessor to be performed and observed ". This reference was the only information available to the court with regard to the superior lease.

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(1) Ante, 142.

Since the head term also ran from March 25, 1949, it might be assumed that the grant of the lease under consideration was connected with the grant to the landlord of a new head lease. It also seemed probable that the covenants in the head lease, which the landlord undertook to observe, included a covenant for the maintenance of the exterior. But, apart from those surmises, there was no evidence of the circumstances in which the lease was granted to the tenant, or of any negotiations leading up to it.

From 1939, when the tenancy agreement was made, until the present action was begun, the landlord had maintained two advertisements on the outside of the premises demised without, as was conceded, any complaint or claim on the part of the tenant. The first advertisement consisted of an advertisement of the landlord's own business painted on the bricks of the middle and shortest side of the premises and occupying the whole of that side. The second was an advertisement of Brymay safety matches contained in a wooden frame and attached to part of the western wall of the premises. It was not in evidence, and did not appear, whether the area covered by the frame, which was considerable, was limited to the wall above the ground floor or, as seemed probable, started below the level of the first floor. It extended nearly to the top or cornice of the first floor.

The tenant raised no question with regard to these advertisements until January, 1950. On January 23, 1950, his solicitors wrote to Bryant & May Ld. mentioning that ever since March, 1939, they had had an advertisement on the west wall of the premises, but that the tenant had received no payment. Accordingly, they asked for particulars of any payments made and requested that all future payments should be made to the tenant. As a result the tenant learnt from Bryant & May Ld. that the advertising site had been "leased" to the Borough Billposting Co., Holborn House, High Holborn, to whom Bryant & May Ld. had always paid their rental. The tenant's solicitors accordingly communicated with the Borough Billposting Co. and they in turn stated that they had been in occupation of the site for many years, having obtained a "licence" for that purpose from the landlord. No further information was before the court of the nature of the arrangement subsisting between the landlord and the Borough Billposting Co. The tenant's solicitors then wrote to the landlord requiring him to account for all sums received by him in respect of the licence to the Borough Billposting Co. since the grant of his original tenancy in 1939 and asking him to pay for his own advertisement.

On March 6, 1950, the tenant's solicitors wrote to the landlord revoking all licences, if any, to display advertisements on the outer walls of the demised premises. On March 27, 1950, the tenant issued an originating summons asking whether, on the true construction of the lease of August 11, 1949, the landlord was entitled, until the determination of the lease, to use for the purposes of advertising the outer walls of the premises and, if so, what portions or portion of the outer walls without the tenant's consent.

The only evidence before the court consisted of the affidavits of the plaintiff and defendant, which contained no evidence as to the circumstances in which the lease was granted. The landlord conceded that the demise included the outer walls of the premises.

Danckwerts, J. (2), held that there was an implied reservation in favour of the landlord which entitled him to use the outside of the demised premises for advertising purposes in the manner in which they were used at the date of the demise.

The tenant appealed.

Mulligan for the tenant. The question is whether, since there is no express reservation in the lease of August 11, 1949, of any right for the landlord to use the outside walls of the demised premises, the landlord is entitled to retain these advertisements there. The right to maintain the Bryant & May advertisement and the advertisement of the landlord's own business is a right

(2) Ante, 142.

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which passed under s. 62 of the Law of Property Act, 1925, to the tenant. The retention of a right to maintain these advertisements is inconsistent with the landlord's covenant for quiet enjoyment, which will be given a wide construction: *Robinson* v. *Kilvert* (3). A landlord cannot assert against his tenant any right and privilege, unless it has been expressly reserved by the lease: *Suffield* v. *Brown* (4). The only exceptions to that general principle are in connexion with rights of way of necessity and reciprocal rights.

The tenant does not claim to determine the licence granted to the Borough Billposting Co. before it expires, but he claims to be entitled to the fees payable under that licence. The tenant says that he took subject to and with the benefit of that licence.

[He referred to *Crossley & Sons Ld.* v. *Lightowler* (5); *Wheeldon* v. *Burrows* (6); *Aldridge* v. *Wright* (7).]

The facts in *Simpson* v. *Weber* (8), which Danckwerts, J., followed, were very different. That authority is contrary to the other authorities, and it is submitted that it was wrongly decided. It would be contrary to the authorities, in the absence of any evidence of intention, to imply a reservation in favour of the landlord. Where a landlord does not expressly reserve a right over demised premises, he must be presumed to have abandoned it. It is submitted that Danckwerts, J., was wrong in holding that a reservation was to be implied here in the landlord's favour under which he could maintain these advertisements.

Richmount for the landlord. The lease of August 11, 1949, contained a covenant by the tenant not to use the demised premises for any purpose other than that of a hairdresser's business. It follows that the tenant cannot let the outside walls for advertising purposes. This would be to carry on an advertising business contrary to his covenant. The landlord contends that a reservation must be implied in his favour of a right to maintain the advertisement of his own business and to maintain the actual advertisement of Bryant & May or to continue the licence to the Borough Billposting Co. It is not suggested that the right to preserve the advertisements in question was an easement of necessity, but it is suggested that it is an implied easement. When user is claimed as of right and acquiesced in by the tenant, the court will treat the landlord as having an equitable right of user.

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(3) (1889) 41 Ch. D. 88.
(4) (1864) 4 De G. J. & S. 185.
(5) (1867) L. R. 2 Ch. 478.
(6) (1879) 12 Ch. D. 31.
(7) [1929] 2 K. B. 117.
(8) (1925) 133 L. T. 46.

[EVERSHED, M.R. In considering what is equitable the court must have regard to the evidence.]

It is true that normally an easement will not be treated as created except by express words, but there may be exceptions as laid down in *Wheeldon* v. *Burrows* (9). Rules are without effect if equity decides otherwise. These advertisements had been on the walls of the demised premises for ten years before the grant of the lease. If the tenant objected to them he owed a duty to the landlord to tell him so before the grant of the lease of August 11, 1949. Other authorities are *Aldridge* v. *Wright* (10); *Liddiard* v. *Waldron* (11).

[EVERSHED, M.R. Why did not the landlord insert a reservation in the lease in respect of the advertisements instead of assuming that while the parties were on good terms the advertisements could be maintained?]

Admittedly only the advertisements in use can be maintained.

[He referred to *Simpson* v. *Weber* (12).]

Mulligan in reply.

Cur. adv. vult.

May 11. The following judgments were read:—

EVERSHED, M.R. The question raised in this appeal is that stated in the originating summons dated March 27, 1950, issued by the tenant against the landlord, "whether upon the true "construction of the lease dated August 11, 1949, and made "between the landlord of the one part and the tenant of the "other part, and in the events which have happened, the land-"lord is entitled, until the determination of the lease, to use "for the purpose of advertising the outer walls and if so what "portions or portion of the outer walls of the property demised "by the lease without consent of the tenant".

The emphasis in the language I have quoted is on the phrase "and in the events which have happened"; for there is no question of the construction of the lease itself. The point is whether "in events which have happened" there is an implied reservation in favour of the landlord of a right (stating it loosely at this stage) to maintain advertisements on the walls of the premises the subject of the demise in favour of the tenant.

Danckwerts, J., came to a conclusion in favour of such a

(9) 12 Ch. D. 31.
(10) [1929] 2 K. B. 117.
(11) [1934] 1 K. B. 435.
(12) 133 L. T. 46.

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WEBB'S LEASE, *In re.* SANDOM *v.* WEBB.

Evershed, M.R

reservation. "It seems to me", he said (13), "common sense "to imply an intention on the part of the two parties to the document that those advertisements should be allowed to remain." In the circumstances of the case, the strength of the appeal to common sense is not negligible; but in the light of the authorities binding on this court I have found myself unable to agree with the learned judge and I think that this appeal must succeed.

The landlord, by his counsel, in the course of the argument complained of the form of the proceedings as being inappropriate to the problem which we are called upon to determine—particularly he complained that in the proceedings there was no opportunity for him, as an alternative weapon of defence, to counterclaim for rectification. It is true that the evidence before us is of a very meagre character. But of that it does not seem to me the landlord can fairly complain. He was the lessor under the relevant lease which he must be taken to have proffered, and admittedly the onus must be on him to establish any implied reservation in his favour. The application was supported by a brief affidavit on the tenant's part in which (inter alia) he swore that he had never granted to the landlord any right, or otherwise any easement or licence over or for or in respect of the user of the outer walls of the demised premises.

No application to cross-examine the tenant was made by the landlord, who contented himself by filing a still briefer affidavit containing no evidence whatever relating to the circumstances in which the lease was granted and stating in the last paragraph that he "contends and will contend" that when the tenant took possession of the premises he "was well aware of the presence of "both advertisements complained of and, in taking no exception "to them, then it is contended that he acquiesced and entered "into a tenancy agreement with the landlord, accepting the "landlord's rights to continue to have the benefit of both the "advertisements".

We have, therefore, to decide the case on the material before us. Our decision must necessarily be related to those facts and cannot be regarded as extending beyond them to cover other cases in which much fuller material might be before the court. Our decision, moreover, must be without prejudice to any claim the landlord may have to rectify the lease or to any point he may be able or entitled to raise on any application by the tenant for an account or an injunction or otherwise by way of enforcement of his rights.

(13) Ante, 142, 148.

The facts, as proved by the limited evidence to which I have referred, are as follows. [His Lordship stated the facts and continued:] The problem then is: Having regard to the apparent and continuous user by the landlord (or those under contract with him) with the full knowledge of the tenant, ought there to be implied the reservation which the landlord seeks? Beyond the facts of user and of the tenant's acquiescence, there is no other relevant consideration. As I have already indicated, the authorities, in my judgment, compel me to hold that the landlord has failed to establish any sufficient ground for an implied reservation in his favour.

The first question is: what is the reservation sought to be implied? It is at this point that the landlord's difficulties appear to me to begin. As regards the use of the corner wall by the landlord for advertising his own business, the only claim made by him through his counsel is a right personal to himself to maintain on that wall the existing advertisement, or some other advertisement, substantially identical. As regards the Brymay advertisement, the landlord has put his claim in more than one way. First, he says that he is entitled to a personal right to maintain that advertisement and no other; secondly, and alternatively, he claims a personal right to continue to license or let to the Borough Billposting Co. the site of the present advertisement for any advertisements which the company may in turn authorize; thirdly, he suggested (but this claim has not been persisted in before us) that there was reserved a right to him and his assigns, persons entitled to the reversion expectant on the tenant's lease, to maintain on the site of the Brymay advertisement any advertisement or advertisements whatever.

This then is the landlord's first difficulty. For if he is entitled to an implied reservation in his favour, it is essential that he should be able precisely to define its terms and character. To put the matter alternatively: if the implication of a reservation is justified in order to give effect to what the parties must be presumed between them to have intended, the terms and nature of the reservation should be capable of certain statement. But the landlord's case presents a disconcerting ambiguity. There is, in the first place, a difference in quality between the right claimed by him in respect of the corner wall and that claimed in respect of the west wall. As regards the former, he claims a right personal to himself and limited by application to the business which he himself is now carrying on. As regards the latter, the right asserted is to let the space in question to others for advertisements unrelated to the landlord's own trade; and it is uncertain whether and to what extent such right is further qualified.

If the court were satisfied that, in order to make the transaction between landlord and tenant sensible and effective according to its terms, they must have intended some particular right to be reserved to the landlord, it might be possible to imply an appropriate reservation. Such a result might be said to be implicit in the language of Lord Parker in *Pwllbach Colliery Co. Ld.* v. *Woodman* (14): "The law will readily imply the grant "or reservation of such easements as may be necessary to give "effect to the common intention of the parties to a grant of real "property, with reference to the manner or purposes in and for "which the land granted or some land retained by the grantor "is to be used: see *Jones* v. *Pritchard* (15); *Lyttelton Times Co.* "*Ld.* v. *Warners Ld.* (16). But it is essential for this purpose "that the parties should intend that the subject of the grant or "the land retained by the grantor should be used in some definite "and particular manner. It is not enough that the subject of the "grant or the land retained should be intended to be used in "a manner which may or may not involve this definite and "particular use".

Whatever be the proper significance of the language I have quoted, the landlord's difficulty in the way of its application in the present case seems to me to be that the facts as proved in evidence, if they are consistent with such an implied reservation as the landlord claims, are equally consistent with a merely permissive privilege allowed by the tenant to the landlord and revocable by the former at any time. Such a reservation as the landlord claims is requisite, so far as I can see, for the effective enjoyment neither of the premises demised nor of the premises retained.

Ever since *Suffield* v. *Brown* (17) it has, in my judgment, been established that prima facie a grantor or lessor cannot assert against his grantee or lessee any right or privilege, unless it has been expressly reserved to him by the grant. To this general rule there are no doubt exceptions, no less well established. Thus a right of way to the grantor's premises will be impliedly reserved over the premises granted if it is necessary to enable access to the former to be had. Similarly, rights will be impliedly reserved which are in their nature reciprocal to rights which the grant must be taken to have conferred upon the grantee.

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(14) [1915] A. C. 634, 646, 647.
(15) [1908] 1 Ch. 630.
(16) [1907] A. C. 476.
(17) 4 De G. J. & S. 185.

In *Aldridge* v. *Wright* (18) Greer, L.J., attempted an exhaustive classification of the rights which the courts will imply in favour of a grantor, none of which (as Mr. Richmount concedes) can be said to cover the landlord's case. But Mr. Richmount has argued that there are further exceptions to the general rule. He says that a right in favour of a grantor will be implied either (a) whenever in all the circumstances it is equitable so to do, or (b) (and this may be a particular manifestation or example of his general exception) where there has been any failure on the part of the other party to perform such duty of disclosure as the circumstances of the case may have imposed upon him. As regards the former alternative, the answer seems to me to be that such an alleged general equity would be inconsistent with the duty of express reservation which prima facie is imposed upon the grantor, and further would render otiose and inappropriate the particular exceptions to the general rule which the court has made and precisely defined. For his second alternative, Mr. Richmount has particularly relied upon the language of Lord Blackburn in his dissenting opinion in *Russell* v. *Watts* (19): "Lindley, L.J., "refers to *Dann* v. *Spurrier* (20) and *Cotching* v. *Bassett* (21), "and he might have referred to *Freeman* v. *Cooke* (22), at law, "as exemplifying the principle that where one man induces "another to alter his position by active misleading, or by silence, "where there is by contract, usage of trade, or otherwise, a duty "to speak, or, in an equitable case, one may say, where the "circumstances are such as to make it against conscience to be "silent, his rights must be regulated by what he has himself "brought about".

In the present case, Mr. Richmount has pointed to the somewhat remarkable facts to which I have already alluded—the ten years of user by the landlord from 1939 to 1949 with the full knowledge of the tenant and without any complaint or claim on his part; the fact that the advertisement on the west wall was obviously (for the name "Boro" appeared on the frame) the subject of some letting or licence for reward and the fact that such advertisement extended in part over the wall of the ground floor premises or at least was part of a larger advertisement which manifestly so extended; and the terms of the lease of 1949 itself, including the obligation imposed on the tenant to use the premises demised solely for the purposes of a hairdressing saloon. From these facts, Mr. Richmount has submitted that, unless the tenant was intending to concede to the landlord the right which he claims, his failure to inform his landlord to the contrary when the lease was being negotiated and prepared was in effect an act of bad faith on his part.

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(18) [1929] 2 K. B. 117.
(19) (1885) 10 App. Cas. 590, 613.
(20) (1802) 7 Ves. 231.
(21) (1862) 32 Beav. 101.
(22) (1848) 2 Ex. 654.

Whether silence on the part of a grantee at the time of, or immediately prior to, the grant to him would in the particular circumstances of any given case amount to bad faith and whether, in such event, the grantee would be treated as disabled in a court of equity from disputing the grantor's claim to an implied reservation, are matters on which it is unnecessary for me to express any opinion; for in my judgment those are not the circumstances relevant to the present case. And in the absence at any rate of bad faith, it seems to me that such a duty as Mr. Richmount says was imposed upon the present tenant is inconsistent with the general principles established by authority. For the existence of any such general duty, as Mr. Richmount alleges, on the part of the grantee is to my mind inconsistent with the duty which, according to the cases, is imposed by the law upon the grantor expressly to reserve any right which he desires to secure or maintain against the grantee. What indeed would be the character of the latter's obligation? To draw the grantor's attention to his own duty? To warn him that in the absence of express reservation he will go without? Where (as seems likely enough in the present case) neither party ever had the matter in mind at all, is the grantee under a greater duty than the grantor to ascertain (and disclose) what might be the true legal position?

I do not attempt for my part any exhaustive definition of the exceptions to the general rule. In my judgment the general rule itself, as formulated in the cases, leaves no room for either of Mr. Richmount's exceptions. I content myself by referring to the judgment of Thesiger, L.J., in this court in the case of *Wheeldon* v. *Burrows* (23), where he says: "We have had a "considerable number of cases cited to us, and out of them I "think that two propositions may be stated as what I may call "the general rules governing cases of this kind. The first of "these rules is, that on the grant by the owner of a tenement of "part of that tenement as it is then used and enjoyed, there

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(23) 12 Ch. D. 31, 49.

"will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant".

After referring to *Suffield* v. *Brown* (24), he quoted Lord Chelmsford, L.C.'s observation in *Crossley & Sons Ld.* v. *Lightowler* (25), where he said: "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it". Finally, and in reference to what he had said in the course of the first passage from his judgment which I have quoted, Thesiger, L.J., reconciled certain other cases with the general propositions he had stated by adding as a second exception to his second proposition reciprocal easements of the kind already mentioned. "It seems to me", he said (26), "to be consistent with reason and common sense that these reciprocal easements should be implied."

It remains only for me to say a word or two about the case of *Simpson* v. *Weber* (27), which Danckwerts, J., regarded as being "nearest to the present case" and which he followed accordingly. The facts are, to my mind, in some degree obscure.

The dispute was plainly of a most trivial character. The plaintiff and defendant were respectively successors in title of the grantee of a common owner and the common owner. There had been growing at all material times on the border of the defendant's tenement a Virginia creeper which had according to its nature attached itself to the plaintiff's easterly wall. At some time before action brought, the growth of the creeper had obstructed a gutter of the plaintiff which the plaintiff had cleared —a matter to which the Divisional Court attributed the county court judge's award of 40*s.* damages. It is to be noted that the gutter in fact overhung the defendant's property, though no point appears to have been made of this not unimportant fact. The other casus belli related to a gate post of the defendant which was attached to the plaintiff's wall by nails or plugs, part of the length of which was inserted in the plaintiff's wall.

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(24) 4 De G. J. & S. 185.
(25) L. R. 2 Ch. 478, 486.
(26) 12 Ch. D. 31, 59.
(27) 133 L. T. 46.

I will not criticize the conclusion of the Divisional Court, which reversed the judgment of the county court judge in the plaintiff's favour. But there seems to me all the difference in the world between a long-lived tree and a gate post permanently attached to a wall on the one hand and temporary advertisements on the other; and to the case of the tree the analogy of reciprocal easements might perhaps have been applied. But in the course of his leading judgment Salter, J., used the following language (28): "I have to ask", he said, "what was the "intention of the parties in the present case as to whether the "creeper was to remain and grow against the plaintiff's wall, "and as to whether the gate-post was to remain fastened to it. ". . . I have come to the conclusion . . . that there was no "evidence that it was not the intention of the parties that the "creeper and gate-post should stay".

If by this language Salter, J., intended to lay it down that in a case such as this (where it is or may be reasonable for the court to assume that, if the parties had applied their minds to the problem of the advertisements, they would or should have made provision for securing to the landlord such right as he now claims) it is sufficient for the landlord to establish the absence of any evidence of a contrary intention, it seems to me that the proposition is in direct conflict with the principle, which is not only well established but which also, in my judgment, ought not to be lightly qualified, the principle that it is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee or at least to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant.

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(28) 133 L. T. 46, 47.

Failing, as I think the landlord does, to establish the necessary condition, the question raised in the summons must necessarily, in my judgment, be answered in the negative. But, as I have earlier stated, my conclusion on the particular question raised for our consideration leaves unjudged the results which properly flow if the tenant seeks by asking for an account or otherwise to enforce the rights which, by reason of this judgment, he has. In the hope that in some measure further litigation and dispute may be saved, I add this: The proper conclusion from the facts now before the court appears to me to be that the landlord's activities, until challenged, ought to be regarded as having been by the tacit permission or licence of the tenant. That permission or licence was terminated when the tenant called in question the landlord's rights in January, 1950. So far as concerns the landlord's own advertisement upon the middle or diagonal wall, it is painted on the bricks which (as the landlord concedes) are included in the demise. Prima facie that is all that has to be said—save that the landlord cannot henceforth renew the advertisement. The position of the "Brymay" advertisement is less easy. We know nothing of the terms of the contract between the landlord and the Borough Billposting Company. Mr. Mulligan concedes that his client cannot—or cannot without exposing himself to liability—terminate or interfere with that contract. Where part of premises granted or demised is subject to an existing and valid tenancy or other agreement prima facie no doubt the grantee or lessee would take subject to and with the benefit of that contract. But in the present case the tenant's rights, on the facts, may not be so simple. If the tenant should be taken to have granted to the landlord a permission or licence to use the relevant space for advertising purposes by means (inter alia) of letting it for reasonably short terms to advertising contractors, it may well be that he could not recall his permission or licence so as to attract to himself the profits of any pending contract entered into within the scope of the permission granted; though he could, presumably, require any such existing contract to be determined as soon as legitimately possible. In working out the rights much may depend on the usual practice in regard to such lettings and on the actual terms of any contract with the billposting company. It would, however, appear that, in any case, the tenant could not possibly require the landlord to account in respect of the period prior to the date of the lease (August 11, 1949) and (as I think at present) prior to the date of his challenge of the landlord's rights in January, 1950.

The fortunes of war have favoured the tenant: and I venture to express the hope that he will prefer the claims of neighbourliness and reasonableness to the costs and hazards of further litigation, as he must also remember his covenant against user of the premises otherwise than as a hairdressing saloon. The hope is perhaps the less futile, since in any further litigation he will, I gather, claim the privilege of suing at public expense.

JENKINS, L.J. I agree. The facts have been fully stated by the Master of the Rolls, and I will therefore confine myself to a brief recapitulation of their essential features. [His Lordship stated the facts and continued:—] As my Lord has already stated, the proceedings took the form of an application by the tenant by originating summons for the determination of the question whether, on the true construction of the lease of August 11, 1949, and in the events which had happened, the landlord was entitled until the determination of the lease to use for the purposes of advertising the outer walls and, if so, what portion or portions of the outer walls of the property demised by the lease without the tenant's consent.

I would say nothing to discourage the use of the relatively cheap and expeditious procedure by originating summons for the construction of a written instrument, where the real issue between the parties is one of construction. But in the present case there is in truth no question of construction at all.

The lease of August 11, 1949, contains no vestige of a provision reserving to the landlord any right to use any part of the outer walls of the demised premises for advertising purposes, and the real issue between the parties was whether the circumstances in which the lease was granted were such that some reservation of this character ought to be implied in favour of the landlord, notwithstanding the total absence of any such provision from the expressed terms of the lease. An originating summons heard without oral evidence is not in my view a satisfactory form of procedure for the trial of an issue such as this. The result in the present case has been that the only evidence before the court consists of affidavits by the tenant and the landlord on which there was no cross-examination and which leave the matter to be determined simply by applying the relevant law to the bare facts above summarized.

The matter therefore stands thus: The landlord did not include in the provisions of the lease as executed any reservation of advertising rights over any part of the outer walls; but, at the date of the lease, the advertisements now in dispute were in their present positions on the walls and plainly to be seen. Moreover, they had existed in their present positions continuously since before the commencement of the tenant's original tenancy in 1939; and the tenant never objected to their presence at any time during his original tenancy, or at the time of the granting of the lease of August 11, 1949, or thereafter until January, 1950. There is no evidence that either party ever even mentioned the subject of the advertisements to the other during the whole of this period of more than ten years.

This being in substance the whole of the available facts, the question is whether on those bare facts without more, the court can and ought as a matter of law to imply in favour of the landlord a reservation during the term of twenty-one years granted by the lease of August 11, 1949, of advertising rights over the outer walls demised, at all events to the extent required to enable him to maintain the existing advertisements and to retain for his own benefit any periodical payments receivable from the Borough Billposting Co. in respect of the site of the "Brymay" poster.

As to the law applicable to the case, it is not disputed that as a general rule a grantor, whether by way of conveyance or lease, of part of a hereditament in his ownership, cannot claim any easement over the part granted for the benefit of the part retained, unless it is expressly reserved out of the grant. See (for instance) *Suffield* v. *Brown* (29); *Crossley & Sons Ld.* v. *Lightowler* (30); *Wheeldon* v. *Burrows* (31).

There are, however, certain exceptions to the general rule. Two well-established exceptions relate to easements of necessity and mutual easements such as rights of support between adjacent buildings. But it is recognized in the authorities that these two specific exceptions do not exhaust the list, which is indeed incapable of exhaustive statement, as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor, or such as to preclude the grantee from denying the right consistently with good faith, and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation.

(29) 4 De G. J. & S. 185.
(30) L. R. 2 Ch. 478.
(31) 12 Ch. D. 31.

For statements of the general rule, and observations on the types of case which should be treated as exceptions to it, reference may usefully be made to the following authorities.

In *Wheeldon* v. *Burrows* (32), Thesiger, L.J., states two propositions as " the general rules governing cases of this kind ". The first concerns easements passing to the grantee and is not relevant here. The second he states as being " that, if the " grantor intends to reserve any right over the tenement granted, " it is his duty to reserve it expressly in the grant ". The learned Lord Justice continues: " Those are the general rules governing " cases of this kind, but the second of those rules is subject to " certain exceptions. One of those exceptions is the well-known " exception which attaches to cases of what are called ways of " necessity; and I do not dispute for a moment that there may be, " and probably are, certain other exceptions, to which I shall " refer before I close my observations upon this case. Both of " the general rules which I have mentioned are founded upon a " maxim which is as well established by authority as it is " consonant to reason and common sense, viz., that a grantor " shall not derogate from his grant."

He deals further with the question of exceptions (33), but, apart from the case of easements of necessity, he does not appear to have been disposed to admit any further exceptions other than cases of mutual easements and cases in which the same vendor sells by auction different lots to different persons at the same time, where the purchaser of one lot may be entitled to an easement over another lot, even though the latter was in fact actually conveyed before the former: see *Swansborough* v. *Coventry* (34). In *Russell* v. *Watts* (35), Lord Selborne, L.C., after referring to the general rule that a man cannot be prevented from darkening his neighbour's windows by a lawful act done on his own land unless light has been enjoyed through those windows for twenty years, and also to the second of the two propositions in *Wheeldon* v. *Burrows* (36) quoted above, said: " It is manifest, however, " that neither of those rules can be invoked in defence of any act " contrary to the good faith of a particular contract ".

In *Aldridge* v. *Wright* (37), Scrutton, L.J., said: " There are " exceptions to the doctrine of *Wheeldon* v. *Burrows* (36). I do " not see my way to attempt an exhaustive statement of those " exceptions, as facts would immediately present themselves to

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(32) Ibid. 49.
(33) Ibid. 59.
(34) (1832) 9 Bing. 305.
(35) 10 App. Cas. 590, 596.
(36) 12 Ch. D. 31.
(37) [1929] 2 K. B. 117, 124.

"prove my absence of foresight, and I find some of the suggested "exceptions difficult to understand—but I do not find any "suggested exception which covers the facts of this case", and after citing the well-known statement of Lord Parker in *Pwllbach Colliery Co. Ld.* v. *Woodman* (38) (to which I will return), stated his conclusions thus (39): "I think the grantee of No. 30, when "his grantor claims to have impliedly reserved such a right from "his grant, though it is not mentioned in his grant, is entitled to "require the clearest evidence of an 'intention of the parties' "that there should be reserved for the benefit of No. 28 an "easement or quasi-easement to be used and enjoyed as of right. "In my opinion the defendant has failed to show such a common "intention or implied reservation in this case; the doctrine of "*Wheeldon* v. *Burrows* (40) applies; the decision of the Divisional "Court must be affirmed, and the appeal dismissed".

Greer, L.J., quoted the general rule as enunciated by Thesiger, L.J., in *Wheeldon* v. *Burrows* (40), and stated five classes of exception which he thought to be the only ones, warranted by the authorities, and of which it is only necessary to mention the third, thus stated by Greer, L.J. (41): "3. If the "owner of two adjoining properties, A and B, grants to the tenant "of A a tenancy from year to year with a right of way during his "tenancy over B, and subsequently leases B, the lease of B is "subject to a reservation of the right of way which has "ex hypothesi been granted to the tenant of A if it is shown that "the lessee of B was aware of a long-continued exercise of "the right by the tenant of A: *Thomas* v. *Owen* (42)". Sankey, L.J., said (43): "I do not think it possible, at any rate "I propose to resist the dangerous ambition of trying, to lay "down a rule which will cover all exceptions. It is impossible "to foresee facts; all that can be said is that the onus is upon "the grantor to establish the facts to prove that his case is an "exception to the rule. In *Wheeldon* v. *Burrows* (40) he failed "to do so".

In *Liddiard* v. *Waldron* (44) *Thomas* v. *Owen* (42) was distinguished, and Greer, L.J., after referring to *Aldridge* v. *Wright* (45) and the rule in *Wheeldon* v. *Burrows* (40), said (46): "The courts have been faced with the question whether or not

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(38) [1915] A. C. 634, 646.
(39) [1929] 2 K. B. 117, 127.
(40) 12 Ch. D. 31.
(41) [1929] 2 K. B. 117, 130.
(42) (1887) 20 Q. B. D. 225.
(43) [1929] 2 K. B. 117, 134.
(44) [1934] 1 K. B. 435.
(45) [1929] 2 K. B. 117.
(46) [1934] 1 K. B. 435, 447.

"in some cases there are exceptional circumstances which justify "departure from that rule. One of those exceptional cases was "established in *Thomas* v. *Owen* (42), the effect of which I "ventured to summarize in these words". Greer, L.J., then set out and reaffirmed his statement of the effect of that case in *Aldridge* v. *Wright* (45), and added: "*Thomas* v. *Owen* (42) is "only an illustration of the proposition that a man cannot grant "to A what he has already given to B, and, therefore, in order to "give effect to what he has already given to B, if the grantee "knows the facts, there must be an implied reservation of that "which would enable him to perform his obligation to his tenant "under his existing lease".

The most comprehensive statement of the area of potential exceptions is probably that contained in the speech of Lord Parker in *Pwllbach Colliery Co. Ld.* v. *Woodman* (47), where his Lordship, after referring to the exception with respect to easements of necessity, said this: "The second class of cases in "which easements may impliedly be created depends not upon "the terms of the grant itself, but upon the circumstances under "which the grant was made. The law will readily imply the "grant or reservation of such easements as may be necessary to "give effect to the common intention of the parties to a grant "of real property, with reference to the manner or purposes in and "for which the land granted or some land retained by the grantor "is to be used. See *Jones* v. *Pritchard* (48), and *Lyttelton* "*Times Co. Ld.* v. *Warners Ld.* (49). But it is essential for "this purpose that the parties should intend that the subject "of the grant or the land retained by the grantor should be used "in some definite and particular manner. It is not enough that "the subject of the grant or the land retained should be intended "to be used in a manner which may or may not involve this "definite and particular use".

The illustrations given by Lord Parker in support of this general proposition seem however to show that it is of less comprehensive import than would at first sight appear. He refers to *Jones* v. *Pritchard* (48), which was in effect a case of mutual easements, to *Lyttelton Times Co. Ld.* v. *Warners Ld.* (49), where both parties contemplated at the time of the grant that the grantor should carry on his printing works on the part of the premises retained, and it was held that the grantee could not in those circumstances complain of a nuisance to the premises granted due to noise and vibration unavoidably occasioned by the carrying on as contemplated of printing operations on the grantor's part of the premises, and to two other cases which appear to have proceeded on similar principles.

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(42) (1887) 20 Q. B. D. 225.
(45) [1929] 2 K. B. 117.
(47) [1915] A. C. 634, 646.
(48) [1908] 1 Ch. 630.
(49) [1907] A. C. 476.

The case which in point of actual decision goes furthest in the direction of implying reservations of easements in favour of a grantor is undoubtedly that of *Simpson* v. *Weber* (50). The question there was whether the grantor of one of two adjoining houses owned by him had by implication reserved the right to have a creeper growing in the garden of the house retained supported by a wall of the house granted over which its foliage had spread, and the right to continue the attachment of a gate forming part of the premises retained to a wall forming part of the premises granted; and the Divisional Court, reversing a county court judge, decided in favour of the grantor's successor in title on both points. Of this case I need only say that, while the physical circumstances at the date of the severance may perhaps have sufficed to support an implication of an intention common to grantor and grantee that the easements in question should be reserved, I cannot agree that the decision is good law, so far as it proceeds on the ground, given in both the two not very satisfactory reports, " that there was no evidence that it was not the " intention of the parties that the creeper and the gatepost " should stay".

In his judgment in the present case, Danckwerts, J., after citing at length from *Simpson* v. *Weber* (50), and also referring to *Liddiard* v. *Waldron* (51), *Wheeldon* v. *Burrows* (52) and *Thomas* v. *Owen* (53), expressed his conclusion thus (54): " It does seem " to me that there may be exceptional circumstances in which it is " only common sense to imply some reservation, for example, the " circumstances of the present case. When I see that, when the " parties entered into their transaction, there was an enormous " advertisement painted on the wall advertising ' Webb's for " ' Meat, Grocery and Provisions ', and a very large advertisement " advertising ' Brymay ' safety matches, which had been there " since 1939 and before, and nothing was said between the " parties about the removal of those advertisements, it seems to " me common sense to imply an intention on the part of the " two parties to the document that those advertisements should be

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(50) 133 L. T. 46.
(51) [1934] 1 K. B. 435.
(52) 12 Ch. D. 31.
(53) 20 Q. B. D. 225.
(54) Ante, 147.

"allowed to remain. Therefore, I am prepared to hold that there "was implied in favour of the landlord in this lease an easement "until the termination of the lease to keep those two advertisements in the position in which they are, and, of course, by "necessary implication, a right to repair them, paint them, or do "whatever may be necessary from time to time to preserve them "as effective advertisements".

I find myself unable to agree with the judge's conclusion. The question is whether the circumstances of the case as proved in evidence are such as to raise a necessary inference that the common intention of the parties was to reserve to the landlord during the twenty-one years' term some, and if so what, rights in regard to the display of advertisements over the outer walls of the demised premises, or such as to preclude the tenant from denying the implied reservation to the landlord of some such rights consistently with good faith.

That question must be approached with the following principles in mind: (i) If the landlord intended to reserve any such rights over the demised premises it was his duty to reserve them expressly in the lease of August 11, 1949 (*Wheeldon* v. *Burrows* (55)); (ii) The landlord having failed in this duty, the onus was upon him to establish the facts to prove, and prove clearly, that his case was an exception to the rule (*Aldridge* v. *Wright* (56)); (iii) The mere fact that the tenant knew at the date of the lease of August 11, 1949, that the landlord was using the outer walls of the demised premises for the display of the advertisements in question did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them he intended to claim, or to take the case out of the general rule: see *Suffield* v. *Brown* (57); *Crossley & Sons Ld.* v. *Lightowler* (58).

Applying these principles to the present case, I ask myself whether the landlord has on the meagre facts proved discharged the onus which lies upon him of proving it an exception to the general rule. He can, so far as I can see, derive no assistance from the passage quoted above from Lord Parker's speech in the *Pwllbach Colliery* case (59). It might, I suppose, be said to have been in the contemplation of the parties that the landlord would continue to use the ground floor of the premises for the purposes of his business as a butcher and provision merchant, but it cannot in my view be contended that the maintenance during the term of the lease of his advertisement over the door was a necessary incident of the user so contemplated. This applies a fortiori to the "Brymay" advertisement, the display of which on the outer wall of the demised premises by the Borough Billposting Company as licensees of the landlord was so far as I can see not related in any way to the use or occupation of the ground floor for the existing or any other purpose. The transaction with the Borough Billposting Company was simply a hiring out for reward of part of an outer wall of the demised premises for use as an advertising or billposting site or station.

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(55) 12 Ch. D. 31.
(56) [1929] 2 K. B. 117.
(57) 4 De G. J. & S. 185.
(58) L. R. 2 Ch. 478.
(59) [1915] A. C. 634, 646.

The mere fact that the tenant knew of the presence of the advertisements at the date when the lease of August 11, 1949, was granted being, as stated above, beside the point, nothing is left beyond the bare circumstance that the advertisements were not only present at the date of the grant but had been continuously present without objection by the tenant since the commencement of his original tenancy in 1939. Does this circumstance suffice to raise a necessary inference of an intention common to both parties at the date of the lease that the landlord should have reserved to him the right to maintain these advertisements throughout the twenty-one years' term thereby granted? I cannot see that it does. The most that can be said is that the facts are consistent with such a common intention. But that will not do. The landlord must surely show at least that the facts are not reasonably consistent with any other explanation. Here he manifestly fails. It may be that neither party ever applied his mind at all to the question whether the outer walls were included in or excluded from the original tenancy or the lease ultimately granted, or what their respective rights as to the use of such walls for any purpose might be. It may be that the tenant, so far as he applied his mind to the matter at all, merely refrained from objecting to the presence of the advertisements because, whether the landlord was within his rights in maintaining them or not, he, the tenant, did not for the time being think it worth his while to object. As to the landlord, he may have been under the erroneous impression that notwithstanding the tenancy and subsequently notwithstanding the lease, he was entitled to use the outer walls for advertising purposes. If so, his own mistake will not avail him, at all events in the absence of evidence that the tenant was aware of it. On the other hand, the landlord may have thought, when he came to grant the lease, that, since the tenant had never objected to the advertisements during all the ten years of his previous tenancy, it could be assumed that the tenant would not object in the future, and have preferred accordingly to let the matter rest at that rather than raise the question by claiming a a reservation.

In short, I can hold nothing more established by the facts proved than permissive user of the outer walls by the landlord for the display of the advertisements during the original tenancy and thereafter from the granting of the lease until the tenant's objection in January, 1950; with nothing approaching grounds for inferring, as a matter of necessary inference, an intention common to both parties that such permissive user should be converted by the lease into a reservation to the landlord of equivalent rights throughout the twenty-one years' term thereby granted.

If the hypothetical officious stranger sometimes used as a test of implied terms had intervened in the course of the negotiation of the lease and said: "What about Mr. Webb's advertise-"ments?" Would both parties have exclaimed with one voice? "Of course they are to stay!" I see no justification at all for this assumption. The landlord might well have said: "Of course "I want them to stay", but as likely as not the tenant would have said: "At present I have no objection to your advertise-"ments, but I cannot bind myself to allow them for twenty-one "years. For all I know, I may at any time during that period for "one reason or another want them removed. If you insist on "reserving rights in the matter you must reduce the rent or find "some other tenant".

So far as the "Brymay" advertisement is concerned, the case resembles *Thomas* v. *Owen* (60) in that the right in question was granted by the landlord to the Borough Billposting Co. before the date of the lease. But this only means that prima facie the demise to the tenant took effect subject to the company's right, and cannot, so far as I can see, afford any ground for implying a reservation by the landlord to himself of the proceeds accruing subsequently to the date of the lease from thus hiring out a part of the demised premises, or any right to grant any further licence for a similar purpose.

For these reasons, I am of opinion that the appeal should be allowed and that a negative answer should be returned to the question raised by the summons. The consequences of a decision to that effect are not strictly before us, but I should perhaps add (with a view so far as possible to curtailing the grounds for future

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60) 20 Q. B. D. 225.

controversy): (i) That so far as the painted advertisement is concerned, the surface on which it appears, including the painted lettering and background themselves, in my view passed under the demise, so that the mere continued presence of the painted background and lettering in their existing state cannot constitute a trespass. But repainting would be a different matter, and there is nothing to prevent the tenant's using the same surface for any purpose not involving a breach of any of the covenants on his part contained in the lease notwithstanding that the effect of so doing may be to obscure the landlord's advertisement. (ii) Although there is no reservation to the landlord of any rights over the relevant area of wall in respect of the "Brymay" advertisement, the lease must, as I have said, prima facie have taken effect subject to the rights (whatever they may be) of the Borough Billposting Co. under the licence granted to them by the landlord and, as between the tenant and the landlord, have passed to the benefit of the company's obligations under that licence so far as it affects the outer wall of the demised premises. It is obvious that if the parties choose to litigate further there may be ample room for controversy as to the apportionment of any rent paid by the company in respect of the two posters (the "Brymay" one being substantially but perhaps not wholly on the demised part of the outer wall and the "Oxydol" one being substantially but perhaps not wholly on the retained part of the outer wall), and as to the date from which the tenant can claim the benefit of any contract with the company or call upon the landlord to account for his receipts under it, having regard to the fact that the tenant as between himself and the landlord must, I think, clearly be taken to have given his tacit consent to the presence of the "Brymay" poster down to January 1950.

It is to be hoped that common sense (to which Danckwerts, J., appealed in his judgment) will lead to a reasonable settlement of these outstanding matters.

MORRIS, L.J. I agree. The lessor and the lessee expressed the terms of their agreement in a lease which appears to be both full and formal. The lessor becomes confronted therefore with one of the general rules referred to by Thesiger, L.J., in *Wheeldon* v. *Burrows* (61), i.e., that if a grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. That rule is but one application of the maxim

(61) 12 Ch. D. 31.

that a grantor shall not derogate from his grant, a maxim which Thesiger, L.J., refers to as being as well established by authority as it is consonant to reason and common sense. The general rule is, however, subject to certain exceptions, and these are discussed by Thesiger, L.J., in the judgment to which I have referred. One of the most familiar examples of an exception is that which attaches to cases of what are called ways of necessity. Instances of other exceptions were recited by Greer, L.J., in his judgment in *Aldridge* v. *Wright* (62). The issue in the present case may be stated in the form of the question which Sankey, L.J., posed in *Aldridge* v. *Wright* (63), i.e., "Has the defendant proved that "the case is an exception to the general rule?"

In my judgment the landlord has not shown that he comes within any exception which is embraced by the principles laid down in the authorities. In his speech in *Pwllbach Colliery Co. Ld.* v. *Woodman* (64) Lord Parker said that apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which easements can be granted by implication could be classified under two heads. Lord Parker stated the first of these as being where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. He stated the second in the following words: "The second class of cases in which easements "may impliedly be created depends not upon the terms of the "grant itself, but upon the circumstances under which the grant "was made. The law will readily imply the grant or reservation "of such easements as may be necessary to give effect to the "common intention of the parties to a grant of real property, "with reference to the manner or purposes in and for which the "land granted or some land retained by the grantor is to be "used: see *Jones* v. *Pritchard* (65) and *Lyttelton Times Co. Ld.* "v. *Warners Ld.* (66). But it is essential for this purpose that "the parties should intend that the subject of the grant or the "land retained by the grantor should be used in some definite and "particular manner. It is not enough that the subject of the "grant or the land retained should be intended to be used in "a manner which may or may not involve this definite and "particular use".

If the landlord referred to these words by which to apply a test to the situation, he would, in my judgment, fail to show on the facts of the present case that some reservation of a right ought to be implied. The implication of a reservation would have to be conclusively indicated and it would not suffice if the matter remained in the sphere of conjecture or ambiguity. The facts in the present case are not inconsistent with, and do not effectively negative, the view that the tenant may not have given thought to the question of having advertisements on the wall demised to him continuously during the period of the lease. Further, it may be that the tenant lacked advice on legal matters. Neither is it shown, in my judgment, that any reflection upon his good faith can validly be alleged, nor that he remained silent at a time when he should have been assertive. Further, it cannot be demonstrated that he has done anything to jeopardize his right to withdraw any permission previously tacitly given.

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(62) [1929] 2 K. B. 117, 130.
(63) Ibid. 137.
(64) [1915] A. C. 634, 646.
(65) [1908] 1 Ch. 630.
(66) [1907] A. C. 476.

On the particular and somewhat meagre facts which are before the court, it is not, in my judgment, shown that it must have been the common intention that the landlord was to reserve a right to retain advertisements upon the wall demised. As that is not shown, the question propounded in the summons should, in my judgment, be answered in the negative.

I would also add that I am in agreement with the observations made by my Lord, the Master of the Rolls, in regard to any further assessment or adjustment of the position as between the tenant and the landlord.

Appeal allowed.

Solicitors: *F. Duke & Sons; Neil Maclean & Co.*

B. A. B.

In re SHAW'S SETTLEMENT; SHAW *v.* SHAW AND OTHERS.

[1951 S. 327.]

In re WISELY'S SETTLEMENT; WISELY AND ANOTHER *v.* THE PUBLIC TRUSTEE AND ANOTHER.

[1951 B. 77.]

HARMAN, J.
1951
Feb. 20, 26.

Settlement—Determinable life interest—Forfeiture on income becoming vested in other persons—Express power of advancement—Whether consent to exercise of power operates as forfeiture—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

HARMAN, J.

1951

SHAW'S SETTLEMENT, *In re*; SHAW *v.* SHAW.

WISELY'S SETTLEMENT, *In re*; WISELY *v.* THE PUBLIC TRUSTEE.

The owner under a settlement of a determinable life interest declared to be forfeitable if the income payable to him should become vested or charged in favour of some other person does not forfeit his life interest by consenting to the exercise of an express power of advancement contained in the settlement.

Quære whether the position would be different, and *In re Stimpson's Trusts* [1931] 2 Ch. 77 applicable, if the settlement contained no express advancement clause and no use were made of the protective trusts set out in s. 33 of the Trustee Act, 1925.

In re Hodgson [1913] 1 Ch. 34 followed; *In re Stimpson's Trusts* [1931] 2 Ch. 77 distinguished.

TWO ADJOURNED SUMMONSES heard together.

In re SHAW'S SETTLEMENT.

By a settlement dated February 5, 1912, the plaintiff's grandmother, Mary Jane Shaw, settled certain shares on trust for herself for life with remainder to her son John Reginald Shaw for life with remainder to his sons absolutely. John Reginald Shaw died without issue and, thereupon, under further limitations of the settlement the settled fund became equally divisible between the plaintiff Geoffrey Reginald Devereux Shaw and his brother, the two sons of James Edward Shaw, the second son of the settlor.

By cl. 5 of the settlement the plaintiff's interest was settled on trust to pay the income to him " during his life unless and " until some act or event shall have happened or shall happen " whereby the said income or some part thereof if belonging " absolutely to him would be or become vested in or charged in " favour of some other person ". There followed a discretionary trust and a remainder for the plaintiff's sons at twenty-one years, with divers remainders over.

By cl. 9 of the settlement the trustees were empowered to advance any minor interested under the settlement, " provided " always that no such advancement shall be made during the " existence of any prior life or other interest or interests without " the consent in writing of the persons or person entitled there- " to ".

As he had an infant son, namely, the second defendant, in whose favour the trustees proposed to exercise the above-named power of advancement, the plaintiff had been requested to consent.

A summons was taken out to have determined whether the plaintiff by giving such a consent forfeited his life interest.

H. E. Francis for the plaintiff. The plaintiff's life interest is settled on a protective trust analogous to that set out in s. 33 of the Trustee Act, 1925. Section 33 expressly excepts advances under an express or statutory power from working a forfeiture.

It would be strange if the plaintiff, by merely consenting to the trustees' exercise of the power conferred by the settlement, thereby forfeited his life interest. The object of a protective trust is to prevent a life tenant from selling or mortgaging or otherwise disposing of his interest in favour of creditors, and a forfeiture clause is drafted to that end. To construe the forfeiture clause in such a manner that the life tenant forfeits his interest by granting an advance or consenting to an advance in favour of other persons interested under the settlement is, it is submitted, to defeat the intentions of the settlor. Accordingly the words in cl. 5 of the settlement "some act or event" should be construed as if they read "some act or event save some act or event "authorized to be done by the settlement": see *per* Neville, J., in *In re Hodgson* (1).

In re Stimpson's Trusts (2) is in conflict with the decision in *In re Hodgson* (3). It is submitted that *In re Hodgson* (4) is to be preferred since *In re Stimpson's Trusts* (5) was not fully reported and contained no argument upon the point at issue in the present case.

[He also referred to *In re Garrett* (6) and Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), vol. 2, p. 1320.]

R. Cozens-Hardy Horne, for the son, adopted the argument for the plaintiff.

B. G. Burnett-Hall for other persons interested under the settlement. *In re Stimpson's Trusts* (7) and *In re Hodgson* (8) are irreconcilable. In *In re Hodgson* (9) it was held that the life tenant did not forfeit his interest by consenting to the exercise of a power of advancement. *In re Stimpson's Trusts* (10) is a decision to the contrary. The decisions cannot be distinguished on the ground that in *In re Stimpson's Trusts* (11) the settlement contained no express advancement clause; for Luxmoore, J., held that the trustees were entitled to exercise the power of advancement conferred by s. 33 of the Trustee Act, 1925, in consequence of which, it is submitted, the settlement in that case must be read as though it had expressly included an advancement clause; for the effect of the decision was to incorporate in the settlement a power of advancement identical with that set out in s. 32 of the Act.

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(1) [1913] 1 Ch. 34, 40, 41.
(2) [1931] 2 Ch. 77.
(3) [1913] 1 Ch. 34.
(4) Ibid.
(5) [1931] 2 Ch. 77.
(6) [1934] Ch. 477.
(7) [1931] 2 Ch. 77.
(8) [1913] 1 Ch. 34.
(9) [1913] 1 Ch. 34.
(10) [1931] 2 Ch. 77.
(11) Ibid.

W. S. Wigglesworth for the trustees of the settlement. It is to be noted that the proviso at the end of cl. 9 of the settlement is similar to the proviso in s. 32, sub-s. 1 (*c*), the paragraph under consideration in *In re Stimpson's Trusts* (12). *In re Hodgson* (13) is distinguishable from the facts of the present case, since there the consent of the life tenant was expressly specified as a prerequisite to the exercise of the power of advancement. It was plain that the settlor envisaged that the life tenant could consent to an exercise of the power. However, in the present case it does not appear from the terms of the settlement whether or not the settlor's mind was directed to this point.

It is submitted that *In re Stimpson's Trusts* (14) should be followed in preference to *In re Hodgson* (15).

[He also referred to Key and Elphinstone's Precedents in Conveyancing (14th ed.), vol. 2, pp. 553, 554 n.]

Cur. adv. vult.

Feb. 26. HARMAN, J., reading his judgment, stated the facts and continued:—Both determinable life interests and provisions for the advancement of infant remaindermen have been common features of settlements for many years past. Precedents for both are to be found in Davidson's Precedents and Forms in Conveyancing (3rd ed. 1875), vol. 3, part II, pp. 715, 798. It is not suggested in that work that consent to the exercise of the power of advancement would determine the life interest. This suggestion, however, seems to have been made early in the present century, for in the 9th (1909) edition of Key and Elphinstone's Precedents in Conveyancing, vol. 2, p. 537, the precedent for a determinable life interest includes, in round brackets, these words: "other than a consent to the exercise of the power of "advancement hereinafter contained".

The question came before the court in 1913 in *In re Hodgson* (16). The main question in that case was whether the advancement clause applied to appointed shares, but Neville, J., also decided that consent by the owner of a determinable life interest to the exercise of a power of advancement did not work a forfeiture. On this subject the judge expressed himself as follows (17): " The point raised in this case is a peculiar one. " Under a marriage settlement the husband takes a protected life " interest in the wife's settled funds subject to the payment of " 150*l*. a year to the wife, and a clause giving over his share of " the income in case he incumbers or charges it is of the widest " possible description and is prima facie wide enough to cover " what has been done in the present case, because by an act of " his he has enabled income which otherwise would have been " payable to him to become payable to somebody else. The " settlement also contains a power of advancement, and it provides in the power of advancement that half of the share of any " child may be advanced by the trustees with the consent of the " husband and the wife ".

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(12) [1931] 2 Ch. 77.
(13) [1913] 1 Ch. 34.
(14) [1931] 2 Ch. 77.
(15) [1913] 1 Ch. 34.
(16) [1913] 1 Ch. 34.

He then considered the other point raised, and continued in these terms (18): " In order to understand what the settlement " meant the whole document must be read together, and must be " read intelligently, and one must consider what are the objects " sought to be attained by the words that have been used. To " suppose that by giving effect to the power of advancement the " husband committed a forfeiture under the previous forfeiture " clause would to my mind be perfectly absurd, and would be " failing to give an intelligent construction to the whole of the " settlement. I think it should be read as though there had been " inserted at the end of the forfeiture clause ' But this provision " ' is not to affect any steps taken by the husband to enable the " ' advances by the trustees hereinafter provided for to take " ' effect '. I think it is clear in the present case that nothing has " been done which is not in accordance with the terms of the " advancement clause, and I am bound to assume that the " trustees properly exercised their discretion ". At the end of the judgment, he said (19): " The forfeiture clause was never " intended to operate in that direction at all, and it would be, " I think, directly contrary to the whole intention of the deed if I " held that it was so. I hold, therefore, that there has been no " forfeiture ".

Acting on this view, the editor of the 10th edition of Key and Elphinstone's Precedents in Conveyancing put the words which

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(17) [1913] 1 Ch. 34, 39.

(18) Ibid. 40.

(19) [1913] 1 Ch. 34, 41.

I have already quoted from the earlier edition into square brackets and added a note that probably the words were unnecessary: "but "it may be safer to insert them" (vol. 2, p. 582); and the careful draftsman before 1925 acted, I think, on this last admonition. The legislation of 1925 altered the position first by enacting a statutory power of advancement by s. 32 of the Trustee Act, 1925; and, secondly, by providing under s. 33 of that Act a form of determinable life interest which could be imported into settlements by directing income to be held on protective trusts. These two sections have had the effect of shortening many documents, but some practitioners still prefer to include an express power of advancement and to set out the terms of a determinable life interest in full. Section 33, sub-s. 1 (i), of the Trustee Act, 1925, expressly excepts advances under a statutory or an express power from working a forfeiture in the case of statutory protective trusts, so that this question cannot arise where this statutory form is used.

The question, nevertheless, seems to have come before Luxmoore, J., in 1930, in *In re Stimpson's Trusts* (20), where he held that the plaintiff in that case, who was both trustee and beneficiary, would forfeit his interest under the will of a woman who died in 1929 if he exercised the statutory power of advancement under s. 32 of the Trustee Act, 1925. The point is not fully reported, and the headnote is misleading in that respect. The terms of the determinable life interest are thus set out in the report (20): "If the plaintiff should assign or charge the life "interests given to him by her will or any part thereof, or become "bankrupt or do or suffer any other act or thing whereby "the said life interests or either of them if payable to him "absolutely or any part thereof would become vested in or "payable to any other person", then the trusts should cease. The judge decided the point, but the report, having said so much, moves to another point, and one does not know what arguments or authorities (if any) were cited. All that the judge, as reported, said on this point is this (21): "The summons, in "addition to asking whether the power of advancement of the "defendant Thomas Edwin Stimpson is applicable in the manner "provided by and subject to the conditions contained in s. 32 of "the Trustee Act, 1925, also asks a further question, whether, on "the true construction of the will of Mary Stimpson, in the event "of the plaintiff consenting to any advancement being made to

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(20) [1931] 2 Ch. 77, 78.

(21) [1931] 2 Ch. 77, 80.

"the son, he forfeits his life interest. The matter came before "me on October 21 last, and I then decided that if this consent "was given it would in fact bring about a forfeiture of the life "interest of the plaintiff". Not unnaturally this has since been considered a matter of doubt; see, for instance, the note in Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), vol. 2, p. 1320. This difficulty, it is said, I must now resolve.

If I am free to do so, I should wish to follow the judgment of Neville, J., in *In re Hodgson* (22), the reasoning of which appeals to me. Even though, on the wording of the forfeiture clause, it might be said to cover a consent to the exercise of the power of advancement, as Neville, J., recognized, it seems absurd to suppose that the settlor intended the power to advance a minor during the lifetime of one of her grandchildren to be exercisable only at the expense of that grandchild's life interest. In effect, that would be to make it certain that the power would never be exercised. This kind of interest used to be called a spendthrift trust, and that well enough describes its object, which is to protect a life tenant against his own extravagance: it was never intended to prevent a proper use of the capital for the advantage of his children. It was pointed out to me here that the first life interest of a son of Mary Jane Shaw was not determinable and that if John Reginald Shaw had had sons he could safely have consented to the exercise of the power, and from this it was argued that no repugnancy in fact existed in the present case. But I cannot think that this was the draftsman's view or the settlor's intention. Am I then precluded by Luxmoore, J.'s decision in *In re Stimpson's Trusts* (23) from adopting this view? I think not.

In the first place, that decision is unsatisfactory so far as any record of it goes, as counsel pointed out during the argument in *In re Garrett* (24). That case did not really touch this point, though there is one observation of Clauson, J., which might be thought relevant. He was deciding that the existence of a restraint on anticipation did not prevent a lady from consenting to the exercise of a power of advancement. In the course of his judgment, he said (25): "It is to be observed that in this will "there is no forfeiture clause, the presence of which might well "make a difference and introduce matter for consideration". This, however, does no more than voice a doubt. Moreover, the will in *In re Stimpson's Trusts* (26) contained no advancement

(22) [1913] 1 Ch. 34.

(23) [1931] 2 Ch. 77.

(24) [1934] Ch. 477, 480.

(25) [1934] Ch. 477, 482.

(26) [1931] 2 Ch. 77.

clause; nor, apparently, did the settlement which conferred the power exercised by the will. Both settlement and will in that case long preceded the legislation of 1925, and the statutory advancement clause cannot, therefore, have been in the mind of the settlor or testator. In these circumstances, the argument which appealed to Neville, J., in *In re Hodgson* (27), and appeals to me, was not available. It may be that the decision in *In re Stimpson's Trusts* (26) may hereafter be followed in a case where an express advancement clause is lacking and where, on the other hand, no use is made of the protective trusts set out in s. 33 of the Trustee Act, 1925. I leave that question to be decided when it arises. In the present case, both power and trust are expressed in the deed, and, in my judgment, the consent to the exercise of one does not lead to the forfeiture by the consenting party of his life interest under the other.

Declaration accordingly.

Solicitors: *Messrs. Hunters.*

In re WISELY'S SETTLEMENT.

By a marriage settlement dated September 24, 1915, the settled funds were to be held during the lifetime of the husband, as to one-half on trust to pay the income to him " provided that " at the date when such . . . income would otherwise be payable " to him under this provision no forfeiture as hereinafter defined " shall have been incurred and be subsisting as regards him ". After the death of the husband the wife, if surviving, had a similarly forfeitable interest.

The forfeiture clause was in these terms: " A forfeiture by the " husband or the wife (as the case may be) of the annual sum or " income payable to him or her hereunder will be incurred if he or " she (as the case may be) shall at any time have done or suffered " or shall hereafter do or suffer some act or thing or if some event " shall have happened or shall hereafter happen in consequence " whereof, if such annual sum or income belonged to him or her " absolutely at the time when but for such forfeiture it would be " payable to him or her hereunder, the same or some part thereof " would be vested in or payable to some other person or persons ".

The settlement contained an advancement clause (cl. 4 (h)) in the following terms: " The trustee may at any time or times but " with the consent in writing of the husband (if living) or after

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(26) [1931] 2 Ch. 77.

(27) [1913] 1 Ch. 34.

" the husband's death of the wife (if living) raise any part or parts " not exceeding together one-half of the presumptive or vested " share of any child or other issue of the said intended marriage " under the trusts aforesaid and may pay or apply the same for " his or her advancement or benefit ".

The plaintiffs were the husband and wife who took respectively under the settlement. There was one child of the marriage, a daughter. It was proposed to make an advancement in the daughter's favour, and, accordingly, a summons was taken out to have determined whether by giving consent to such advancement the plaintiffs would forfeit their interests.

H. J. Goolden for the plaintiffs.

W. S. Wigglesworth for the first defendant, the Public Trustee.

G. A. Rink for the second defendant, the daughter.

Cur. adv. vult.

HARMAN, J. [having stated the facts]. The plaintiffs are the husband and wife who take respectively under this instrument, and the second defendant is the only child of the marriage. Here, again, an advance in the child's favour is proposed, but the plaintiffs are unwilling to give their consents if the result be a forfeiture of their interests. In my judgment, I ought in this case also to follow *In re Hodgson* (28) and my own decision just delivered. Both the interests of the husband and the wife and the necessity for their consent to the exercise of the power of advancement are expressly provided by the same instrument and it would, in my judgment, be to construe the two parts as inconsistent the one with the other if I were to hold that consent worked a forfeiture. I accordingly hold that the plaintiffs can safely consent to advancement without forfeiting their interests.

Declaration accordingly.

Solicitors: *Strong & Co.*

(28) [1913] 1 Ch. 34.

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May 2, 3; 10.

Evershed, M.R., and Denning, L.J.

In re DULLES' SETTLEMENT (No. 2).
DULLES *v.* VIDLER.

[1948 D. 231.]

Jurisdiction—Infant's application for maintenance—American father resident abroad—Appearance by counsel to oppose application—Whether in fact submission to jurisdiction by father.

In proceedings by writ resulting in an infant's being appointed a ward of court, the infant (by his mother as next friend) took out a summons asking (1.) that his mother should be appointed his guardian under the Guardianship of Infants Acts, 1886 to 1925, and be given his custody, and (2.) for provision to be made for his maintenance. Without coming to England the father, who was an American resident abroad, was represented by solicitor and counsel to resist the first claim on the ground that he had been given the custody of the infant by the French courts; but against the second claim the father's residence out of the jurisdiction was relied on. Romer, J., appointed the mother to be guardian with custody of the infant, but he made no order against the father on the question of maintenance on the ground that there was no jurisdiction under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925, to make an order against a person out of the jurisdiction. On the hearing of an appeal, ante, p. 265, it was held, contrary to the contentions of counsel for the father, (1.) that an individual outside the jurisdiction could submit to it by choosing to be represented by solicitor and counsel in a case heard by the High Court and arising under a statute not expressly limited in jurisdiction; (2.) that there was no such special limit in the Guardianship of Infants Acts; and (3.) that it was impossible to sustain the objection based on the application for custody not being made by the mother. The Court of Appeal then referred back to Romer, J., the question whether the father had submitted to the jurisdiction, and Romer, J., decided that he had not. On appeal:—

Held, (1.) that the affidavit put in on behalf of the father at the original hearing was directed only to the question of custody and was too vague to be given a more extended meaning; and (2.) that counsel for the father could not be said at the previous hearing before the Court of Appeal to have resisted the claim for maintenance except in so far as he resisted the claim that he had subjected himself to the jurisdiction on this issue on three separate grounds.

Harris v. *Taylor* [1915] 2 K. B. 580 distinguished.

Per Denning, L.J. There were two means by which an order for maintenance might have been obtained against the father, namely, (1.) if a claim had been made on the father for custody and maintenance by originating summons so that he would be a party to the summons and leave could have been given to serve him out of the jurisdiction under R. S. C. Ord. 11, r. 8A (*b*); or (2.) if a claim on the father for custody and maintenance were made on the writ in an action to make the infant a ward of court and to execute the trusts of a settlement. The father would then be a proper party to these proceedings, and leave could be given to serve him out of the jurisdiction under Ord. 11, r. 1 (*g*).

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DULLES' SETTLEMENT (No. 2), *In re.* DULLES *v.* VIDLER.

APPEAL from Romer, J.

The appeal arose out of a direction by the Court of Appeal on a previous appeal from Romer, J., in the same matter (1). The facts in the previous appeal were as follows:—

As the result of the writ in these proceedings issued on February 6, 1948, the infant Frank William Harrison Dulles was made a ward of court. The infant, by his mother Gweneth Betty Dulles as next friend, then made an interlocutory application by summons asking, first, that the mother be appointed to be his guardian under the Guardianship of Infants Acts, 1886 to 1925, and be given his custody; and secondly, for an order for maintenance against the infant's father, L. Harrison Dulles, an American citizen resident abroad. The father, who did not come to England, was represented by counsel in opposing the application, he having previously been given the custody of the infant by the French courts. The mother, having previously made an affidavit in support of the application, the father made an affidavit on March 21, 1950, dealing with matters contained in the mother's affidavit. In particular, in para. 7, he gave an account of his income, saying that he had recently received an accretion by reason of his mother's death; and in para. 9 he said: " As " regards the statement of my former wife . . . as to her means, " I find it difficult to suppose that the statement can be true. " It is true that at the time of our marriage she had no means " of her own, but during the course of our marriage I from time " to time have given to my former wife property of considerable " value . . . ".

Romer, J., had made an order appointing the mother as the guardian of the infant and giving her his custody; but he refused to make the order for maintenance on the ground that there was no jurisdiction under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925, to make the order against a person out of the jurisdiction. Even though the father had submitted to the jurisdiction of the court, that had no application to a case when the jurisdiction was conferred as limited by statute.

The Court of Appeal held, contrary to the contention of counsel for the husband, (1.) that, although English statutes would not prima facie be treated as extending to jurisdiction beyond English territory, an individual outside the jurisdiction could voluntarily submit to it either by coming to England or, when a case was heard by the High Court and concerned a question arising under a statute not expressly limited in its jurisdiction, by choosing in his absence abroad to be represented by solicitors and counsel to contest a case arising under the statute; (2.) that there was no such special limitation as to jurisdiction in the Guardianship of Infants Acts, 1886 to 1925; and (3.) that, having regard to R. S. C., Ord. 55, rr. 2 and 3, it was impossible to sustain the technical objection that, because the mother did not apply for the custody of the infant in accordance with s. 5 of the Act of 1886, the infant's application for maintenance under s. 3, sub-s. 2, of the Act of 1925 could not be maintained.

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(1) Ante, 265.

The Court of Appeal held however that, in view of the very special facts, which were best known to Romer, J., the case must be remitted to him to ascertain whether the father had in fact submitted to the jurisdiction.

Romer, J., decided that the husband had not submitted to the jurisdiction of the court so far as the claim for maintenance under the summons was concerned.

The infant appealed.

Michael Albery for the infant. First, it is submitted that the father, having argued this case on the merits, cannot now raise any question as to the jurisdiction of the court. Secondly, it is submitted that the judge was wrong in holding that, so far as this was an application for maintenance, it was not argued by the father on the merits. The father's affidavit dealt both with the question of custody and with that of maintenance. In relation to the custody of the infant, one of the relevant facts which the court had to consider was how it was to be maintained. The questions of custody and of maintenance are bound up together. It is submitted that the evidence shows that the question of custody was fought on the merits. That being so, it is not open to the father to dispute the jurisdiction of the court.

It is submitted that the father should not have raised the question of the jurisdiction of the court by way of defence: *Preston* v. *Lamont* (2); *Boissiere & Co.* v. *Brockner & Co.* (3). He should have applied under s. 41 of the Judicature Act of 1925 for a stay. The father's solicitors in this country accepted service and instructed counsel. They should have followed the procedure which is ordinarily followed when proceedings are begun by writ, and have applied under R. S. C., Ord. 12, r. 30, for a stay. The jurisdiction to order a stay is not limited to proceedings by writ. The father is before the court and has submitted to the jurisdiction. *Thomas* v. *Dowager Duchess of Hamilton* (4) and *Manitoba and North-West Land Corporation* v. *Allan* (5) show that, if a party takes any step in the proceedings, that amounts to a submission to the jurisdiction. The father here unequivocally submitted to the jurisdiction.

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(2) (1876) 1 Ex. D. 361.

(3) (1889) 6 T. L. R. 85.

Lastly, it is submitted that this summons raised one question and not two. The custody and maintenance of the infant were taken together as one question. The father submitted to the jurisdiction so far as the question of custody was concerned; and, the question of maintenance being merely ancillary to that of custody and determined at the same time, he must be treated as having also submitted to the jurisdiction so far as maintenance is concerned.

Bonner and *C. P. Hutchinson* for the father. On a fair reading of the father's evidence it was not directed to the question of maintenance but to the credibility of the mother. The father was bound to meet all the mother's evidence: she had made serious charges against him. If he had not challenged all her evidence, he would have been taken to have admitted it. This was not a case where there were any pleadings. The father in fact had objected to the jurisdiction before he had put in any evidence.

Secondly, it is submitted that the court has no jurisdiction to stay this matter in limine. If the father had applied for a stay, the application would have failed for it would have been said that until the question of custody had been settled no question as to the infant's maintenance arose. The material contained in the father's affidavit is, when fairly read, directed to credit, and Romer, J., was right in holding that it is too flimsy to amount to a submission to jurisdiction on the question of maintenance. If it was intended to have a wide effect it was singularly lacking in strength. In this connexion reference should be made to *Harris* v. *Taylor* (6), as showing that the father here made no submission to the jurisdiction. There has been no submission by anything counsel has said on behalf of the father.

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(4) (1886) 17 Q. B. D. 592.

(5) [1893] 3 Ch. 432.

(6) [1915] 2 K. B. 580.

Again, the point has been taken that, by taking two objections, counsel for the father had disputed the question of maintenance and submitted to the jurisdiction of the English court. That is not so: the points taken on the previous hearing before this court were really objections to the jurisdiction on three alternative grounds. The objection was a single one. All that was said was that the court had no jurisdiction against the father. The technical objection based on the failure of the mother to apply for the custody of the infant was merely one of these grounds.

It is to be noted that custody of the infant had been given to the father by the French courts, a matter to which the English courts would pay special attention: *McKee* v. *McKee* (7). That goes only to the question of custody, but when the question of maintenance came up the father merely relied on the absence of jurisdiction against him. The two jurisdictions are as the poles apart, and must be dealt with separately on the two issues.

On the claim for maintenance the father rests himself on his residence out of England and his failure to submit to jurisdiction of the English courts.

Albery in reply.

Cur. adv. vult.

May 10. The following judgments were read:—

EVERSHED, M.R. I have had the advantage of reading the judgment about to be delivered by Denning, L.J., and, as I agree with him in his conclusion that the appeal fails, and with his reasons, I will confine myself to a few observations. The question is whether, on the infant's application for an order for maintenance under the Guardianship of Infants Acts, 1886 to 1925, of which application notice was given to the father's solicitors, the father, who is an American citizen resident at all material times outside the United Kingdom, has submitted to the jurisdiction of the High Court, that is, voluntarily rendered himself amenable to the court's jurisdiction. There can be no doubt that from the first, consistently and vigorously, he has protested against the jurisdiction, and no other question on the application for maintenance has yet been canvassed before the court.

Romer, J., before whom came each of the three hearings of the matter before the case came, on the last occasion, before the

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(7) [1951] A. C. 352.

Court of Appeal, and who therefore heard all that was said on behalf of the father, held that he had not so submitted himself. In those circumstances I should be most reluctant to hold that the father, by reason of some tactical or other false step, must be taken, contrary to his avowed intention, to have cut the ground from under his feet; but it is just that that Mr. Albery, in his able and forceful argument, says that the father has done.

The proceedings out of which the question arises are of an essentially informal character. The action is one by writ to administer the trusts of the settlement, to which the father is no party. The object, according to well-established Chancery practice, was to make the infant a ward of court. In accordance with the same practice the infant, by his mother as next friend, has issued an ordinary summons, not inter partes, asking that orders be made (1.) for his custody and (2.) for his maintenance. There are no pleadings which formulate the issues. Affidavits were filed by the mother, and, I understand, by others on her side, constituting the evidence in support of the application under both heads. To such evidence the father, having made it plain that he was only concerned to challenge the right of the mother to an order for custody, and that on the question of maintenance he protested against the jurisdiction of the court, put in evidence in reply.

Mr. Albery's first point is that the father could not oppose the mother's claim to custody without also accepting the jurisdiction of the court to make an order against him for maintenance. I do not agree. I think that the two matters are in essence distinct, as is pointed out by my brother Denning.

Then it is said that, since the mother's evidence covers indiscriminately the question of custody and maintenance, the father by his affidavit by way of answer, and particularly by para. 9, in which he questioned the mother's allegation as to means, involved himself in the question of the merits of the application for maintenance, as well as the question of the merits of the application for custody.

It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him. And he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits. I agree, however, with Romer, J., that these passages in the affidavit fastened upon by Mr. Albery cannot, taken at the highest in his favour, be regarded as so unequivocal.

It is further said that the father argued the question of the construction of the Guardianship of Infants Acts, which was recently decided in this court, and further argued the point that, since the application for maintenance was made not by the mother but by the infant, it was outside the purview of the Acts. In my judgment those questions were in the circumstances merely alternative grounds for protesting the jurisdiction, and the issue in the former hearing before this court was only separated from the present question because this court, for reasons to which I will return, decided on the former occasion to limit its decision as it did.

In *Harris* v. *Taylor* (8), to which I will later refer, the defendant's motion to set aside the service of the proceedings upon him as being in excess of the jurisdiction of the Manx court was based upon three grounds. I cannot think that the defendant's failure to establish any one of those grounds could have been suggested as having been fatal to the others.

Finally, it is said that the father's proper course was to take out a summons to stay the proceedings quoad the claim for maintenance. I agree with the judge that such an application would, in the circumstances, have been wholly inappropriate and futile as a proceeding. Since on any view the court's powers under the Acts to order maintenance depended upon the condition that it had first made the order for custody, it is clear that such an application would have been stood over until the latter question had been determined, and so the court would have arrived precisely at the present situation.

I have said that the proceedings are of an informal character; and questions of substance ought to be decided and to be capable of being decided without recourse to formalities. I regret that, as things have turned out, two excursions to this court have been necessary, and that in the end no order can be made on the father to pay the infant's costs of the last excursion. I regret it the more since, as Romer, J., justly pointed out, the material for the decision of the present question was all before this court on the last occasion. I venture, however, to observe that on that occasion our attention was drawn to language in the judgment then under appeal in which the judge expressed regret at the conclusion which he had reached on the construction of the statute, and which seemed to indicate that he might otherwise have made the order he was asked to make; and there was, moreover, some divergence of recollection between counsel upon what had occurred before the judge. It was for those reasons that this court thought it best to refer the matter back.

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(8) [1915] 2 K. B. 580.

In conclusion, I would say that I agree with Denning, L.J., that *Harris* v. *Taylor* (8) can only be regarded as deciding that the matter of jurisdiction had on the facts of the case become res judicata between the two parties to it. As such, it is, of course, binding on this court. Its correctness may, however, fall at some time to be considered in the House of Lords, for, as I understand the principles of private international law applied in these courts, a foreign judgment can be treated as conclusive only if, inter alia, it was pronounced by a court of competent jurisdiction; and the question of the court's competence would prima facie, I should have thought, be open to the consideration of our own courts.

The appeal should be dismissed.

DENNING, L.J. On December 23, 1930, in Paris, Mrs. Dulles, an Englishwoman, married the respondent, who was an American then domiciled in France. On May 5, 1940, a son was born to them. On May 28, 1946, the husband obtained in the French courts a decree of divorce against the wife. On September 5, 1947, the mother brought the child to England, and she has remained here with him ever since. The father afterwards obtained an order from the French courts giving him the custody of the child, but this order has never been put into operation, because on February 6, 1948, an action was brought in England in the Chancery Division by the infant (by his mother as his next friend), against his maternal grandparents, claiming to become a ward of the court.

On June 28, 1948, the infant (by his mother as his next friend) took out a summons in that action asking for the mother to be given the custody of the child and also " that such provision " may be made for the maintenance of the said infant as to this " court may seem meet ". A copy of that summons was sent to the father's solicitors and they acknowledged it. It is to be noted that in that summons no direct claim was made on the father for maintenance. He was no party to the action: and he was only given notice of the application so that he could attend if he wished. The father himself had by this time gone back to

America. He is a very rich man and is said to have assets in England worth 40,000*l*.

When the summons came on for hearing the father, by his counsel, attended and strongly contested the wife's claim for custody, relying on the order which he had obtained from the French courts; but nevertheless the wife was awarded the custody. The judge must have been of opinion that that was best in the interests of the child: see *In re B.'s Settlement* (9); *McKee* v. *McKee* (10).

So far as maintenance of the child was concerned, the father by his counsel vigorously opposed any order for maintenance being made against him. He said that the court had no jurisdiction to make an order against him. The judge upheld this view, but the Court of Appeal reversed his decision, holding that the English courts had power to order maintenance against him if he had voluntarily submitted to the jurisdiction in that respect: see *In re Dulles' Settlement* (11). The Court of Appeal therefore referred the case back to the judge to see if the father had submitted to the jurisdiction. The judge has held that the father has not submitted to the jurisdiction, and I agree with his decision.

I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction: see *Tallack* v. *Tallack* (12), per Lord Merrivale, P.

It may be said that in this case the father did more than protest against the jurisdiction, because he contested the issue of custody. But in that respect he was only seeking to protect the order for custody which he himself had obtained in the French courts. That is not sufficient to amount to a submission to jurisdiction on the maintenance claim. So also it is said that he did more than protest against the jurisdiction, because he took the technical objection that the application was not made by the mother (13), but that was not an objection on the merits: it was another objection going to jurisdiction, and was not sufficient to amount to a submission to the jurisdiction.

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(9) [1940] Ch. 54.
(10) [1951] A. C. 352.
(11) Ante, 265.
(12) [1927] P. 211, 222.

Harris v. *Taylor* (14) appears at first sight to conflict with the views which I have expressed, but a careful examination of that case shows that it is quite distinguishable. The plaintiff there sued the defendant in the Isle of Man for a tort committed there. The defendant was not in the island, but the Manx court gave leave to serve him out of the jurisdiction of that court, on the ground that the cause of action was founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him; whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in Ord. 11; and I do not doubt that our courts would recognize a judgment properly obtained in the Manx courts for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not; just as we would expect the Manx courts in a converse case to recognize a judgment obtained in our courts against a resident in the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here. *Harris* v. *Taylor* (14) is an authority on res judicata in that the defendant was not allowed in our courts to contest the service on him out of Manx jurisdiction; because that was a point that he had raised unsuccessfully in the Manx court, and he had not appealed against it. To that extent he had submitted to the jurisdiction of the Manx court and was not allowed to go back on it. But the case is no authority on what constitutes a submission to jurisdiction generally.

Relieved of *Harris* v. *Taylor* (14), I think it plain that the father here did not voluntarily submit to the jurisdiction of the Court of Chancery in regard to the claim for maintenance. He appeared and protested vigorously against it. It would be contrary to the facts to say that he submitted to it.

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(13) Ante, 277, 278.

(14) [1915] 2 K. B. 580.

That is sufficient to decide the only issue which this court on the last occasion referred back to the judge. But I desire to point out that no application was made in this case to make the father a party to the proceedings or to serve him out of the jurisdiction under R. S. C., Ord. 11, r. 1 (*g*) or r. 8A (*b*). If it had been, I think that an order for maintenance might well have been made against him. Take the case of the English wife of an American, who is deserted by him and left here with a child and no means to maintain it, whilst the father goes off to America leaving assets here: if she brings a petition in a matrimonial cause, she can serve her husband out of the jurisdiction without leave: see r. 9 of the Matrimonial Causes Rules, 1947. She can properly include in her petition a claim for custody and for maintenance of the child, and the Divorce Court would undoubtedly have jurisdiction to order him to pay maintenance for it. I see no reason why the Court of Chancery should not in its own sphere exercise a like jurisdiction. It could be done in one of two ways: (1.) if a claim on the father for custody and maintenance were made by originating summons, he would have to be a party to the summons and leave could be given to serve him out of the jurisdiction under Ord. 11, r. 8A (*b*). (2.) If the claim on him for custody and maintenance were made on the writ in an action to make the infant a ward of court and to execute the trusts of a settlement, the father would be a proper party to those proceedings, and leave could be given to serve him out of the jurisdiction under R. S. C., Ord. 11, r. 1 (*g*).

In the present case, however, no such procedure was gone through. The father was not made a party to the proceedings at all: he was only given notice of a summons which did not make any claim on him at all. That is quite insufficient to found a jurisdiction under Ord. 11. That is a sufficient reason why this court on the last occasion said that the judge would only have jurisdiction to order maintenance if the father voluntarily submitted to the court having jurisdiction in the matter. I take it to be clear that if a child is within the jurisdiction of the Court of Chancery, it has power to order custody to the mother and maintenance against the father under the Guardianship of Infants Acts, even if the father is resident outside the jurisdiction; but it is essential that the father should be a party to the proceedings and should either be served here or be served out of the jurisdiction

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under Ord. 11, or voluntarily submit to the jurisdiction. None of that has been done.

The appeal therefore fails. I must say that I regret it, because it only fails on a technicality. I would willingly overcome it if I could, but I do not see how to do it, having regard to all that has happened. The process of the court can only be exercised against a person who is properly made a party to the proceedings and is properly served.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Landons.*

H. C. G.

CHELSEA AND WALHAM GREEN BUILDING SOCIETY *v.* ARMSTRONG.

VAISEY, J.
1951
May 29; *June* 5, 12.

[1951 C. 935.]

Deed—Covenant—Mortgagor and mortgagee—Transfer of mortgaged property with registered title—Transferee's covenant to pay principal and interest to mortgagee—Deed poll or deed inter partes—Whether covenant enforceable.

A registered transfer of land, contained a covenant by the transferee with a building society for the repayment to them of money due under a mortgage to which the land was subject. The transfer was executed by the transferor and transferee, but not by the building society.

On an application made by the society by procedure summons in an action brought by the society against the transferee to have determined whether the society were entitled to the benefit of the covenant:—

Held, that the registered transfer was a deed but not a deed inter partes, and as at common law a covenant in an indenture not inter partes expressed to be made with a person not a party to the indenture could be sued upon by the covenantee as if the indenture were a deed poll, the society, though not a party to the deed, could sue upon the covenant.

Cooker v. *Child* (1673) 2 Lev. 74; and *Sunderland Marine Insurance Co.* v. *Kearney* (1851) 16 Q. B. 925 applied.

Procedure summons.

By a mortgage dated December 1, 1933, between Lilian Alice Brooks (the mortgagor) and the Chelsea and Walham Green

Building Society, the mortgagor, in consideration of 525*l*., advanced by the society, demised to the society certain leasehold premises in London, subject to the proviso for redemption therein contained. The Land Registry title number of the premises was 65305.

By an instrument of transfer, which was not inter partes, dated May 19, 1938, it was provided: "In consideration of 34*l*., "I Lilian Alice Brooks . . . having obtained the consent of "the Chelsea Permanent Building Society . . . as beneficial "owner hereby transfer to David Anthony Armstrong . . . the "land comprised in the title above referred to for the residue of "the term granted by the registered lease subject to the registered charge dated December 1, 1933, to the society.

"I the said David Anthony Armstrong hereby covenant with "the said Lilian Alice Brooks that I will duly pay the balance "of the principal interest and other moneys under the said charge "in accordance therewith and indemnify the said Lilian Alice "Brooks therefrom.

"In consideration of the premises I the said David Anthony "Armstrong hereby covenant with the society that I shall and "will repay to the society the principal sum of 438*l*. 2*s*. 0*d*. now "owing on the security of the said registered charge and the "interest thereon and all sums of money now due or to become "due under or by virtue of such registered charge and also will "perform and observe all the other covenants by the said Lilian "Alice Brooks in and by the said registered charge contained "and implied . . .".

The transfer was executed by Lilian Alice Brooks and David Anthony Armstrong and registered with the Land Registry on May 27, 1938.

By a similar instrument of transfer dated November 2, 1945, David Anthony Armstrong assigned the premises to Charles Anthony Murry and Cecilia Murry (his wife) subject to the mortgage. This transfer was also duly registered with the Land Registry.

A summons was taken out by the society for: "Payment of "79*l*. 19*s*. 4*d*., being arrears of instalments outstanding on "February 8, 1951, secured by [the mortgage] for payment of "which sum the defendant [David Anthony Armstrong] is liable "under his covenant with the Chelsea Permanent Building "Society, now known as the Chelsea and Walham Green Building "Society, contained in the deed of transfer dated May 19, 1938".

An application was made by the society to the court, by procedure summons, to have determined the question of law whether, as the instrument of transfer was not made inter partes, the society were entitled to the benefit of the covenant by the defendant expressed in that document to be made directly with the society.

J. W. Mills for the plaintiff society. The plaintiffs are entitled to proceed against the defendant: see *Cooker* v. *Child* (1); *Sunderland Marine Insurance Co.* v. *Kearney* (2) and *Lucke* v. *Lucke* (3).

A deed poll is published to everyone and is a semi-public document. It can be sued on by anyone with an interest: see Norton on Deeds (2nd ed.), p. 29. [Counsel also referred to the judgment of Simonds, J., in *White* v. *Bijou Mansions Ld.* (4); and to Sheppard's Touchstone (7th ed.), p. 50.]

Section 56 of the Law of Property Act, 1925 (5), shows that a person, although not a party to the instrument, can take an immediate interest in the property concerned.

Alternatively, if this is a deed inter partes, the society is, in the particular circumstances, just as much entitled to enforce the covenant as the mortgagor. [He referred to Key and Elphinstone's Precedents in Conveyancing (14th ed.), vol. 3, p. 138.]

K. J. T. Elphinstone for the defendant. This is a deed inter partes, and therefore the society, not being named as a party to the deed, cannot enforce the covenant. It is not a covenant in the words of s. 56 of the Law of Property Act, 1925, "over or "respecting land or other property": it is merely a covenant to pay a sum of money, and that sum of money is not property within the meaning of the section. *Cooker* v. *Child* (6) and *Sunderland Marine Insurance Co.* v. *Kearney* (7) do not apply.

Mills in reply.

VAISEY, J. This matter comes before me in the guise of a procedure summons, and undoubtedly it raises a point of law which may not be covered precisely by authority.

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(1) (1673) 2 Lev. 74.

(2) (1851) 16 Q. B. 925.

(3) (1709) 1 Lutw. 110.

(4) [1937] Ch. 610; [1938] Ch. 351.

(5) Law of Property Act, 1925, s. 56, sub-s. 1: "A person may take "an immediate or other interest in "land or other property, or the benefit "of any condition, right of entry, "covenant or agreement over or respecting land or other property, "although he may not be named as "a party to the conveyance or other "instrument".

(6) 2 Lev. 74.

(7) 16 Q. B. 925.

The property is registered land and the action is based on a covenant made, or expressed to be made, by the defendant in a registered transfer dated May 19, 1938. By that registered transfer, a Mrs. Brooks, having obtained the consent of the society, who were and are the mortgagees, transferred to the defendant the land comprised in the registered title, and the transfer proceeds as follows: [His Lordship read the transfer and continued:] This action is brought, as I have said, to enforce the covenant made by the defendant expressly with the society to pay the moneys due under the registered charge, and it is to be noticed that the society was no party to this transfer, but it is named as consenting to the transfer and as being entitled to the benefit of the covenant. The society did not execute the deed and, although named in it, for those two purposes cannot be described as a party to it.

The point which appears to be involved here may be thus stated: Is the society entitled to the benefit of the covenant by the defendant expressed to be made directly with the society in that instrument of transfer? That appears to depend on the nature of that instrument of transfer, and in particular on the question whether it is analogous to a deed inter partes or to a deed poll.

The old law, apart from any questions under the Land Registration Act, is stated thus in Norton on Deeds (2nd ed.), pp. 27–29. The author puts the matter thus, at p. 27: " The distinction " between indentures and deeds poll, which is not (as is " commonly supposed) the same as the distinction between deeds " inter partes and deeds not inter partes, is not now of any " importance ". Then there is a reference to the modern practice which is that deeds are no longer indented. Then the old law and the old practice are explained. Then there is this further statement, at p. 28: " There does, however, appear to be a distinction " which is still of importance between deeds made inter partes " and deeds not so made, for it is a rule of law that no person " can sue on a covenant made with him in a deed made inter " partes, unless he be a party to such deed, and this is the case " even if he execute the deed ". Then finally it is said (p. 29): " The rule "—that is the rule that a man cannot take advantage of a covenant in a deed to which he is not a party—" never " applied except to deeds inter partes; a deed poll could always " be sued on by any person with whom the covenant was made, " and an indenture not inter partes is for this purpose a deed " poll ".

For that certain authorities are cited, including in particular the case of *Cooker* v. *Child* (8), the side-note to which is as follows: "Indenture of charter-party, not being inter partes, "covenants to pay to a stranger to the deed. Debt by indenture "per testat. existit". The court held: "The declaration per "testat. existit. well enough, though it be in debt and not in "covenant, and that the action was well, though brought by "him only to whom the debt is due"; that is to say by the covenantee who was not a party to the charter-party.

There is a later decision of *Sunderland Marine Insurance Co.* v. *Kearney* (9), where the same conclusion was reached under a contract of marine insurance.

The question really is: What is the nature of this instrument of transfer dated May 19, 1938? First, I think that it is clear that it is a deed. Then the question arises: If it is a deed, is it a deed poll; or is it, although not under the form of a deed poll, a deed not inter partes; or is it a deed inter partes?

It is said that this is an ancient, technical, and out-of-date rule, but I am inclined to think that it has a solid foundation. Normally speaking, a deed between parties is contemplated as a contract, or as carrying out a contract made, so to speak, indoors, round the table by the family, as a matter done not in public but in private. On the other hand, a deed poll is clearly addressed to everybody—"Know all men by these "presents"—or is addressed to "All to whom these presents "shall come".

I incline to the view that there is all the difference between a deed made in private inter partes, between parties round the table, on the one hand, and a deed not inter partes, which may or may not be a deed poll, but is something of quasi-public interest addressed to the whole world.

When you look at this transfer you do not find any reference to parties at the beginning. Secondly, you find it is expressed in the first person: "I Lilian Alice Brooks" transfer the property, and then: "I the said David Anthony Armstrong hereby "covenant" first with Mrs. Brooks for indemnity and secondly with the building society direct for payment.

It seems to me that the document is in form much more analogous to a deed poll. It may be more accurately stated as a deed not inter partes, although it is not strictly a deed poll.

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(8) 2 Lev. 74.

(9) 16 Q. B. 925.

VAISEY, J.
1951

CHELSEA AND WALHAM GREEN BUILDING SOCIETY *v.* ARMSTRONG.

Then, like all these Land Registry transactions, it is of a quasi-public character. The entry is made in a public register. It is recorded, not for everybody to look at, but as a matter of public record, in the sense that everybody concerned in it has a right to inspect what is to be found in the register.

As I have said, I think it may be that that ancient distinction between a deed inter partes and a deed not inter partes has that solid foundation that the deed inter partes is essentially a private arrangement; whereas a deed not inter partes, and in particular a deed poll, is a matter of public record and is announced not to the whole world in the sense that everybody is concerned in it, but to the world who are concerned, or who are interested, in what is being done.

When that point is reached, I think that the statement which I have read from Norton on Deeds (2nd ed.), p. 29, covers the case: "A deed poll could always be sued on by any person with "whom the covenant was made, and an indenture not inter partes "is for this purpose a deed poll".

I have come to the conclusion that this registered transfer, effecting a transfer of the land from Mrs. Brooks to the defendant, is a deed, but I do not think that it is a deed inter partes. I have mentioned the various indications that appear to me to take it out of that particular category. The fact that they speak for themselves, first Mrs. Brooks and then Mr. Armstrong, shows that they are really announcing to the world what they are doing and are not merely making a private bargain one with the other. I think these documents recorded in the Land Registry are much more comparable to the deed poll which was addressed "To all "to whom the deed shall come", and are not the result of a private arrangement but a matter of public record.

If that is right, it seems to me that the society are entitled to bring their action against the present defendant. He feels, of course, that the position is rather unsatisfactory, because later on—on November 2, 1945,—he transferred the land to two other persons, and in that further transfer there were covenants corresponding to those which he himself gave; that is to say, covenants by the fresh transferees with him that they would pay the balance of the principal moneys under the registered charge and indemnify and keep him indemnified therefrom, and the new transferees covenanted in their turn with the society that they would repay to the society the principal sum and duly discharge the obligations under the registered charge.

The present defendant, having parted with the land, having taken those covenants and having obtained that substituted covenant with the society, now finds himself in the position of being regarded as a person better worth suing than those to whom he transferred the land in 1945, and he is naturally aggrieved to find himself under this transfer, which created an interest in him, which has now ceased, now asked to implement and carry into effect the covenant into which he entered in 1938.

I think that the only defence to this action is on what is called the technical point that, as the society were not named as parties in the registered transfer of May 19, 1938, they are not entitled to sue under the covenant, nominally, notionally and apparently made with them by the defendant. I think that I must overrule that objection.

It may be that the point is covered by s. 56 of the Law of Property Act, 1925, but, having reached a conclusion favourable to the plaintiffs on the grounds above stated, I prefer to express no opinion on the applicability of that section to the facts of this case.

It seems to me that, although this is only a procedure summons, the best course to take would be to treat the summons itself as before me and grant the relief which the summons, dated February 28, 1951, asks for. I therefore propose to make an order for payment of the sum of 79*l.* 19*s.* 4*d.*, being arrears of instalments outstanding on the day before the issue of the writ, secured by the mortgage, for payment of which sum the defendant is liable under his covenant with the society contained in the registered deed of transfer dated May 19, 1938, from which covenant the defendant has not been released and in respect of which he is in default.

Declaration accordingly.

Solicitors: *T. J. Robinson & Son; Parfitt, Cresswell & Williams.*

J. L. D.

VAISEY, J.

1951
June 14, 15.

In re KLEINWORT'S SETTLEMENTS.

WESTMINSTER BANK LD. *v.* BENNETT AND OTHERS.

[1951 K. 348]

Settlement—" Special capital profits dividend "—Income not capital—Jurisdiction to apportion—Special circumstances.

The trustees of a settlement owned 2,000*l.* ordinary stock in a limited company. By a resolution of March 17, 1949, that company ordered the distribution of a special capital profits dividend by which the holders of the ordinary stock received 5*l.* British Transport 3 per cent. Guaranteed Stock for every 1*l.* ordinary stock in the company.

The question on a summons taken out by the trustees was whether the 10,000*l.* stock received by them by reason of this resolution was to be treated as capital or income of the settlement.

Held, (1.) that the sum was distributed as a dividend, and accordingly was income belonging to the tenants for life:

(2.) that the court had, in special circumstances, jurisdiction to apportion such a payment between capital and income, but that there were not here any special circumstances justifying an apportionment.

In re Sechiari (1950) 66 (Pt. 1) T. L. R. 531; [1950] 1 All E. R. 417 followed.

ADJOURNED SUMMONS.

By an order of Uthwatt, J., dated December 4, 1942, a scheme was sanctioned under which the trustees of three settlements were authorized to enlarge the range of trust investments to include (among other things) the purchase of ordinary stock of any company quoted and dealt in on the London Stock Exchange.

The trustees of the settlement dated January 12, 1927, invested 6,000*l.* on November 3, 1944, in the purchase of 2,000*l.* ordinary stock in Thomas Tilling Ld., the price being 3*l.* for each 1*l.* of the stock. The trustees held the stock on the trusts of the settlement.

On March 17, 1949, Thomas Tilling Ld. passed a resolution for the distribution of 20,600,000*l.* of British Transport 3 per cent. Guaranteed Stock, as a special capital profits dividend on their ordinary stock, 5*l.* of the British Transport stock being received by the stockholders for each 1*l.* of the ordinary Thomas Tilling stock.

The trustees accordingly received 10,000*l.* British Transport stock. They took out this summons for the determination of the question whether they should distribute the 10,000*l.* British

Transport stock to the persons entitled to the income of the trust funds, or whether they should retain any, and if so what, part of it as capital.

Jopling for the plaintiff trustees.

J. A. Brightman for the tenants for life. This sum belongs to the tenants for life, and it should not be apportioned. The jurisdiction of the court to apportion between capital and income should only be exercised in exceptional circumstances. No exceptional circumstances exist here. The court should apply the ordinary rule that this sum, being profits distributed as dividends, should be treated as accretion to income. It is a windfall, and therefore income which belongs to the tenants for life. The same thing happened in *In re Doughty* (1).

[He also referred to *In re Sechiari* (2) and *In re Harrison's Will Trusts* (3).]

W. F. Waite for the remaindermen, including infants. The court ought, here, to order an apportionment. One of the principal duties of the trustees is to keep the balance evenly between tenants for life and remaindermen. If the trustees retain the stock, they benefit the tenants for life, and not the remaindermen; but if they sell the stock, the proceeds will be capital and benefit only remaindermen. That is an impossible position for the trustees.

The trustees ought to have come to the court for directions. They would have done so, had there been time. If they had come to the court, it is submitted that one interest would not have been allowed to profit at the expense of the other. The court should direct the trustees to do now what they could have done then: to sell half of the stock and retain half; that would hold the balance equally between the tenants for life and the remaindermen.

It is said that under the general rule there should be no apportionment of dividends unless there are special circumstances; for instance, if the trustees had sold the 2,000*l.* stock with the rights attached to them, or had sold the rights themselves. That would have resulted in an application to the court by the tenants for life, on the ground that the sale was done to profit remaindermen at their expense.

It is not necessary that an apportionment should be made equally between capital and income, but that seems to be the right proportion.

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(1) [1947] Ch. 263.

(2) (1950) 66 (Pt. 1) T. L. R. 531; [1950] 1 All E. R. 417.

(3) [1949] Ch. 678.

VAISEY, J. In *In re Sechiari* (4) Romer, J., declared, in circumstances indistinguishable from the present case, that another sum of this British Transport stock received by trustees in respect of a sum of Thomas Tilling stock forming part of a settled fund was to be treated, not as an accretion to capital but as dividend or income; but the order was expressed to be made (5) "without prejudice to any question whether, in the "circumstances in the administration of the trust, the court has "or would exercise any jurisdiction to apportion the dividend on "equitable principles between income and capital".

If I am not actually bound by that decision, I am in full agreement with it, and it is not, and cannot be, disputed that this sum of 10,000*l.* British Transport stock has to be treated as dividend or income belonging to the life tenants. The only question for my decision is as to the suggested jurisdiction to apportion, which was adverted to in the concluding words of the order of Romer, J.

The life tenants here do not, I think, dispute that such a jurisdiction exists, or may exist, and that it could be exercised by the court in proper circumstances. It may be so; though I am not entirely satisfied that the jurisdiction does not depend upon and arise out of the power and duty of the court to remedy a breach of trust.

By way of example, and only by way of example, if the trustees had acquired the Thomas Tilling stock on the eve of, or within a short time before, the resolution of March 17, 1949, at the instigation of a life tenant, or expressly with the object of benefiting a life tenant, or for some other ulterior motive, the court might well consider that an apportionment should be made; but that is not this case.

It is no doubt a question of degree. The disparity between the amount of the original capital of the Thomas Tilling stock and the amount of the British Transport stock is certainly very striking; but it is not, in my judgment, such as by itself to justify the court's interference, in the circumstances.

It was pointed out in argument that the trustees might have sold the Thomas Tilling stock cum rights, or might have sold the rights, in either of which cases the proceeds would have been capital. It was suggested that they ought to have sought the directions of the court whether it was their duty to adopt one or other of those courses for the benefit of capital, or whether, on the other hand, they ought to remain as they did, passive, and to accept the British Transport stock for the benefit of income.

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(4) 66 (Pt. 1) T. L. R. 531; [1950] 1 All E. R. 417.

(5) Ibid. 533; 417.

It was further suggested that if the directions of the court had been so sought, the trustees would have been ordered to arrange for half the British Transport stock to go to capital and the other half to income, on the principle that equality is the best equity in the absence of any other measure. Finally, it was suggested that I ought to do now what I could have done then, and to divide the British Transport stock in equal shares between capital and income.

I am unable to accede to those suggestions in the present case. While it may well be that the suggested jurisdiction exists, and while I do not doubt the power of the court to exercise it in suitable special circumstances—although the court's interference may only be justified where the trustees could be said to have committed a breach of trust consisting either of some action or inaction on their part—here, in my judgment, there are no special circumstances; and I cannot think that there is anything in the nature of a general rule that profits distributed, in whatever shape, as dividends, and belonging under well-settled principles to the tenant for life, must be subject to an apportionment for the benefit of capital.

The cases which govern the general principle applicable to this kind of income rights are *In re Doughty* (6) and *In re Harrison's Will Trusts* (7).

These accretions to the normal income of the trust fund are sometimes metaphorically described as "windfalls", and when they have left the parent tree I can see no principle for notionally replacing them on the boughs from which they have fallen.

I direct the plaintiffs to treat the British Transport stock as part of the income of the trust funds of which the Thomas Tilling stock forms part.

Declaration accordingly.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards; Simmons & Simmons; Lawrence, Graham & Co.; Official Solicitor.*

I. G. R. M.

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(6) [1947] Ch. 263.

(7) [1949] Ch. 678.

VAISEY, J.

1951
May 30;
June 7.

In re GANSLOSER'S WILL TRUSTS.
CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* CHILLINGWORTH AND OTHERS.

[1950 G. 2533]

Will—Construction—Gift to "relations" after prior life interest—Date of ascertainment of class—whether joint tenants or tenants in common.

A testator by his will dated April 15, 1929, gave the residue of his estate, which consisted wholly of personalty, ". . . to be divided ". . . one half to my wife's relations one half to my own relations "but not till the death of my wife . . .". The testator died in 1929 and was survived by his wife who died in 1949. Neither the testator nor his wife had issue, but both had several collateral relations.

The construction of the testator's will depended upon the law in force in the Straits Settlements at the time of his death. Under that law the law in force in England before 1925 was applicable. On a summons asking what persons were entitled to the testator's residuary estate and for what interests and in what shares:—

Held, (1.) that the term "relations" must be construed as meaning those persons who would have taken under the Statutes of Distribution on intestacy; and that those persons formed an artificial class to be ascertained as at the death of the testator, and, in the case of the wife's relations, on the hypothetical footing that she had died intestate at the date of his death:

(2.) that, where an artificial class was ascertained at the date of a hypothetical and not an actual death, the implied reference to the statute should not be carried further than the ascertainment of the persons of whom the class was composed, and that accordingly the persons entitled took as joint tenants and not in the shares prescribed by the statutes.

Semble, where the gift is to next of kin and not relatives the argument for applying the statutes for all purposes is much stronger.

ADJOURNED SUMMONS.

By his will, dated April 15, 1929, Gustav Gansloser, hereinafter called the testator, appointed the Chartered Bank of India, Australia and China his executors, and, after giving certain directions, disposed of the residue of his estate as follows: "The "remainder of my estate wherever situated, . . . I desire to "be divided as follows, viz., one half to my wife's relations one "half to my own relations but not till the death of my wife. "Until then my wife shall have the unrestricted use of the income

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[Reported by MISS J. F. LAMB, Barrister-at-Law.]

"of my said estate". The testator died on September 4, 1929, and was survived by his wife. His estate consisted wholly of personalty, partly in England and partly in Singapore. The will, which was a holograph document and unsigned, was admitted to probate on March 10, 1930, as a valid will by the laws of Italy.

By an order dated April 27, 1932, made in former proceedings in the matter of the testator's estate (1) it was declared, among other things, that the will effectively disposed of all the testator's estate; that the construction and effect of his will depended upon the law of Italy, and that under Italian law the law operative in the Straits Settlements applied; and that his wife was entitled to a life interest in the whole of his estate in specie.

The law operative in the Straits Settlements at the time of the testator's death was the English statute law in force on November 26, 1826, and English common law and equity before that date. A decision by an English court on the construction of the testator's will would be followed in the Straits Settlements.

The testator's wife married again after his death, and died on September 8, 1949. Neither the testator nor his wife had issue, but both had several collateral relations. There were no material changes amongst the testator's relations between the time of his death and that of his wife, but some of the wife's relations who had survived the testator died during her lifetime.

The bank, as executors and trustees of the will, took out this summons to have determined (a) whether the persons entitled under the gift to the wife's relations were those persons living at her death who would have been entitled to her personal estate by virtue of the Statutes of Distribution (22 & 23 Car. II, c. 10, and 1 Jac. II, c. 17) had she died intestate, and, if so, whether in the proportions provided for by the statutes, or whether they took as joint tenants or tenants in common; (b) similar questions regarding the gift to the testator's relations in respect of his relations living at his death; and (c) generally, what persons were entitled to the testator's residuary estate and for what interests and in what shares or proportions.

Kenneth Elphinstone for the plaintiff.

M. W. Cockle for a brother of the wife. The "relations" of the wife are those persons who would have taken under the Statutes of Distribution in force before 1926 if she had died

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(1) 1931 G. No. 1491.

VAISEY, J.

1951

GANSLOSER'S WILL TRUSTS, *In re.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* CHILLINGWORTH.

intestate: see Jarman on Wills (7th ed.), Vol. 3, p. 1601. The class must be ascertained at the date of the wife's death. There is a statement to that effect in Hawkins on Wills (3rd ed.), p. 138.

The persons entitled take in such shares as the statutes provide with representation; this is the view taken in Jarman on Wills (7th ed.), Vol. 3, p. 1602, and Hawkins on Wills (3rd ed.), p. 144. It is submitted that the statement to the contrary in Theobald on Wills (10th ed.), p. 246, is not borne out by the cases cited in support of it. *Tiffin* v. *Longman* (2) is in favour of the present submission and *Eagles* v. *Le Breton* (3) can be distinguished. The testator has divided his estate between two families, but it would be capricious and unfair if nephews and nieces were to take equally with their uncles.

R. R. A. Walker for the wife's stepbrother.

B. L. Bathurst for nephews and nieces of the wife. Where there is a gift to members of a class they take as joint tenants unless there are words of severance: see *Lucas* v. *Brandreth (No.* 2) (4), *Eagles* v. *Le Breton* (3) and *Tiffin* v. *Longman* (2). Here there are no words of severance. It is submitted that the court only refers to the Statutes of Distribution to determine who are the persons entitled. Reference to the statutes is a rule of convenience to avoid uncertainty, and they do not govern the shares of the persons so determined or the date of vesting.

The words " but not till the death of my wife " do not govern the date on which the class is to be ascertained. The court favours early vesting, and there is no difficulty in creating an artificial class of the wife's next of kin at the date of the testator's death: see the rule in *Bullock* v. *Downes* (5); *Mortimore* v. *Mortimore* (6); and *In re Mellish* (7).

If the words in the will had been " to my wife for life and " after her death to her relations ", her relations would have been ascertained at her death. Here it is the other way round, and the placing of the life interest after the division of the remainder between the two families shows that the " relations " are to be ascertained before the determination of the life interest.

F. E. Skone James for nephews and nieces of the wife whose father survived the testator but predeceased the wife. [He referred to Jarman on Wills (7th ed.), Vol. 3, p. 1616.] " Relations " is as a matter of construction to be construed as next of kin; where there is a reference to the next of kin of a

(2) (1852) 15 Beav. 275.
(3) (1873) L. R. 15 Eq. 148.
(4) (1860) 28 Beav. 274.
(5) (1860) 9 H. L. C. 1.
(6) (1879) 4 App. Cas. 448.
(7) [1916] 1 Ch. 562.

named person, prima facie they are ascertained on the death of that person: see *Mortimore* v. *Mortimore* (8). It is submitted that the date of distribution is that of the death of the wife. There is no clear indication to the contrary in the will; neither is there anything to oust the rule of construction that "relations" means next of kin.

J. Monckton for a niece and nephew of the testator whose parents predeceased the testator. If the gift to the wife's relations vests at her death it is submitted that the testator's relations must consist of those relations who were alive at his death and survived the wife, because the will draws no distinction: *In re Winn* (9).

O. M. Swingland for the testator's sister and her son. The argument that the statutes control the division as well as the persons entitled stems from the presumption that reference to the statutes is a rule of construction. It is not a rule of construction, but only one of convenience, and does not govern the division of the gift. The testator was referring to a number of persons individually and not per stirpes.

Denys Buckley for the Custodian of Enemy Property.

Cur. adv. vult.

June 7. VAISEY, J., reading his judgment, stated the facts substantially as set out above and continued:—It is established by evidence in these proceedings that under the law operative in the Straits Settlements at the time of the testator's death the gifts to "relations" would be construed in the same manner as in England before the year 1926 and that the English authorities on the subject would be followed. On that footing I have now to determine the meaning and effect of the gifts to the relations of the testator and his wife respectively.

It has long been settled that, in order to give a measure of certitude to the word "relations", a testamentary gift to the relations of a named person is construed as a gift to the persons who would by virtue of the relevant Statute or Statutes of Distribution take the personal estate of that named person upon his or her intestacy. This is not disputed, and it is also agreed that the relevant statutes to be looked at in the present case are those which were in force before the year 1926, namely, the Acts 22 & 23 Car. II, c. 10, and 1 Jac. 11, c. 17, which regulated the law of intestate succession until repealed by the Administration of Estates Act, 1925.

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(8) 4 App. Cas. 448.

(9) [1910] 1 Ch. 278.

It will be observed that the wife's relations are mentioned first, a point which may have some slight significance, and I will deal first with the gift to them. The question which arises at the outset is this: is the class of her relations to be ascertained upon the assumption and footing of her having died intestate at the date of the testator's death or upon the assumption and footing of her having died intestate at the actual date of her own death? On either view of the matter, do the members of the class take as tenants in common in the shares in which they would have taken under the statutes in the event of her notional intestacy, or do they take as individuals in joint tenancy? I cannot construe the direction to divide as applying further than to the original division into halves.

Neither of these questions would appear to be precisely covered by authority. As to the first, however, I think that the class should be ascertained as at the death of the testator, consisting of those persons who, if the wife had died at the date of his death, would have been her statutory next of kin. There is no difficulty about the ascertainment of an artificial class on such a hypothetical and contingent footing: cf. *In re Mellish* (10); although there the artificial class was ascertained after, and not before, the actual death. In the present case the gift to the wife's relations comes first, and the life interest of the wife follows, and it seems more likely that the testator was intending to benefit such of her relations as he might be expected to have known rather than persons of whom none might have been existing in his lifetime, and, moreover, it is well settled that the court inclines to an early date of vesting: see *Mortimore* v. *Mortimore* (11).

As to the second question, I think that the members of the class take as joint tenants, and not in the shares prescribed by the statutes, and this view appears to me to be supported by the authority of *Eagles* v. *Le Breton* (12) and *Lucas* v. *Brandreth* (*No.* 2) (13). *Tiffin* v. *Longman* (14) is rather puzzling, but the material point seems to me to be that, where we have, as here, an artificial class to be ascertained at the date of a hypothetical and not an actual death, the implied reference to the statutes should not be carried further than the ascertainment of the

(10) [1916] 1 Ch. 562.
(11) 4 App. Cas. 448.
(12) L. R. 15 Eq. 148.
(13) 28 Beav. 274.
(14) 15 Beav. 275.

persons of whom the class is composed: see *White* v. *Springett* (15), *per* Selwyn, L.J. (16), and *Mortimore* v. *Mortimore*, *per* Lord Cairns (17). When the gift is to next of kin and not to relations or relatives, the argument for applying the statutes for all purposes is obviously much stronger.

Though the point is to my mind a doubtful one, I have come to the conclusion that under para. 1 of the originating summons I should declare that, on the true construction of the testator's will and in the events which have happened, the persons entitled to the one half of the testator's residuary estate expressed in the will to be given to his wife's relations are the persons who under or by virtue of the former Statutes of Distribution (22 & 23 Car. II, c. 10, and 1 Jac. II, c. 17) would have been entitled to her personal estate if she had died intestate in respect thereof on the day of the testator's death immediately after him and those statutes had been applicable to the distribution of such personal estate, such persons to take as joint tenants and not as tenants in common.

As regards the gift to the relations of the testator, I understand that on any view of the matter the same persons are entitled, but I will none the less express my view and declare that, on the true construction of his will and in the events which have happened, the persons entitled to the one half of his residuary estate expressed to be given to his relations are the persons other than his wife who under or by virtue of the same statutes would have been entitled to his personal estate if he had died intestate in respect thereof and those statutes had been applicable to the distribution of that personal estate, those persons to take as joint tenants and not as tenants in common.

Declaration accordingly.

Solicitors: *Linklaters & Paines; Langton & Passmore; Gordon, Dadds & Co.; Lethbridge, Money & Prior; Robins, Hay & Waters; Cruesemann & Rouse; Nisbet, Drew & Loughborough; Solicitor, Board of Trade.*

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(15) (1869) L. R. 4 Ch. 300.
(16) Ibid. 303.
(17) 4 App. Cas. 448, 451

WYNN-PARRY, J.

1951
May 1, 2.

In re SCHINTZ' WILL TRUSTS. LLOYDS BANK LD. AND ANOTHER *v.* MORETON AND OTHERS.

[1951 S. 508]

Will—Construction—Incorporation of trusts of settlement—Settlor's power of revocation—Validity.

A settlor reserved to himself power " at any time . . . by deed . . . " revocable or irrevocable " to declare further trusts for the benefit of named persons and for that purpose to revoke the provisions of the settlement. Subsequently, he made a will and directed that shares of his residuary estate should be held by the trustees of the settlement on the trusts therein declared and the deed or deeds which might " hereafter be executed . . under the power of revocation and declaration of new trusts thereby reserved . . . or as near " thereto as circumstances will admit ".

Held, (1.) that the gifts of residue were valid, for, although they incorporated the whole of the trusts of the settlement, including the power reserved to the settlor to declare new trusts by subsequent deeds, and that power offended against the Wills Act, 1837, and was ineffective so far as the will was concerned, that did not affect the validity of the other incorporated trusts.

In re Edwards' Will Trusts [1948] Ch. 440 applied.

In re Jones [1942] Ch. 328 distinguished.

(2.) That, on the true construction of the will, the reference in it to " the deeds or deeds . . . hereafter . . . executed " was merely descriptive of the trusts of the settlement and was not intended to be operative.

ADJOURNED SUMMONS.

On September 12, 1906, H. G. Schintz made a voluntary settlement in favour of his three children for life and, after other life interests, for his grandchildren and issue. One of the three children predeceased the settlor without having married. By cl. 10 of the settlement he reserved to himself power " at any time . . . by deed . . . revocable or irrevocable " to declare such new or other trusts of and concerning the trust " premises . . . for the benefit of " his wife or children or more remote issue or collateral relations, but not in favour of himself or any other person or persons " and for that purpose wholly or " partially to revoke and make void the trusts, powers and " provisions herein declared ".

On April 16, 1912, he made a will. By that will, after

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

appointing trustees and executors and making various gifts, he directed his trustees to hold the residue of his estate on trust for sale with power to postpone, setting aside out of the proceeds, after payment of debts and testamentary expenses, 300,000*l.* to be held on trusts declared in a subsequent clause and to hold the ultimate residue on trust " for all or any of my children " who shall be living at my death and the issue then living of any " deceased child of mine who being male attain . . . twenty-one " or being female attain that age or marry if more than one as " tenants in common in equal shares . . . no issue remoter than " a child . . . shall take except in the case of the death in my " lifetime of his or her parent and in the place of such parent ".

By cl. 17 he declared: " The share in my residuary estate " which my daughter Julia Lucy Moreton shall take if she shall " survive me shall not vest absolutely in her but shall be transferred . . . to " the trustees of the voluntary settlement of 1906, to be held by them " upon the trusts and subject to the powers " and provisions . . . upon and subject to which the share in the " said settlement . . .", that was, the settled share of Julia Lucy Moreton, referred to as " Lucy's share ", " . . . shall be held " under or by virtue of the said settlement and the deed or deeds " (if any) which may hereafter be executed by me under the " power of revocation and declaration of new trusts thereby " reserved to me or as near thereto as circumstances will admit ".

The testator then declared: " . . . my trustees shall set aside " . . . of the share of . . . Dora Cecilia Schintz in my residuary " estate . . . 100,000*l.* and the portion . . . so set aside shall be " transferred . . . to " the trustees of the voluntary settlement to be held by them " upon the trusts and subject to the powers " and provisions upon and subject to which the share in the said " settlement . . . shall be held . . . and the deed or deeds (if " any) which may hereafter be executed by me under the power " of revocation and declaration of new trusts thereby reserved to " me . . .".

By cl. 19 he declared that the 300,000*l.* set aside by his trustees was, after the death of his wife and in default of the exercise of a power (which was never exercised), to be held on trust to pay the income of one moiety to Dora Cecilia Schintz for life and after her death for her children and issue, but that, if there should be no issue who should attain a vested interest, as she should by will or codicil appoint. Dora was eighty years of age and had never been married. The other moiety of the 300,000*l.* was to be transferred to the trustees of the settlement

WYNN-PARRY, J.
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of 1906 to be held by them on the trusts affecting Lucy's share in the settlement and the deed or deeds (if any) which might be executed by the settlor by the power reserved to him in the settlement.

The plaintiffs, as executors of the will, took out this summons asking whether, having regard to s. 9 of the Wills Act, 1837 (1), the gifts of the residue were valid and effective.

Russell, K.C., and *R. W. Goff* for the children of Julia Lucy Moreton. The gifts of residue are invalid, for the testator has attempted to incorporate into his will all the trusts of the earlier settlement, including any which might be declared in the deed or deeds executed subsequently. If the power to execute deeds declaring new trusts were incorporated into the will, it would mean that the testator could dispose of his property by an unattested codicil contrary to the Wills Act, 1837. *In re Jones* (2) is applicable here, but *In re Edwards' Will Trusts* (3) is distinguishable on the facts.

If, as is submitted, the trusts on which the shares of the residue were to be held are invalid, the rule in *Lassence* v. *Tierney* (4) applies, so that Lucy's share was held by her absolutely and, on her death, formed part of her estate.

[In the events which had happened this share would then be divided equally between the two children.]

Milner Holland, K. C., and *H. A. Rose* for the trustee in bankruptcy of the testator's daughter Dora, adopted the argument submitted on behalf of Julia Lucy Moreton.

[In the events which had happened, the effect of this would be that the trustee in bankruptcy of Dora would take her share absolutely.]

Cross, K.C., and *W. A. Bagnall* for the great grandchildren of the testator. The gifts in the will are valid. This is closer on the facts to *In re Edwards' Will Trusts* (5) than to *In re Jones* (6). In *In re Edwards' Will Trusts* (5), the will directed that the property was to be held on trusts declared in a settlement which was made already, as in this case, and was clearly identifiable. In the settlement, the settlor had reserved to himself powers which could be exercised in a way which was contrary to the Wills Act, 1837. When the settlement was incorporated into the will, the trusts which were contrary to the Wills Act, 1837, had to be ignored, but the other trusts were not affected and, as in this case, the gift in the will could take effect. In *In re Jones* (7), on the other hand, the will purported to reserve power to the testator to substitute an entirely fresh document for the settlement. It was therefore impossible to identify the document which was to be incorporated into the will, and, as the subsequent document need not have been made in accordance with the Wills Act, 1837, the gift in the will failed. As a matter of construction the reference to the deeds to be made subsequently in this will is surplusage, for it was only intended as an amplified reference to the powers of the settlement and was not intended to be operative.

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(1) Wills Act, 1837, s. 9: ". . . "no will shall be valid unless it shall "be in writing and executed in "manner hereinafter mentioned; (that "is to say,) it shall be signed at the "foot or end thereof by the testator, "or by some other person in his pre-"sence and by his direction; and "such signature shall be made or "acknowledged by the testator in the "presence of two or more witnesses "present at the same time, and such "witnesses shall attest and shall sub-"scribe the will in the presence of "the testator, but no form of attesta-"tion shall be necessary".

(2) [1942] Ch. 328.

(3) [1948] Ch. 440.

(4) (1849) 1 Mac. & G. 551.

(5) [1948] Ch. 440.

(6) [1942] Ch. 328.

[If the gifts of residue were valid the testator's great grandchildren had an interest in their grandmother's share of the ultimate residue and the 300,000*l.* which the testator directed should be set aside. But if the gifts were invalid those shares passed to the testator's grandchildren under the terms of a compromise of the will of their mother, Julia Lucy Moreton.]

WYNN-PARRY, J., referred to the facts and continued:—It is clear that, having regard to the operation of s. 9 of the Wills Act, 1837, the provision at the end of cl. 17 in the will cannot be operative whether looked at as in the will or as in cl. 10 of the settlement.

The question is whether the presence of that provision in cl. 17 has the effect of invalidating the whole of that clause, and the answer depends upon which side of the line this case falls, having regard to two relevant authorities to which reference has been made. The first is *In re Jones* (7), a decision of Simonds, J. In that case the testator by his will directed his trustees to pay a legacy of 1,000*l.* to "the Tettenhall College Investment "Trustees appointed or to be appointed under special declaration "of trust for the benefit of Tettenhall College or otherwise as "therein contained executed by me bearing even date with this "my last will and testament or any substitution therefor or

(7) [1942] Ch. 328.

"modification thereof or addition thereto which I may hereafter "execute". By deed poll of even date, he declared the trusts on which the sum of 1,000*l.* was to be held.

Simonds, J., held that if effect were to be given to such a direction it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the Wills Act, 1837, and that therefore the gift failed for uncertainty. The basis of his reasoning appears conveniently in the following passage (8): "A bequest in the terms of that before "me is invalid, as evidence cannot be admitted to establish "the first but not the second of two alternatives which together "are the expression of the testamentary intention, because, if "evidence is admitted to establish the first but not the second "alternative, the testator's intention as a whole cannot be ascer-"tained. The gift must then fail for uncertainty, because it is "not permissible to make a gift in a form which involves power "to change a testamentary disposition by an unexecuted "codicil".

Before leaving that case I would draw attention to the circumstance that, on the language of the relevant provision in the clause, the testator retained power to destroy altogether the trusts in favour of the Tettenhall College Investment Trustees and to substitute some entirely different trust relating to the 1,000*l.* in question; whereas in this case cl. 10 of the settlement, which is referred to in the will, does not contain a complete power of revocation but a limited power of revocation and appointment.

In re Jones (8) was distinguished in *In re Edwards' Will Trusts* (9), a decision of the Court of Appeal; but it was in no way adversely commented on and by implication was clearly approved. In *In re Edwards' Will Trusts* (9), the settlor settled a sum of 100*l.* to be invested and held as the trust fund. By cl. 2 he directed that the trust fund and its income should be held upon trust to pay the income and to transfer the capital to such persons as the settlor should by a memorandum direct and made other directions in default. By cl. 3 he provided that: "subject to the provisions of the preceding clause" the trust fund and its income should be held on trust for the benefit of his wife and children. By a will made on the same date but afterwards the settlor as testator directed that his residuary estate should be held by the trustees of the settlement—"upon the "trusts and subject to the powers and provisions therein declared

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(8) [1942] Ch. 328, 334.

(9) [1948] Ch. 440.

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“ and contained so far as such trusts and provisions are subsisting “ and capable of taking effect ”.

By a memorandum dated November 21, 1937, under the settlor's hand he directed that in pursuance of cl. 2 of the settlement the trustees should raise and pay out of the trust fund the sum there mentioned to be applied as therein directed. He died on February 6, 1944.

Jenkins, J., held that the trusts declared by the memorandum and cl. 2 of the settlement failed, and that the trusts declared by cl. 3 also failed, in view of the testator's intention to incorporate the settlement as a whole into his will.

That decision was reversed by the Court of Appeal, distinguishing *In re Jones* (10). Lord Greene, M.R., said (11): “ The “ testator makes quite clear what his testamentary wishes are. “ He is directing that those concerned with the administration of “ his estate shall turn to the document, namely, the settlement, “ in order to find what those wishes are. The identification of “ that document is a perfectly simple matter. There is no “ question what the document is, and there is no rule of law “ which makes it impossible to lead evidence to identify it. I “ say that at the outset, because reliance has been placed upon “ a decision of Simonds, J., . . . in *In re Jones* (10). That was a “ case in which the testator directed payment of a legacy to “ trustees ”—then he quotes the words of the will in that case, and continues: “ In the very gift itself the testator is endeavour-“ ing to reserve power to himself to modify or alter the gift at “ some subsequent date by means of a subsequent instrument not “ executed in accordance with the Wills Act. Simonds, J., “ pointed out that, whereas in the case of a document in “ existence it is always possible to lead evidence to identify the “ document, in the case before him it never would be possible to “ lead evidence to identify any subsequent document. On that “ ground he held that if effect were given to the direction it “ would be equivalent to giving a power to change a testamentary “ disposition by an unexecuted codicil in violation of the Wills “ Act. He held, therefore, that the gift failed for uncertainty. “ That seems to me to be a different case from the present one. “ The settlement here is a document which can be perfectly well “ identified, and there is no rule of law to the contrary. It can “ accordingly be incorporated as a piece of writing into the testa-“ mentary disposition ”.

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(10) [1942] Ch. 328.

(11) [1948] Ch. 440, 445.

Lord Greene, M.R., then went on to hold, in agreement with Jenkins, J., that, although the trusts declared by cl. 2 failed, the provisions of cl. 3 could be effective, reading the words " subject " to the provisions of the preceding clause " as meaning subject to the trusts declared by that clause so far as they proved effective.

Cohen, L.J., in the course of his judgment (12) quoted this passage from the judgment of Jenkins, J.: " ' It is clear that the " ' testator's intention was to incorporate as part of the trusts of " ' his will the whole of the trusts subsisting under the settlement, " ' including the trusts of any memorandum he might have " ' executed or might thereafter execute. That was his intention. " ' That intention fails, for the reasons I have stated. It seems " ' to me impossible for the court to substitute another intention " ' and, by rejecting that part of the disposition which is bad, " ' arrive at some residual disposition which can be held to be " ' good, because, by so doing, the court would be making a new " ' will for the testator and would be doing something which there " ' is no ground to suppose was his intention at all ' ".

Cohen, L.J., continued: " It is with the last sentence that I " respectfully quarrel. It seems to me to be a non sequitur. " Granted that it was the testator's intention to incorporate as " part of the trusts of his will the whole of the trusts in a settlement, including trusts in any memorandum he might have " executed after the date of the will and granted that that " intention fails in part for the reasons that Jenkins, J., gave, " it does not seem to me to follow that by giving effect to cl. 3 " we are making a new will for the testator in any sense whatsoever. The question is in what event did the testator intend " cl. 3 to operate? That depends on the words ' subject to the " ' provision of the preceding clause '. For the reasons that my " Lord has given, I think those words mean ' subject to any " ' effective disposition under the preceding clause ' ". His Lordship then quoted from a judgment of Lord Selborne in *Webb* v. *Sadler* (13), and continued (14): " Applying the principle of " that passage to the documents with which we are concerned, " as I read cl. 3 the declared intention of this testator is that " unless effective dispositions are made which would cut down " the gift of the trust fund and the income thereof in favour of " his widow and his children, then his widow and his children

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(12) [1948] Ch. 440, 450.
(13) (1873) L. R. 8 Ch. 419, 426.
(14) [1948] Ch. 440, 451.

" are to have the whole of that estate. No effective dispositions " were so made, and, therefore, in my view cl. 3 operates on the " whole of the residuary estate ".

The effect, as it appears to me, of those judgments is that if cl. 17 of the will stands, it will incorporate the whole of the settlement, but that the offending clause in the settlement, cl. 10, will not have effect so far as the dispositions made by the will are concerned. As I have observed earlier, there is this distinction between the will in *In re Jones* (15) and cl. 17 of the will which I have to consider, that the power of destroying the trusts created by the settlement given by cl. 10 is a very much more limited power than that reserved to himself by the testator in *In re Jones* (15), and " the deed or deeds " referred to in the offending last part of cl. 17 of the will is or are referable necessarily to that limited power in cl. 10 of the settlement. If cl. 17 had ended at the words " upon and subject to which the share " in the said settlement referred to as Lucy's share shall be held " under or by virtue of the said settlement ", there could have been no doubt whatsoever that this case was governed by the decision of the Court of Appeal in *In re Edwards' Will Trusts* (16). What is the effect of the addition of the latter words of the clause which I have already read? Upon the face of cl. 17 read with those words included, it can, of course, be said that part of the trusts upon which the testator by his will has directed the share of the daughter Lucy to be held, are the trusts which may be declared by the subsequent deed or deeds referred to at the end of the clause. If I am to treat that provision as being an operative provision so far as the will is concerned then, following the decision of Simonds, J., in *In re Jones* (17), I must treat the whole clause as being invalid.

On the other hand, it is argued by Mr. Cross that those words are completely otiose and are really no more than descriptive of the terms of the settlement. He points out with force that if there had been written into the will which was being considered in *In re Edwards' Will Trusts* (18) after the words " to be held " by them upon the trusts and subject to the powers and pro- " visions therein declared and contained " some such words as " or any direction which may hereafter be executed by me ", it would be difficult to see that the decision of the Court of Appeal would have been different from that which it was, and in his

(15) [1942] Ch. 328.
(16) [1948] Ch. 440.
(17) [1942] Ch. 328.
(18) [1948] Ch. 440.

submission these words are to be treated upon the same basis, that is, they are to be regarded as not decisive but merely restrictive of the trusts created by the settlement.

The point, as will be seen, comes down to a very short question of construction of the particular will, construed, of course, against the background created by s. 9 of the Wills Act, 1837, and the judgments in the cases to which I have referred. I do not find the point easy, but I have come to the conclusion that the submission put forward by Mr. Cross is to be preferred, and that, laying emphasis upon the fact that the direction is to transfer the share in question to the trustees of the voluntary settlement and that the offending clause in the voluntary settlement is a limited power of revocation and a limited power of appointment, I am justified in treating the latter part of cl. 17 containing the offending words as being merely descriptive of the powers contained in the settlement. Finally, I realize that, were these words not in cl. 17, exactly the same effect would have followed as regards the disposition of the share of Lucy when the settlement came to be considered.

Declaration accordingly.

Solicitors: *Travers Smith, Braithwaite & Co.*; *Parry, Sharlock and King*; *Lee, Ockerby & Co.*, for *Murton, Clarke and Murton-Neale, Cranbrook.*

VAISEY, J.
1951
June 22, 29.

In re PRESTON'S ESTATE. RABY AND ANOTHER *v.* PORT OF HULL SOCIETY'S SAILORS' ORPHANS' HOMES AND OTHERS.

[1949 P. 2442.]

Costs—Charities claiming under will—Claims dismissed—Claims without merit—Whether costs payable out of testator's estate.

The testator gave his residuary estate on trust for "the Widows' "and Orphans' Fund of the Royal Merchant Navy." No institution or body of that name existed. Five charities claimed that they were entitled to the gift, and were joined as defendants to the present summons, which was taken out to have determined the effect of the gift. Four of the five appeared at the hearing and argued their case by counsel. The claims of all five were dismissed as being without foundation. On application of the four charities for payment of their costs out of the estate of the testator.

Held, that each of the five defendants should have realized that its claim was hopeless after considering the plaintiffs' evidence, and that, although they had every right to continue their claims by way of filing evidence and appearing in court, they could so continue only at their own risk and expense. Accordingly, they would be allowed their costs up to and including review of the plaintiffs' evidence, but they must bear any remaining costs themselves.

The testator, George Edward Preston, by his will, dated June 28, 1948, appointed the plaintiffs to be his executors and trustees. He bequeathed a number of pecuniary and other legacies, and gave the residue of his estate to his trustees upon trust for sale and directed them to stand possessed thereof (after payment of his debts, funeral and testamentary expenses and legacies) upon trust "to pay the same unto the Widows and "Orphans Fund of the Royal Merchant Navy".

He died on January 17, 1949. His will was proved by the plaintiffs on April 7, 1949. The value of the ultimate residue of which he purported to dispose by the words quoted was about 8,500*l.* The plaintiffs, having failed to find any institution or body of persons having the name of "the Widows and Orphans Fund of the Royal Merchant Navy", made inquiries to discover what other charities there were with names resembling the words in the will, or carrying on activities of the nature indicated by those words. As a result of those inquiries the following institutions were brought to the notice of the plaintiffs: the Port of Hull Society's Sailors' Orphans' Homes; the Royal Alfred Aged Merchant Seamen's Institution; the Mercantile Marine Service Association; the Shipwrecked Fishermen and Mariners' Royal Benevolent Society; the Shetland Fishermen's Widows' Relief Fund; and the Admiral of the Fleet Sir Frederick Richards Memorial Fund.

Letters were sent by the plaintiffs to each of those six institutions asking whether they wished to make a claim to the testator's residuary estate. Claims were put forward by the first five. It was intimated on behalf of the sixth that they did not wish to make a claim. The five claimants or persons representing them were joined as defendants to the present summons, which was issued on October 10, 1949.

The question to be determined was whether the gift to the Widows' and Orphans' Fund of the Royal Merchant Navy operated as or was a gift to any of the five bodies or institutions, or to some other and if so what body or institution; or, alternatively, whether the gift should be regulated by a scheme; or, in the further alternative, whether it lapsed; and, if necessary, for an inquiry as to what institution or body of persons was referred to by the words of the will. The court was also asked to make an order providing for costs.

I. Campbell for the plaintiff executors.

M. J. Albery for the Port of Hull Society's Sailors' Orphans' Homes.

M. Berkeley for the Mercantile Marine Service Association.

G. H. Newsom for the Royal Alfred Aged Merchant Seamen's Institution.

C. V. Rawlence for the Shipwrecked Fishermen and Mariners' Royal Benevolent Society.

J. A. Plowman for the next of kin.

Denys Buckley for the Attorney-General.

Cur. adv. vult.

VAISEY, J., reading his judgment, stated the facts substantially as above set out and continued:—The plaintiffs did not, as they might have done, though it was not incumbent on them to do so, warn the five defendant charities that if they wished to appear as parties to the application it must be at their own risk as to costs.

The Shetland Fishermen's Widows' Relief Fund very prudently withdrew from the proceedings at an early stage. They filed no evidence, and did not appear by counsel at the hearing. But the other four defendants did file evidence to support their claim to be the institution indicated in the will, and argued their case by counsel, or attempted to do so, at the hearing. Not one of them, in my judgment, came anywhere near establishing a case. None of their names bears any similarity whatsoever to the words used in the will: there is no ground for supposing that the testator had ever heard of any of them, or that any of them had ever heard of him; and there is, I think, really nothing to choose between them: all are equally "out of the picture". I am satisfied on the evidence that there is in fact no institution or body of persons which can be said to be identifiable with the testator's descriptive words, and no inquiry on the point is necessary.

This is not a case such as *In re Alchin's Trusts* (1), in which

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(1) (1872) L. R. 14 Eq. 230.

I could hold that the testator must have intended to refer to one or other of the claiming institutions although I cannot say which. The matter seems to me to lie between the Attorney-General, who, relying on cases such as *In re Davis* (2), submitted that the words imported a general charitable intent and asked for a scheme to give effect to that intent, and the testator's statutory next of kin who submitted that the residuary estate is undisposed of. I reject the submission of the next of kin and accede to the Attorney-General's argument, and I will make an order accordingly.

The only difficulty in the case concerns the costs of the application. Obviously the plaintiffs' costs taxed as between solicitor and client must be raised out of the estate in due course of administration, and the costs of the Attorney-General and the next of kin, between whom there was a serious point to be argued, must be similarly taxed and raised.

What order ought I to make as regards the costs of the five institutions? As regards four of them (I can disregard the fifth for the moment) each has argued that it is entitled to have the whole of its costs paid out of the estate, irrespective of the merits or absence of merits of its case, by the mere fact of having been joined as a defendant to the proceedings. I do not agree, particularly when I recall that it had already put forward its claim when the summons was issued, in contrast to the sixth which deliberately refrained from doing so. Each of the five was in fact joined at its own request, with a view, no doubt, to establishing, if it could, its identity with the institution designated by the words of the will. To number five a discreet withdrawal appeared to be preferable to the advocacy of a hopeless cause.

Every case must, of course, depend to some extent on its own facts. For example, where a party has requested to be made a defendant to proceedings which but for that request would have been wholly unnecessary, he might be ordered to pay the whole of the costs himself: see *In re Buckton* (3). Again, where such a request is wholly without justification, he might well be made to pay the whole of his own costs and any other costs occasioned by his intervention. In the present instance, I think the test is this: when ought these five charities to have discovered the utter hopelessness of their respective cases? I think that this should have been quite apparent to them at the very

(2) [1902] 1 Ch. 876.

(3) [1907] 2 Ch. 406, 415.

latest on perusal of the evidence filed in support of the summons. From that point onwards they were, in my judgment, bound to go on, if they wished to go on at all, at their own expense and risk. In other cases, the discovery might not have been complete until the parties had perused the whole of the evidence; but here I think the position was abundantly clear from the affidavit of the plaintiff, William Ernest Raby, filed on October 19, 1949. I do not for a moment dispute the right of each of the parties to file evidence and argue, however hopelessly, in support of its supposed claim; the only question is whether other parties should be asked to pay them for doing so.

It may be regretted that the matter has not so far been adequately dealt with in any reported case, but in The Times of January 14, 1932 (p. 4) the following paragraph appeared: "Mr. Justice Farwell on the hearing of an originating summons "yesterday for the determination of the question whether any "and what charitable society was entitled to a charitable bequest "where no such charitable society as that named in the will "actually existed, stated, on the suggestion of Mr. Stafford "Crossman, who appeared for the Attorney-General, that in "such a case a society who appeared in court to support a claim "which was not admitted must not expect as of right to be paid "its costs out of the estate and might in certain events have "to pay costs". I am informed by Mr. Buckley that the name of that case was *In re Millington.* He also informed me that in another case, *In re Clara Jones, decd.* (4), where there was a gift "to Cancer Research", Danckwerts, J., refused to make any order as to the costs of the first three defendants, namely the British Empire Cancer Campaign, the Imperial Cancer Research Fund, and the Christie Hospital.

It was suggested that the four remaining defendants were justified in coming forward at the hearing in order to establish their claim to participate under any scheme to give effect to a general charitable intent if such were held to be the true effect of the will. I do not assent to that. Any of those defendants could, when intimating (as did the Shetland Fishermen's Widows' Relief Fund) the withdrawal of their claim to the whole fund, state that they would wish their claims to be considered in the event of a scheme being formulated. A similar request was made by another institution, not a party to these proceedings, namely, the Royal Merchant Navy School. But a scheme would not necessarily have included any of those defendants; it might, for example, provide for the setting up of a new and independent organization. The idea that any and every claimant to an imaginary identity with a misdescribed institution has a sort of secondary right to come in as a participant under a hypothetical scheme is not one to be encouraged, at any rate not by giving such a claimant any costs. The truth is that these four defendants have really not assisted me at all: they have merely put forward propositions of a most unsubstantial character in the hope of benefiting themselves. I do not complain of that, but I really do not see why their costs of doing so should be paid by anyone but themselves.

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(4) Nov. 30, 1949, not reported.

The order will provide for the taxation as between solicitor and client and payment out of the estate of the costs of the respective five defendants of entering appearances to the summons, and any other costs which they may have incurred down to and including the perusal by them respectively of the plaintiffs' affidavit; but as to their subsequent costs I make no order. Each of those defendant institutions must therefore bear its own costs of preparing and filing the evidence in support of its own claim and perusing the evidence of the other defendants, and also, of course, the costs of any attendances in chambers and of appearing at the hearing before me. I hope that attention will be paid to what I have said in this judgment. It involves no new principle, but one which is well supported by the two cases which I have mentioned, and also, I know, by other similar cases of which no record has been preserved. There is nothing in that principle which conflicts in any way with the decision in *In re Buckton* (5), or with any of the propositions laid down in that case.

Order accordingly.

Solicitors: *Hyde, Mahon & Pascall; Robbins, Olivey & Lake; Whitfield, Byrne & Dean; Darley, Cumberland & Co.; Lydall & Sons; Langhams & Letts; The Treasury Solicitor.*

I. G. R. M.

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(5) [1907] 2 Ch. 406, 415.

WYNN-PARRY, J.

1951
April 10, 11.

In re 139 DEPTFORD HIGH STREET.
Ex parte BRITISH TRANSPORT COMMISSION.

[1950 D. 1698]

Land registration—Rectification of register—First proprietor—Mistake on registration—Proprietor contributing to mistake—Jurisdiction to rectify—Factors to be considered—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 82, *sub-s.* 1 (*g*) (*h*); *sub-s.* 2; *sub-s.* 3 (*a*) (*b*) (*c*); *s.* 83, *sub-ss.* 1, 6—*Land Registration Rules,* 1925 (*St. R. & O.* 1925, 1093 L.128).

A purchaser of freehold land was registered at the Land Registry as first proprietor with an absolute title. In the conveyance to the purchaser the land was conveyed by description to which no plan was annexed, and both vendor and purchaser mistakenly believed that the property conveyed included in its description a small area of land which in fact was owned by the British Transport Commission. For the purposes of registration the purchaser furnished the Land Registry with the conveyance to himself. The plan annexed to the land certificate which was subsequently issued to him showed plainly that the plot of land owned by the British Transport Commission formed part of the land in respect of which registration had been granted. On an application by the British Transport Commission for rectification of the register:—

Held, that the applicants were entitled to rectification since the purchaser had substantially contributed to the mistake in registration within the meaning of s. 82, sub-s. 3 (*a*) of the Land Registration Act, 1925, by putting forward, albeit innocently, a misleading description of the property for the purposes of registration.

Semble, the applicants could not have relied on s. 82, sub-s. 3 (*b*) of the Land Registration Act, 1925, for the conveyance to the purchaser was not "void" within the meaning of the paragraph. The word "void" referred to the deed itself, which was a valid conveyance, and paragraph (*b*) was designed to cover cases where the whole deed itself was void, because, for example, it was a forgery.

Chowood Ld. v. *Lyall* [1930] 2 Ch. 156 applied.

ORIGINATING SUMMONS.

The applicants, the British Transport Commission, were, through their predecessors in title, the owners in fee simple of freehold land in Deptford High Street, Deptford, of a small area of which, the disputed land the subject-matter of the application, the respondent had been registered in error at the Land Registry as proprietor with absolute title.

Before 1939, the disputed land and the adjoining property to the north of it, which was not owned by the applicants, were

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

leased by separate leases to a company which for the purposes of their business had made an opening in the party wall between the two properties. At the outbreak of war in 1939, the company surrendered the respective leases of the two properties. The properties thereafter remained unoccupied and eventually became derelict.

In 1948, the respondent entered into negotiations to purchase property in Deptford High Street. This property included the land in dispute and the property immediately adjoining it to the north. The evidence established that in 1948 access to the disputed land could only be gained through the property immediately to the north of it, which was known as No. 139 Deptford High Street. The vendors to the respondent and the respondent himself proceeded upon the mistaken belief, bona fide held, that the description, 139 Deptford High Street, included the disputed land.

Both in the contract of sale and in the subsequent conveyance the land was conveyed by description to which no plan was annexed: the conveyance to the respondent dated August 4, 1948, merely described the land conveyed as "all that shop and "dwelling-house situate at and known as No. 139 High Street, "Deptford, in the county of London".

After the conveyance the respondent's solicitors applied to the Land Registry for the registration of the title to the property conveyed.

The application form was not accompanied by a plan and the only description of the property given was that of 139 High Street, Deptford. On August 17, 1948, the respondent was registered as first proprietor with an absolute title; the plan annexed to the certificate which was issued to him showed plainly that the disputed land formed part of the land in respect of which registration had been granted.

Subsequently, the applicants discovered the error which had been made, and raised objections as a result of which the matter was referred to the High Court under r. 298 (2.) of the Land Registration Rules, 1925.

By this summons the applicants asked that the Property Register should be rectified in respect of the registered title in question by excluding from it the land in dispute.

Plowman for the applicants. The applicants are entitled to rectification by virtue of s. 82, sub-s. 1 (*g*) and (*h*), of the Land

WYNN-PARRY, J.

1951

139 DEPTFORD HIGH STREET, *In re.* *Ex parte* BRITISH TRANSPORT COMMISSION.

Registration Act, 1925 (1). Section 82, sub-s. 2, does not affect the position, it is submitted, since on the facts of the present case the application falls within each of the exceptions enumerated in s. 82, sub-s. 3 (*a*) (*b*) (*c*).

(a) The respondent has substantially contributed to the mistake by lodging with the Land Registry a document which contained a misdescription of the property in respect of which registration was sought: see *Chowood Ld.* v. *Lyall* (2).

(b) Assuming that the disputed land was included in the disposition to the respondent, the disposition of *that* land was void. The disposition of the remainder of the property is immaterial. "Void" means void in respect of the land in dispute.

(c) The applicants have been deprived of property through no fault of their own. The property had become derelict and the applicants had no reason to suppose that it was being occupied by a trespasser. If it be said that the applicants stood by and allowed the respondent to enter and expend money on repairing the property, the answer is two-fold: (i) the respondent is entitled to an indemnity under s. 83 of the Act; (ii) in the absence of any evidence which establishes an estoppel by acquiescence, to refuse the application would be tantamount to establishing that a landowner is under a duty to prevent persons from trespassing on his land. This is not a case of a landowner who, aware of the circumstances, allows an innocent third party to enter and improve his property.

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(1) The Land Registration Act, 1925, s. 82, sub-s. 1: "The register "may be rectified pursuant to an order "of the court or by the registrar, "subject to an appeal to the court, in "any of the following cases, but "subject to the provisions of this "section:— . . . (*g*) Where a legal "estate has been registered in the "name of a person who if the land "had not been registered would not "have been the estate owner; and "(*h*) In any other case where, by "reason of any error or omission in "the register, or by reason of any "entry made under a mistake, it "may be deemed just to rectify the "register".

Sub-s. 2: "The register may be "rectified under this section, notwith-"standing that the rectification may "affect any estates, rights, charges, or "interests acquired or protected by "registration, or by any entry on the "register, or otherwise".

Sub-s. 3: "The register shall not be "rectified, except for the purpose of "giving effect to an overriding "interest, so as to affect the title of "the proprietor who is in possession— "(*a*) Unless such proprietor is a party "or privy or has caused or substan-"tially contributed, by his act, neglect "or default, to the fraud, mistake or "omission in consequence of which "such rectification is sought; or (*b*) "unless the immediate disposition to "him was void, or the disposition to "any person through whom he claims "otherwise than for valuable con-"sideration was void; or (*c*) unless "for any other reason, in any parti-"cular case, it is considered that it "would be unjust not to rectify the "register against him".

Section 83, sub-s. 1: "Subject to "the provisions of this Act to the con-"trary, any person suffering loss by "reason of any rectification of the "register under this Act shall be "entitled to be indemnified".

Sub-s. 6: "Where an indemnity is "paid in respect of the loss of an "estate or interest in or charge on "land the amount so paid shall not "exceed—(*a*) where the register is not "rectified, the value of the estate, "interest or charge at the time when "the error or omission which caused "the loss was made; (*b*) where the "register is rectified, the value (if "there had been no rectification) of "the estate, interest or charge, imme-"diately before the time of rectifica-"tion".

(2) [1930] 2 Ch. 156.

Goulding for the respondent. The court must take into consideration all the relevant circumstances in order to determine whether justice requires that the register should be rectified. The policy of the Land Registration Act, 1925, and earlier Acts has been to protect the title of the registered proprietor in possession. Under the Land Transfer Acts, 1875 and 1897, an error in registration was not rectifiable, but by s. 7 of the Act of 1897, an innocent person, who suffered loss by reason of such an error, was entitled to be indemnified. As to the policy of these early Acts, see *per* Vaughan-Williams, L.J., in *Attorney-General* v. *Odell* (3).

The Act of 1925 is a consolidating Act, and, in construing ss. 82 and 83 it must be remembered that one purpose of the legislature was to guarantee the titles of proprietors registered with an absolute title: see Brickdale and Stewart-Wallace's Land Registration Act, 1925 (4th ed.), p. 212, n.

The applicants rely on s. 82, sub-s. 1 (*g*) and (*h*), but the court must be satisfied that rectification would not cause an injustice. The opening words of s. 82, sub-s. 1, "The register "may be rectified . . .", show that the granting of rectification is entirely within the discretion of the court. Section 82, sub-s. 2, is a revolutionary departure in the history of the Acts relating to land registration, but it is to be noted that the power there given is immediately circumscribed by the provisions of s. 82, sub-s. 3, and is consistent with the policy of guaranteeing registered titles.

As to the interpretation of s. 82, sub-s. 3 (*a*), (*b*) and (*c*), it is submitted that (*a*) is not applicable to the facts of the present case. Every proprietor must of necessity lodge some document with the Land Registry in order to obtain registration. The respondent furnished the Land Registry with a description of the property which he had bought. It was left to the Land Registry to discover from their own plans and maps the precise ambit of the property so described. In those circumstances it cannot be said that the respondent caused or substantially contributed to the mistake.

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(3) [1906] 2 Ch. 47, 69.

As to para. (*b*), by a "void" disposition is meant an instrument which is wholly void, for example, a forged instrument: see *Attorney-General* v. *Odell* (4). In the present case there was a valid conveyance as between the respondent and his vendor.

As for para. (*c*), the double negative is the guide to the meaning of this paragraph. As previously stated, the policy of the Act is to safeguard the titles of registered proprietors. Accordingly, the court must be satisfied that to refuse rectification would amount to a positive injustice.

Generally, in the present case some hardship is bound to ensue either to the applicants or to the respondent. But any hardship which befalls the applicants if their application be refused does not amount to an injustice. Accordingly, on general principles, the court should favour the proprietor in possession, and leave the applicants to seek an indemnity under s. 83.

Plowman replied.

WYNN-PARRY, J. [having stated the facts]. Although the applicants, through their predecessors, can trace a paper title back to 1834, the land in dispute has never been the subject of an application for registration under the Land Registration Act, 1925, or any earlier Act, for circumstances have not arisen which would have necessitated registration. The jurisdiction to rectify the register is contained in the Land Registration Act, 1925, s. 82, and the applicants rely on paras. (*g*) and (*h*) of sub-s. 1. [His Lordship read them, and continued:] It is clear that, having regard to the facts of this case, and to the language of s. 82, sub-s. 2, I should have jurisdiction to effect the rectification which the applicants seek, but for s. 82, sub-s. 3, which narrows the jurisdiction of the court to effect rectification. [His Lordship read the subsection, and continued:] Counsel for the respondent has submitted that, although the Act of 1925, unlike the earlier Acts dealing with land registration, contains this power, it was, nevertheless, designed to preserve the scheme which underlay the earlier Acts, namely, to give a guarantee of title. I think that there is force in that submission, because, although the guarantee can only be regarded as a qualified one, in view of the provisions of s. 82, sub-s. 2, nevertheless the opening words of s. 82, sub-s. 3, make it clear that it is not in every case that the court has jurisdiction or a discretion to rectify the register. Indeed, as will be seen from the structure of s. 82, sub-s. 3, in a case where the proprietor is in possession, as he is in the present case, the jurisdiction to rectify is strictly limited. On the other hand, it appears to me that if any one of the conditions contained in s. 82, sub-s. 3 (*a*), (*b*) and (*c*) respectively, is fulfilled, then the court ought to exercise the jurisdiction to rectify.

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(4) [1906] 2 Ch. 47.

Counsel for the applicants has submitted that he is entitled to rely on each of the three paras. (*a*), (*b*) and (*c*) of s. 82, sub-s. 3. No element of fraud is present, and so far as relevant para. (*a*) in this case is concerned only with mistake. That a mistake has been made by the Land Registry in including the disputed land in the land certificate is clear. The question is whether or not the respondent can be said to have substantially contributed to that mistake.

The only case which bears in any way on this aspect of the matter is *Chowood Ld.* v. *Lyall* (5), in which purchasers of freehold land caused themselves to be registered as first proprietors with an absolute title under the Land Transfer Acts, 1875 and 1897, of the land purporting to be conveyed to them, which included certain strips of woodland, to which the vendors had no title. The statement of the facts does not disclose expressly whether or not the conveyance by the vendors to the purchaser contained any plan, but from a passage in the judgment of Lawrence, L.J., in the Court of Appeal, and having regard to the fact that the land which was the subject-matter of the dispute comprised strips of woodland, I think it reasonably certain that the conveyance must have contained a plan, and that the words of the conveyance must have referred to that plan.

In the court below Luxmoore, J., having referred to the language of s. 82, sub-s. 3, of the Act of 1925, said (6): "The "register, therefore, is not to be rectified so as to affect the title "conferred on the proprietor by registration, unless such proprietor has caused or substantially contributed by his act to the "mistake in consequence of which rectification is sought. Now "apply this to the present case. The plaintiff company has by "its own act, that is, by the registration of a conveyance, which "by itself is inoperative to pass the pieces of land in dispute,

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(5) [1930] 2 Ch. 156.

(6) [1930] 1 Ch. 426, 438.

"caused the mistake; that is, the inclusion of the pieces of "land in dispute in the registered title, and it is in consequence of that mistake that the defendant, Mrs. Lyall, seeks "rectification".

In his judgment in the Court of Appeal, Lawrence, L.J., said (7): "The other point was that the case has not been "brought within s. 82, because the registration of the plaintiffs' "title was not a mistake within the meaning of sub-s. 1 (*h*) of "that section. I disagree with that contention. I see no reason "to limit the word 'mistake' in that section to any particular "kind of mistake. The court must determine in every case "whether there has been a mistake in the registration of the "title, and if so, whether justice requires that the register should "be rectified. Here I think there has been an obvious mistake "by the erroneous inclusion in the plan filed in the register of "this and of the two other strips of land which did not belong "to their vendors. The evidence is clear that the predecessors "in title of the plaintiffs had in fact no title and did not claim "to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no "reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their "title registered in the Land Registry they were acting on the "mistakes which had been made in that plan, and the entry "made in the Registry in derogation of the right of the true "owner who was in possession was an entry made by mistake "within the meaning of the section".

It appears to me to be reasonably clear from that passage that the Court of Appeal was considering a case where the conveyance to the purchasers who had effected registration was by reference to a plan. On that basis, the contribution which the company made to the mistake was putting forward the conveyance with that plan, because it was that act which evidently induced registration of the plaintiffs with an absolute title in respect of the strips of woodland in question.

The present case is somewhat different, because no plan was annexed to the conveyance, and the parcels were not described by reference to any plan. The respondent, by his solicitor, merely put forward an application in the usual form, describing the property as "139 Deptford High Street", and accompanying the application with the conveyance containing the description "all

(7) [1930] 2 Ch. 156, 168.

"that shop and dwelling-house situate at and known as 139 High "Street, Deptford, in the county of London".

Counsel for the respondent, on the one hand, contends that in doing that and nothing more the respondent did something which cannot in any sense be said to have contributed to the mistake, the mistake being that of the Land Registry in including the disputed land in the registration. It is submitted by the applicants, on the other hand, that the respondent must be said to have contributed to the mistake. In order to decide between these conflicting contentions, it is necessary to determine what on the true construction of the language of the parcels was included in them. To resolve that question, which is purely a question of construction, it is necessary to look at the attendant circumstances so far as, in accordance with the well-established rules, they can be taken into consideration.

On doing so I find that at the date of the contract and conveyance to the respondent the only access to the disputed land was through the immediately adjoining premises, which quite plainly were known as 139 High Street, Deptford, and I hold, therefore, that as a matter of construction, this conveyance intended to include, and did include, the disputed land in the description 139 High Street, Deptford. On that view it is contended by counsel for the applicants that by putting forward that description the respondent contributed to the mistake, because the necessary consequence of putting forward the application in that form must have been that the Land Registry officials would make the usual inquiries and, if necessary, a survey of the premises, and they would, therefore, be led to fall into the same mistake as had been made by the respondent and his vendor.

It is not an easy point to resolve, but it appears to me that the determining factor is the circumstance that, so far as the physical aspect of the matter is concerned, the disputed land must have appeared to anyone looking at the properties in question to form part of 139 High Street, Deptford. It was, apparently, so obvious that the vendors to the respondent fell into the mistake, the respondent himself fell into the mistake, and the Land Registry fell into the mistake.

Accordingly, it appears to me, notwithstanding the arguments both practical and theoretical of counsel for the respondent, to follow, necessarily, that the respondent must be held to have contributed to the mistake within the meaning of s. 82, sub-s. 3 (*a*).

That decision is sufficient to dispose of the matter; but in case it should be taken to a higher court I wish to state shortly, for the information of that court, that as regards s. 82, sub-s. 3 (*b*), I accept the submission of counsel for the respondent. In my view, " disposition " in para. (*b*) refers to the deed in question. In the present case there was a perfectly valid conveyance, and therefore there are no grounds for saying that the disposition to the respondent was void. I think that s. 82, sub-s. 3 (*b*), is designed to cover cases where the whole deed in question is a void instrument, either because it is a forgery, or for any other suitable reason.

Furthermore, had I not felt constrained to hold that there has been a mistake contributed to by the respondent within s. 82, sub-s. 3 (*a*), I should not have been prepared to rectify the register under s. 82, sub-s. 3 (*c*). The applicants have put forward no evidence to show that the property which is in dispute is required by them for the purposes of their undertaking. It remained derelict until the respondent purchased it, and he has since expended money upon it. Weighing all the relevant circumstances, if I had had to decide the case under s. 82, sub-s. 3 (*c*), I should have taken the view that the applicants would have been properly protected by their right to claim an indemnity under s. 83, sub-s. 6.

It is with reluctance that I have felt constrained to come to the conclusion which I have stated, because, as the respondent makes clear in his evidence, the land in dispute, although very small in area, is of importance to him and he has expended money upon it, but taking the view which I do of the facts, I feel driven to hold against him under s. 82, sub-s. 3 (*a*).

In the result, I shall order that in respect of the registered title in question the property register be rectified by excluding from it the land in dispute.

Application granted.

Solicitors: *M. H. B. Gilmour; Saunders, Sobell, Greenbury & Leigh.*

DALE AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

HARMAN, J.

1951
July 3, 4.

Reversed.
[1952] 1 Ch. 704

Revenue—"Special Contribution"—Investment income—Trustee's remuneration included in assessment—Onerous duties performed by trustee—Earned income and not investment income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 14, *sub-s.* 3, *All Schedules Rules*, *r.* 19—*Finance Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 33—*Finance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *ss.* 47, 49, 68 (2).

Section 49, sub-s. 1, of Finance Act, 1948, provides that for the purpose of special contribution under that Act, "investment "income" means income "from any source other than a source "of earned income . . .".

A testator by his will established a charitable trust, and directed that the trustees of the trust should receive 1,000*l.* a year free of tax so long as they performed the duties of trustee. The trusteeship involved onerous and regular duties. One of the trustees was assessed to "special contribution" under s. 47 of the Act of 1948, the assessment including as part of his investment income the remuneration which he was paid as a trustee under the trust. He appealed to the Commissioners for the Special Purposes of the Income Tax Acts against the assessment, contending that his remuneration as trustee was earned income, and therefore wrongly included in the assessment.

The commissioners held that they were bound by *Baxendale* v. *Murphy* [1924] 2 K. B. 494, and *Hearn* v. *Morgan* (1945) 26 Tax Cas. 478, to hold that the remuneration was not earned income and that it was therefore investment income. On appeal by the trustee:—

Held, that those cases only decided that tax on the remuneration of a trustee was to be deducted by the payer under r. 19 of the All Schedules Rules, Income Tax Act, 1918, and not by direct assessment under Sch. E to that Act, and did not have the effect of preventing the appellant trustee's remuneration from being regarded as remuneration arising from an office of profit within the meaning of s. 14, sub-s. 3 (*a*), of the Act of 1918. Accordingly the remuneration was earned income and so wrongly included in the assessment to special contribution.

Semble, the trustee's remuneration was not, however, "earned "income" as coming within the words "income from any property "which is attached to or forms part of the emoluments of any office "or employment of profit . . ." within the meaning of sub-s. 3 (*b*), of s. 14 of the Act of 1918.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

A charitable trust known as the "Wellcome Trust" was established under the will of Sir Henry Wellcome, who died in 1936. He appointed five trustees whom he thought particularly qualified in various capacities to administer the trust. The appellant taxpayer was appointed one of the trustees as being a person qualified in the medical and allied sciences. The testator gave each of his trustees 1,000*l.* a year free of tax "so long as he "shall continue to act as trustee . . .".

The trusteeship was subsequently settled by a scheme embodied in an order made in the Chancery Division on May 1, 1939. The scheme regulated the method of appointing new trustees, and each trustee was to be paid a sum at such a rate as after the deduction of income tax at the standard rate, and the provision of that part of the surtax payable by him which was attributable to this remuneration, left a clear sum of 1,000*l.*

In performance of his duties as a trustee the taxpayer did a considerable amount of work. He was provided with an office and secretary, and habitually spent two hours a day on the trust affairs. The trustees also met fortnightly to consider trust matters.

The taxpayer was assessed to "special contribution" under Pt. V of the Finance Act, 1948 (1), and the assessment included as part of his aggregate investment income the sum of 1,446*l.*

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(1) Finance Act, 1948, s. 47, sub-s. 1: "In the case of individuals "whose total income for the year "1947–48 exceeded 2,000*l.* and whose "aggregate investment income for "that year exceeded 250*l.*, there shall ". . . be charged a special contribu-"tion . . .".

Section 49, sub-s. 1: ". . . in this "Part of this Act the expression 'in-"'vestment income' means income "from any source other than a source "of earned income . . .".

Section 68, sub-s. 2: "Save as "expressly provided in this Part of "this Act, expressions used therein "have the same meanings as in the "Income Tax Acts".

Finance Act, 1920, s. 33: ". . . in "any subsequent enactment relating "to income tax, except where other-"wise expressly provided—The ex-"pression 'earned income' means "income which is earned income "within the meaning of s. 14 of the "Income Tax Act, 1918. . . ."

Income Tax Act, 1918, s. 14, sub-s. 3: "For the purposes of this "section the expression 'earned in-"'come' means—(*a*) any income "arising in respect of any remunera-"tion from any office or employment "of profit held by the individual . . . "(*b*) any income from any property "which is attached to or forms part "of the emoluments of any office or "employment of profit held by the "individual . . .".

Rule 19 of the All Schedules Rules to the Act of 1918 provides: "(1) Where any . . . annuity, or any "other annual payment . . . is pay-"able wholly out of profits or gains "brought into charge to tax, no "assessment shall be made upon the "person entitled to such . . . annuity, "or annual payment . . . and the "person liable to make such pay-"ment . . . shall be entitled, on mak-"ing such payment, to deduct and "retain thereout a sum representing "the amount of the tax thereon. . .".

paid to him as trustee. It was admitted that that amount represented a sum (together with appropriate additions in respect of income tax and surtax) received by the taxpayer from the trustees in the financial year 1947–48 as his remuneration as trustee under the will.

The taxpayer appealed against the inclusion of this sum in his aggregate investment income on the ground that it was earned income and not investment income. The trustees of the will appealed against a notice given to them under s. 60, sub-s. 2 (*a*), of the Finance Act, 1948, being a notice stating the amount of contribution assessed on the taxpayer attributable to income received by him as a trustee. The taxpayer also appealed against a "like notice" given to him under s. 60, sub-s. 2 (*a*).

The Special Commissioners upheld the assessment, and decided that the sum in question was investment income for the purpose of special contribution. The taxpayer and the trustees now appealed from that decision.

J. Millard Tucker, K.C., and *F. N. Bucher* for the appellant taxpayer and trustees.

Pennycuick, K.C., *J. H. Stamp* and *Hills* for the Crown.

HARMAN, J. [after stating the facts]:—The commissioners have decided that this remuneration is not earned income. At first sight that view did not appeal to me at all. In fact I felt a sense of frustration at being told that remuneration paid to a distinguished man for the work thus done by him is not earned income. But I was told that, whereas to the ordinary man it might be absurd, in this branch of the law one enters the realms of art and nothing means necessarily what it seems to mean when an ordinary man looks at it, and that, by the definition of "earned income" to which the Finance Act, 1948, refers, I am driven to take the view that this was not earned income. Therefore, whatever work this trustee did, he was not earning this part of his income by that work. One asked why he did the work. The answer was that he was bound to do it because he had accepted the trusteeship. One asked what was the consideration for which he accepted the trusteeship. The answer was 1,000*l.* a year free of tax; but for some reason the two are to be divorced for the purpose of making him pay the special contribution. Anything less like investment income than money so earned it is hard to see. Nevertheless, if the term "earned income" be a term of art in these Acts, and if, when it is used as a term of art, the conclusion to which I must come is that it does not include income earned in this way, then for the purposes of the "special contribution" this must be something other than earned income.

It is said that I am bound to come to that conclusion, chiefly because of *Baxendale* v. *Murphy* (2) and *Hearn* v. *Morgan* (3). These two cases decided, as I understand them, that the remuneration (I use that word without prejudice) of a trustee was not money on which he could be directly assessed for tax, but was money which under a different rule was taxable by deduction in the hands of the payers, namely, his co-trustees or (as the case may be) the settlor or beneficiaries. It is argued that it follows from those two decisions that this sum is not earned income because, the tax being levied in this way, the remuneration does not arise from an "office of profit" within s. 14 of the Income Tax Act, 1918.

The Special Commissioners thought that those two cases obliged them so to hold, and although they mention *Attorney-General* v. *Eyres* (4) (which it appears was not cited either to Rowlatt, J., in *Baxendale* v. *Murphy* (5) or to Macnaghten, J., in *Hearn* v. *Morgan* (6)), they did not feel able to hold that the execution of the duties of a trustee was the performance of the duties of an office. In this they were justified because Macnaghten, J., so held in *Hearn* v. *Morgan* (6); but before me it was conceded that this was an oversight and that it is an office.

The commissioners continued: ". . . we regard the latter "case [that is, *Baxendale* v. *Murphy* (5)] as deciding that the "income was an 'annual payment . . . payable by virtue of a "'deed or will' chargeable to income tax under r. 1 (*a*) of "Case III of Sch. D. . . . After consideration of all the autho"rities cited to us, we are of opinion that, in view of *Baxendale* "v. *Murphy* (5), we ought to hold, and we do hold, that the "source of the income in question is the bequest or gift of the "annuity by the testator, and the source is not an office of profit "held by [the taxpayer]". If by that they mean that the remuneration paid to a trustee of the testator is, from the estate's point of view and from that for instance of death duty, a legacy, then of course they are right so far. Every practitioner knows that the remuneration paid to trustees under wills does not rank as a debt in any question of insolvency: *In re White* (7) shows that quite clearly; so does *In re Brown* (8).

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(2) [1924] 2 K. B. 494; 9 Tax Cas. 76.

(3) (1945) 26 Tax Cas. 478.

(4) [1909] 1 K. B. 723.

(5) [1924] 2 K. B. 494; 9 Tax Cas. 76.

(6) 26 Tax Cas. 478.

In this connexion reliance was placed mainly on *In re J. Thorley* (9). That case decided that a bequest to a trustee of an annual sum on condition that he performed the duties of a trustee was a gift on a condition. That, of course, I accept, and indeed it has long been accepted; but I am unable to see how it carries the matter any further. If the gift be made on a condition, and that condition be that certain money will be paid if certain work is done, it seems to me that the money is clearly remuneration for the work; and the fact that it is also a legacy appears to have nothing to do with the point.

The commissioners, however, thought that the cases to which I have referred bound them to hold that this was not remuneration from an office. I think that they arrived at that conclusion in this way: those cases merely decided that trustees who receive remuneration, whether under wills, settlements or orders of court, cannot be directly assessed under Sch. E. It is therefore said that, conceding that they are offices, the remuneration which a trustee receives is not a profit. That seems to me to be contrary to common sense.

Mr. Pennycuick argued that it is necessary to look first at sub-s. 3 (*a*) of s. 14 of the Income Tax Act, 1918. The words used there are "remuneration from any office"; and in order to be earned income it must be income arising from an office of profit. Under that Act all offices of profit, if they were private offices, were still chargeable to tax under Case III of Sch. D; and r. 1 of the rules applicable to Case III of Sch. D provides: "The tax shall extend to—(*a*) any interest of money, whether "yearly or otherwise, or any annuity, or other annual payment, ". . . by virtue of any . . . will . . .". That describes the payments received by trustees in this and in many other cases. This is an annuity or other annual payment payable by virtue of the will, and therefore chargeable, as Rowlatt, J., held in *Baxendale* v. *Murphy* (10), under Case III of Sch. D, and not under Case II of Sch. D as the Crown had in that case claimed it to be.

By s. 18 of the Finance Act, 1922, profits or gains from an office, which under the Income Tax Act, 1918, had been chargeable under Sch. D, were transferred to Sch. E. It has been argued that, unless a direct assessment can be made under

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(7) [1898] 2 Ch. 217.
(8) (1918) 62 S. J. 487.
(9) [1891] 2 Ch. 613.
(10) [1924] 2 K. B. 494; 9 Tax Cas. 76.

Sch. E, it cannot be an office of profit. With all respect to that argument, I cannot see why. *Baxendale* v. *Murphy* (10) decided that Case III of Sch. D, which concerns annuities and leads on to r. 19 of the All Schedules Rules, applied to the remuneration of a trustee. After 1922, when these profits were transferred to Sch. E, they remained chargeable under r. 19, which in terms corresponds with the former cases under rules applicable to Case III of Sch. D. Although this is, as *Baxendale* v. *Murphy* (10) shows, and as *Hearn* v. *Morgan* (11) confirms, a remuneration which is not assessable directly to tax under Sch. E, but remains subject to deduction of tax under r. 19, nevertheless I will not say that because of that fact it is not an office of profit. There is nothing which drives me to a conclusion so contrary to the dictates, as I think, of reason; and I decline to take that step. In my judgment, therefore, *Baxendale* v. *Murphy* (10) and *Hearn* v. *Morgan* (11) did not bind the commissioners to reach their conclusion. They wrongly supposed that this was not an office, as has, I think, been conceded. They also wrongly supposed this was not an office of profit: it does produce a profit, and therefore it is an office of profit. I therefore propose to allow these appeals.

I ought to say, by way of addition, that Mr. Tucker took a further point, and contended that this also came under s. 14, sub-s. 3 (*b*), of the Income Tax Act, 1918, as being income from any property which is attached to or forms part of the emoluments of an office. Though I need not decide it, I am inclined not to accept that, because in order to avoid unnecessary tautology one must construe sub-s. 3 (*b*) of s. 14 as if the relative " which " governed the word " property " and not the word " income ", that is to say, sub-s. 3 (*b*) only applies to income from property attached to or forming part of the emoluments of an office. It may be that there are such cases, but I do not think that they are very common.

Appeals allowed.

Solicitors: *Markby, Stewart & Wadesons; Solicitor of Inland Revenue.*

I. G. R. M.

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(10) [1924] 2 K. B. 494; 9 Tax Cas. 76.

(11) 26 Tax Cas. 478.

HIGGS (INSPECTOR OF TAXES) *v.* OLIVIER.

HARMAN, J.

1951 *July* 10, 11.

Revenue—Income tax—Actor—Payment for covenant not to act for a period—Capital not income—Not subject to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case II.*

A well-known actor made an agreement with a film company by which in consideration of 15,000*l.* he agreed not to act in, or produce or direct any film anywhere for a period of eighteen months, except for the company. The object of the agreement was to protect the exploitation of a film which he had produced for that company and in which he had acted the principal role under an earlier agreement with them.

The sum of 15,000*l.* was included in his assessment to income tax as part of his income from his vocation as an actor under Case II of Sch. D to the Income Tax Act, 1918. The Commissioners for the Special Purposes of the Income Tax Acts discharged the assessment, holding that the 15,000*l.* did not come to the taxpayer from the exercise of his vocation, but from refraining from carrying on that vocation. On appeal by the Crown:—

Held, that, while, if there had been evidence that such an agreement was a regular practice among actors, this would have been an incident of his vocation of an actor, as there was no evidence to that effect but there was evidence which justified the conclusion of the commissioners that the 15,000*l.* was not an incident of the taxpayer's vocation as an actor, being a conclusion of fact which should not be disturbed, the sum in question was properly excluded from assessment.

Dictum in *Billam* v. *Griffith* (1941) 23 Tax Cas. 757, 761, applied.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

On September 12, 1943, Two Cities Films Ld. entered into an agreement with the respondent taxpayer, Sir Laurence Olivier, in connexion with the screen presentation of the film Henry the Fifth. Work on production of the film had already begun at that date, as the main obligations undertaken by the taxpayer under the agreement were deemed to have begun on June 1, 1943, and were to be for a period of twelve weeks, continuing until the end of September, 1944, if necessary in order to finish the film. The taxpayer was to produce, direct, and act the principal part in, the film, and he was to receive a certain sum in consideration of those services. During the currency of the agreement he agreed to devote the whole of his time to the company's service. The agreement was completely carried out.

The film was shown in London and New York at Christmas-time, 1944. It made its way rather slowly in England, and in July, 1945, was still being shown only in London.

According to the taxpayer's evidence (which was accepted by the commissioners), during a discussion as to the best way of promoting interest in the film, it was agreed that it would be an advantage if he did not appear in any other film or films for a period. He said that he could not afford to do that, although he regarded it as desirable. After some discussion a further agreement was made between the taxpayer and the film company on July 18, 1945, to assist the exploitation of the film.

That agreement, after reciting his services to the company in connexion with Henry the Fifth, and that the company had requested him to enter into a restrictive covenant, provided for the payment to him of 15,000*l.*; and he in return covenanted not, during eighteen months from the date of the deed, to act in, direct or produce any film or films in England or the United States or elsewhere for anybody other than the company. There was no engagement to serve the company, and no obligation on the company to employ him. The taxpayer's evidence was that, during the eighteen months in question, he received a number of tempting offers to appear in films, which he was accordingly obliged to refuse.

The taxpayer was assessed to income tax for the year 1946–47 under Case II of Sch. D to the Income Tax Act, 1918 (1), in respect of the profits and gains of his vocation as an actor for a sum which included the 15,000*l.* payable under the covenant.

It was contended on his behalf that the 15,000*l.* arose under the deed of 1945 alone, and that it was not paid for any activity by him in the exercise of his vocation and, accordingly, was not a taxable receipt.

It was contended for the Crown that the agreement of 1943 and the deed of 1945 related to the same matter and were interdependent; and that, even if they were not interdependent, the sum of 15,000*l.* arose from the taxpayer's vocation as an actor, and formed part of his taxable income from that vocation.

The commissioners held that the agreement and the deed of covenant could not be read together, and that the taxpayer had performed all his services under the former before the latter came into existence. They decided that the sum of 15,000*l.* did not come to the taxpayer as part of the income from his vocation, but, on the contrary, came to him for refraining from carrying on his vocation; and in their opinion it was a capital receipt, and not income.

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(1) By Case II of Sch. D to the Income Tax Act, 1918, tax is charged "in respect of any profession, "employment, or vocation not con-"tained in any other schedule . . .".

The Crown now appealed.

Sir Frank Soskice, K.C. (*A.-G.*), and *Hills* for the Crown.
Grant, K.C., and *P. M. B. Rowland* for the taxpayer.

HARMAN, J. [after stating the facts]:—If there were any evidence that the agreement of 1945 was a device of some sort whereby the taxpayer obtained, as his reward for playing in and producing Henry the Fifth, a further remuneration, it would be easy to see that that would be a taxable sum. There appears to have been some suggestion before the commissioners to that effect, but the commissioners found that there was no evidence to support it. They also found that the respondent had performed the whole of his services under the agreement of 1943 before the agreement of 1945 came into existence, and that the two could not be read together. I think that is manifestly right. Apart from that, the Crown contended that the 15,000*l.* was paid to him as part of his remuneration from his vocation of an actor. The Crown had to face the fact that the agreement of 1945 was an agreement not to act, and their answer was that money might be made by refraining just as by ceasing to refrain, and that this was an incident in the career of a popular actor by which he exploited his personality, just as he might have exploited it in the opposite way, by acting.

On the other hand, the taxpayer's argument was that, so far from being an incident of his vocation, the payment was a payment for not exercising his vocation—for refraining from exercising it, from putting his art and his personality to a profitable use. With that submission, in substance, the commissioners have agreed. They held that the agreement and the deed of covenant could not be read together. The taxpayer had performed all his services under the former, before the latter came into existence. They found it impossible to say that the sum of 15,000*l.* under the deed of 1945 came to the taxpayer as part of the income from his vocation. On the contrary, it came to him for refraining from carrying on his vocation, and in their opinion was a capital receipt.

It is claimed for the taxpayer that that is a finding of fact which I am not at liberty to disturb. It is pointed out by the Crown that there is a slip in it, that the taxpayer did not refrain from carrying on his vocation. It is true that he did not. What he did was to refrain from carrying on one facet of his vocation—namely, that part of it which showed him as a film actor. He continued to act in the theatre and to exercise his vocation in that respect, but I do not think that that invalidates the finding.

It is difficult to determine whether the finding is a finding of fact, or a finding of mixed fact and law (as is not uncommon); but there is the following pertinent observation by the Lord President (Lord Normand) in *Kelsall, Parsons & Co.* v. *Inland Revenue Commissioners* (2): "It has been said by Lord Mac-" millan in *Van den Berghs Ld.* v. *Clark* (3), that the question "whether a particular receipt should be dealt with as an income "receipt or as a capital receipt cannot be solved by reference to "any provisions of the Income Tax Act, and that no infallible "criterion emerges from a consideration of the case law. Each "case depends upon its own facts, and in this case the facts, "which seem to me not to be closely analogous to the facts in "any of the cases cited to us, lead me to the conclusion that the "determination of the commissioners should stand". It seems to me that the determination of the commissioners on a matter of this sort is a determination of a matter of fact. They determined that this was not a receipt of the actor's vocation and that seems to me to be a conclusion of fact from the evidence before them, and not a conclusion in law.

I observe that in *Billam* v. *Griffith* (4) Lawrence, J., started his judgment by saying (5): "I do not think it would be proper "for me in this case to interfere with the finding of the commis-"sioners". The finding of the commissioners there was that the taxpayer in question was carrying on the vocation of a dramatist and that certain receipts were annual profits and gains of that vocation. That seems to me to be analogous to, although not the same as, the finding here. Lawrence, J., said that he should not interfere on the ground that there were facts which seemed to him "to justify the commissioners in arriving at the conclusion "at which they have arrived, that Mr. Billam was carrying on "the vocation of dramatist or playright. It is not necessary for

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(2) (1938) 21 Tax Cas. 608, 619.

(3) [1935] A. C. 431, 438.

(4) (1941) 23 Tax Cas. 757.

(5) Ibid. 761.

"me to say that I should have come to the same conclusion. "The only question I have to decide is whether there was any "evidence upon which a reasonable tribunal of fact could come "to that conclusion". He then said that he thought that there was, and continued (6): "The commissioners in the present case "have, it seems to me, come to the conclusion that it was an "ordinary incident of the business of a dramatist or playright "to dispose of his plays, or, at any rate, of the motion picture "rights of his plays, by outright sale. There was no evidence to "the contrary and, in my opinion, it was open to the commis"sioners to come to that conclusion". If, therefore, the finding in the present case was a finding of fact I need go no further. There clearly was evidence which justified the commissioners in saying that the agreement of 1945 was an agreement by which the respondent refrained from carrying on a part of his vocation, and, therefore, that that could not be incidental to the carrying on of that vocation.

Had there been evidence that it was a regular practice with actors to accept sums as a condition of not exercising their art, it would not be right to come to the conclusion that it was not an incident of the vocation of such persons. When that kind of circumstance arises it can be considered, but the taxpayer gave evidence that he had never entered into such an agreement before, and there was no evidence that anybody else had ever done so. It seems to me, therefore, that it would not have been open to the commissioners to find that this was an ordinary incident of the carrying on of the actor's vocation. It was, in fact a very special case arising in very special circumstances; the commissioners seem so to have found, and I do not think that I should upset the finding.

Numerous cases were cited, but I do not think that a review of them would be of value, because, as Lord Macmillan said in the passage which I have cited from *Ven den Berghs Ld.* v. *Clark* (7), all these cases depend on their own facts and no one case is very like any other. Possibly *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners* (8)—on which both sides rely—is nearer to the present case than any other. That case concerned excess profits duty. A railway company paid to a mining company a sum of money under the well-known provision in the Railways Clauses Consolidation (Scotland) Act,

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(6) 23 Tax Cas. 757, 762.

(7) [1935] A. C. 431, 438.

(8) (1922) 12 Tax Cas. 427.

1845, whereby a railway company has the right to cause mining companies wishing to work minerals underneath the railway to leave certain pillars for support, on paying compensation. The mineral in this case was china clay. The china clay company received X*l.* as compensation for the loss of those pillars, and it was held that that money was not a taxable sum in their hands. Lord Wrenbury said (9): "Was that compensation profit? The answer may be supplied, I think, by the "answer to the following question: Is a sum profit which is paid "to an owner of property on the terms that he shall not use his "property so as to make profit? The answer must be in the "negative. The whole point is that he is not to make a profit "and is paid for abstaining from seeking to make a profit". That seems to be analogous to the present case. The respondent had, as he testified, ample opportunities in the year in question of making a profit by the exploitation of his art as a film actor. Those he agreed to forgo, and for that forbearance he received a sum of money. It was not profit, if Lord Wrenbury be right in the observations which he made.

I do not think that the cases cited in connexion with authors are of help, because they were all cases where the authors were carrying on their vocations as authors, and the acts which they did, whether sales of copyright or of film rights, were ordinary incidents of that profession or vocation, and, therefore, do not resemble the present case. In *Withers (Inspector of Taxes)* v. *Nethersole* (10) Miss Nethersole had ceased to follow the vocation of an actress, and therefore the sum which she received was not received as an incident to her vocation, and accordingly was not taxable.

The cases about compensation, of which there were a number, do not seem to help at all. It is open to a person to take compensation for the breach of some contractual right which he has, or to take money—as in *J. Gliksten & Son Ld.* v. *Green* (11)—for the loss of stock by fire. Such a payment may well be part of his personal taxable profit because he has turned the asset (either his brains or his stock) into money in that way; but it does not seem to me that that is at all comparable with the facts here. Consequently, if I were at liberty to regard the matter, as the Attorney-General invited me to do, as res integra, I should come to the same conclusion as that at which the commissioners

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(9) 12 Tax Cas. 427, 465.

(10) (1948) 64 T. L. R. 157.

(11) [1929] A. C. 381.

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have arrived. All I need say is that there is evidence on which they could come to the conclusion which they reached, and that conclusion, being one of fact, it is not for me to dispute it. I therefore am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Walter, Burgis & Co.*

I. G. R. M.

DANCKWERTS, J.
1951
April 27.

In re BEDFORD, DECD.
NATIONAL PROVINCIAL BANK LD. *v.* AULTON AND OTHERS.

[1950 B. 3833]

Will—Legacy "to each member of the staff who shall have . . . had "not less than five years' service"—Validity—"Member of the "staff"—"Not less than five years' service"—Meaning.

A testator by his will made in 1947 provided among other things: "Cl. 4. I bequeath free from legacy duty to each member "of the staff of such company [namely John Bedford and Sons, Ld.] "who shall have had not less than five years' service with that "company a sum representing three months' salary and emoluments "at the rate payable to him or her at the date of my death and "to each . . . member of the staff . . . who shall have had less than "five years' service at my death a sum representing one month's "salary and emoluments as aforesaid. Cl. 5. I also bequeath ". . . to each other servant (if any) in my personal employ who "shall at my death have had not less than five years in my service "a sum representing three months' salary or wages at the rate "payable to him or her at the date of my death and to each such "servant who shall have had less than five years' service at my "death a sum representing one month's salary or wages . . . and ". . . for the purpose of this clause any former personal servant or "servants of mine (according to the number of years of service "completed by him or her . . . at the date when he or she left "my employ) shall be deemed to be eligible for a legacy or legacies".

In 1940 it had been resolved at a meeting of directors of the company that any member of the staff who had been or might be called up for service with the forces and who had at the time served the company for at least four years should be granted, as from the date of joining the forces, an allowance amounting to half

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the salary that he was receiving at the time, unless he had not asked the board's permission to volunteer for service.

It was the company's practice, in determining whether a person was a member of the staff, to classify as a member of the staff any male or female entitled, under his or her terms of service, to remuneration at a fixed rate per week, month, quarter or year and also entitled thereunder to remuneration when absent for holidays or sickness, but not entitled to remuneration for working overtime; and it was their practice also to include one who was entitled to a pension at a fixed rate per week, month, quarter or year.

Held, (1.) that the testator in using the expression "member "of the staff" intended to describe a class smaller than would be intimated by the word "employee"; (2.) that the bequest "to "each member of the staff" was valid and effective, the expression "member of the staff" comprising persons whose names were in the company's salary list or works pay sheets at the date of the testator's death and who were then entitled under their terms of service to remuneration at a fixed rate per week, month, quarter or year and for absence on holidays or sickness, but not for working overtime; (3.) that the qualifications that a member of the staff, to receive a legacy at the higher rate, should have had "not less than "five years' service" meant five years' aggregate service, and that it was neither implied nor indicated that it had to be continuous; *In re Drake* [1921] 2 Ch. 99 followed; *In re Marryat* [1948] Ch. 298 distinguished; (4.) that the directors' resolution was not equivalent to saying that service with the forces was to amount, for purposes of the testator's will, to service with the company; that a person who was serving in the forces was not "in the service" of the company unless there was very special wording to that effect, which there was not; and that, accordingly, the period of war service of those members of the staff who would otherwise have qualified for legacies at the higher rate could not be included in the qualifying period of five years; *In re Cole* [1919] 1 Ch. 218 distinguished.

ADJOURNED SUMMONS.

A testator by his will dated December 31, 1947, provided, among other things, as follows: "Cl. 4. I bequeath free from "legacy duty to each co-director of mine of John Bedford & Sons "Ld. . . . and also to each member of the staff of such company "who shall have at my death had not less than five years' service "with that company a sum representing three months' salary "and emoluments at the rate payable to him or her at the date "of my death and to each co-director, and member of the staff ". . . who shall have had less than five years' service at my "death a sum representing one month's salary and emoluments "as aforesaid. Cl. 5. I also bequeath free from legacy duty the "following pecuniary legacies [giving the names of the legatees "and the amounts] and to each other servant (if any) in my "personal employ who shall at my death have had not less than "five years in my service a sum representing three months' "salary or wages at the rate payable to him or her at the date "of my death and to such servant who shall have had less than "five years' service at my death a sum representing one month's "salary or wages . . . and . . . for the purpose of this clause "any former personal servant or servants of mine (according to "the number of years of service completed by him or her . . . "at the date when he or she left my employ) shall be deemed "to be eligible for a legacy or legacies".

On October 15, 1948, the testator died. He left quite a large estate, but, to meet the legacies under cl. 4, there was not more than about 7,500*l.*; and by this summons, taken out on July 21, 1950, the bank, as his executor and trustee, asked, among other things (1.) whether the bequest in cl. 4 of the will to "each "member of the staff" of the company at the testator's death (a) was valid and effective, or (b) was void for uncertainty or any other reason; (2.) if it was valid and effective whether (a) the expression "member of the staff" comprised (i) persons whose names were in the salary list and works pay sheets of the company at the date of the testator's death and who, at that date, were entitled under their terms of service to be remunerated when absent for holidays or sickness but who were not entitled to remuneration for working overtime or were entitled to a pension at a fixed rate per week, month, quarter or year, or (ii) all persons whose names were in the salary list or works pay sheets, or (iii) some other and what class of persons; (b) the five years' service required for qualification for the higher rate of legacy had to be continuous or could be discontinuous and cumulative; (c) for the purposes of cl. 4 of the will, periods of war service by a person should be treated as periods of service with the company, or as breaks in service with it; (d) any other and if so what tests should be applied in determining the class of persons to take under the bequest; (3.) if necessary, an inquiry who were "members of the staff" of the company at the date of the testator's death qualified to take under the bequest.

Evidence contained in affidavits was as follows: In 1906 the testator entered the company's service, in 1914 he became a director, in 1919 managing director and in 1930 chairman, which last two positions he held until his death. On November 11, 1940, it was resolved at a directors' meeting that any member of the staff who had been or might be called up for service with the forces and who then had served the company for not less than four years should be granted, from the date of joining the forces, an allowance of half the salary that he was then receiving and that the minimum should be 1*l.* a week. That grant was not to apply to any member of the staff who volunteered for service without having asked the board's permission. At the date of the testator's death, there were on the company's salary list and works pay sheets the names of 773 persons, 107 of whom the company regarded as " members of the staff ". The company gave to the bank a list of these 107 persons. The company had to determine who were members of the staff and who were not for the purposes of staff dinners, staff dances, staff outings and use of the staff canteen. The company's practice, in determining whether a person was a member of the staff, was to classify as such any male or female who was entitled under his or her terms of service to remuneration at a fixed rate per week, month, quarter or year and who was also entitled thereunder to be remunerated when absent for holidays or sickness but who was not entitled to remuneration for working overtime, or who was entitled to a pension at a fixed rate per week, month, quarter, or year.

Maurice Berkeley for the bank.

Salt, K.C., and *T. A. C. Burgess* for a defendant claiming to belong to the narrower class of staff and for a co-director. The expression " each member of the staff " does not mean " each " employee of the company ". First, it cannot mean those who, at the date of the testator's death, were in receipt of pensions, since pensioners are no longer " on " the staff and so cannot be members of it. Another, though perhaps slight, indication that " staff " does not here include all employees of the company is that in cl. 4 the words used are " to each member of the staff " . . . a sum representing three months' salary and emolu- " ments ", while in cl. 5 they are " to each . . . servant . . . " in my personal employ . . . a sum representing three months' " salary or wages ". True, it is not clear whether there is here a contrast between the status of members of the staff of the company and that of personal servants of the testator, or between " salary " and " wages " or between " salary and emoluments " and " salary or wages ", but the fact that in cl. 4, dealing with " members of the staff ", the word " wages " does not occur at all seems to show that the testator—although, when he referred to " wages ", he did so with reference only to his own personal servants, and not to persons who worked for the company whether as members of the staff or not—had in mind when he was making his will two classes of persons who worked, one for remuneration at a fixed rate per week, month, quarter or year, and the other for a daily wage.

Next, keeping strictly to the evidence, it is proper to consider the practice of the company. They classified as " members of " the staff " all who had fixed salaries which continued to be paid to them when they were ill or on holiday, and who were not paid overtime. Clearly, therefore, the company did not regard part-time workers as " members of the staff ". Accordingly, the only ones who qualify for legacies are those who were receiving fixed salaries at the date of the testator's death. Those who were then pensioners, or part-time workers, do not. Thus, as the expression " members of the staff " has this clear meaning, the bequest is valid and applies to those whose names were in the salary list or works pay sheets at the date of the testator's death and were then entitled to remuneration at a fixed rate per week, month, quarter or year, and when absent for holidays or sickness, but not for working overtime.

Christie, *K.C.*, and *R. S. Lazarus* for a defendant claiming to belong to the wider class of " staff ". In considering the evidence the court cannot properly have regard to the company's practice in this matter. The expression in the will is simply " to each " member of the staff ". A " staff " is a body of assistants by whom an institution or business is carried on; and that must include all employees, whether they are receiving a fixed salary or are simply part-time workers. A worker is no less a " member " of the staff " because he or she does not work full time. The bequest, therefore, applies to all those whose names were in the salary list or works pay sheets at the date of the testator's death.

J. H. Fairbairn (*R. W. Goff* with him) for the tenant for life and the residuary legatees. Whether the court ought or ought not to have regard to the company's practice, it is certainly proper for it to take into consideration the rest of the testator's dispositions. Those dispositions, if they are to be carried out, leave only 7,500*l.* available for distribution under cl. 4. If the wider meaning of " staff " is accepted, that may not be enough; and if the narrower meaning is accepted with the result that not all of the 7,500*l.* is used, that is a more desirable result.

E. J. Bagshawe for specific legatees. Two of the specific legatees are infants and, rather than allow their interests to suffer, the court will give effect to the narrower construction of the word " staff ".

DANCKWERTS, J. The testator entered the company's service in 1905, becoming a director in 1914, managing director in 1919 and chairman in 1930, and continuing as managing director and chairman until his death.

It is, therefore, with that background as to his history that I construe his will. I have to apply cl. 4 to certain circumstances which must be ascertained outside the terms of the will because, until the facts about the company and their employees are known, it is impossible to tell for whom the testator intended these legacies.

It appears that at the date of his death the company employed some 773 persons. They have told that to the bank and have given to the bank a list containing the names of 107 persons. One question argued before me was whether all of these 773 persons are entitled to legacies under cl. 4, assuming that they come within the terms as to length of service, or whether some shorter list of a smaller number of persons would comprise those who are entitled. The testator left a fairly large estate; but he made a considerable number of bequests in addition to those in this clause, and it would appear that the total sum available for legacies under this particular clause would be about 7,500*l*.

I must refer also to cl. 5, by which he bequeathed legacies to servants whom he described as servants "in my personal "employ". At the end of the clause he provides that "for the "purpose of this clause any former personal servant or servants "of mine (according to the number of years of service completed "by him or her . . . at the date when he or she left my employ) "shall be deemed to be eligible for a legacy or legacies . . .". The legacies in question are sums "representing three months' "salary or wages". From the information supplied to the bank, it appears that there were certain persons employed by the company who were not remunerated on a time basis or on a piecework basis, but received remuneration at a fixed rate per week, per month, per quarter or per year, and were also entitled to be remunerated when absent on holiday or through sickness, but were not entitled to remuneration for working overtime. There were also some persons who were entitled to pensions at a fixed rate per week, per month, per quarter or per year. I may say at once that those who at the date of the testator's death were pensioners and were not therefore employed by the company in any other way except that they were past employees and so entitled to pensions, appear to me not to have any right to a legacy under this bequest.

It also appears that there were held in connexion with the company certain gatherings or occasions known as staff dinners, staff dances, staff outings, and reference has been made to " the " staff canteen ". It appears that the persons who attended the staff dinners and staff dances did not include all the employees of the company but only those who were remunerated on the basis which I have mentioned, at a fixed salary or remuneration, of so much per week or per month or whatever it might be.

Turning again to the will, I find that the testator refers to " each member of the staff " in addition to the co-directors, and he uses the words " representing three months' salary and emolu-" ments ". Plainly, he is referring to persons occupying a certain qualifying position, whatever that position may be, with the company at the date of his death. I do not think that the contrast between the word " staff " in cl. 4 and the reference to " servants " in cl. 5 helps me at all in construing the will. Cl. 5 is dealing, in my view, with persons of quite a different kind, namely, the testator's personal servants, and therefore any contrast that there may be in that respect between the two classes is really immaterial for the purposes which I have to consider. I do, however, find a reference to " wages " in cl. 5—coupled, it is true, with the word " salary "—and I do find that the word " wages " is not used in cl. 4. It may be that that is one indication how I should construe the word " staff ".

The word " staff ", according to the dictionaries, is obviously used in many different senses, and can have different meanings in different circumstances.

It is contended by Mr. Christie and Mr. Lazarus for the wider class of " staff " that everybody employed by the company is on the staff; by Mr. Salt and Mr. Burgess for the narrower class that that narrower class is what is meant by the word " staff ". Mr. Christie contends, so I understand, that evidence of the company's practice is not admissible for the purpose of construing this gift in the will. In my view, however, having regard to the testator's position in the company during his lifetime, I am entitled to have regard to the company's practice in relation to certain functions during his lifetime. In my view, therefore, the evidence as to the staff dances and staff dinners is material. I attach little weight to the fact that the amount of money left is rather small, but, reading the clause as a whole, I must, in my judgment, conclude that the testator has used the word "staff" intending to describe a class smaller than would be intimated by the word "employee", which he has not used. Therefore I conclude that he was using it (as it had been applied in practice during his lifetime and personal association with the company) as denoting those persons who were not paid by time or piecework rates, but were remunerated on a salary basis by reference to the week, month or year, and were not paid overtime.

I do not decide that all the 107 persons in the list supplied to the bank are necessarily entitled. Most are black-coated workers, but there are a fair number of foremen, and there is one mechanic. Apparently those last-mentioned persons are included because they were remunerated at a fixed weekly salary or monthly salary. Accordingly, they may be entitled to legacies under cl. 4 of the will.

Argument was then heard on the questions whether the five years' service required for qualification for the higher rate of legacy under the bequest had to be continuous or could be discontinuous and cumulative, and whether periods of war service should be treated as periods of service with the company or as breaks in it.

Salt, K.C., and *T. A. C. Burgess.* The service need not have been continuous so long as there has been five years' service altogether. In *In re Drake* (1) the testator bequeathed a year's wages to each of certain servants who should have been in his service for five but less than ten years. Some of them had joined the forces during the war on the understanding that their places would be kept open for them; and on coming out of the army they returned to the testator's service. P. O. Lawrence, J., held that the period of their military service could not be deemed service with the testator, but that their service with him before and after their military service could be aggregated in computing the qualifying period of the bequest.

True, in *In re Marryat* (2), Jenkins, J., did not follow *In re Drake* (3). There, the bequest was "to each employee of [a "named company] who shall have been in the service of such "company at my death for a period of five years and upwards "and shall not then be under notice . . .", and Jenkins, J., following *Tyler* v. *London and India Docks Joint Committee* (4), held that an employee, to obtain a legacy, must have been employed for a continuous period of five years or upwards to the date of the testator's death, and that two periods, which aggregated to five years or upwards but had been interrupted by a period of military service, did not satisfy the condition as to service. It seems clear, however, that Jenkins, J., so decided because the words in that case were "for a 'period' of five "years", and two periods together making five years do not constitute "a" period.

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(1) [1921] 2 Ch. 99.
(2) [1948] Ch. 298.
(3) [1921] 2 Ch. 99.

In the present case the court should follow *In re Drake* (5) and hold that the service with the company need not be continuous, and should also follow *In re Cole* (6) and hold that military service is to be treated as service with the company.

Christie, K.C., and *R. S. Lazarus* took no part in the argument.

J. H. Fairbairn (*R. W. Goff* with him) for the tenant for life and the residuary legatees. The fact that the gift in *In re Marryat* (7) contained the words "for a period" is not decisive. The word "period" did not come into the gift in *In re Lawson* (8), which was to each of the testator's domestic servants who should have been in his service for two years prior to his death. One of them, a male nurse, had been compelled, owing to strain, to take a four months' holiday for which the necessary consent had been given. It was held that the service had to be continuous for the period named. As, however, that did not involve service from day to day, it was held also that the suspense of the service with the requisite consent did not disentitle the male nurse to the legacy which he claimed.

The important part of that decision for the present case is that the service had to be continuous. The male nurse was still "in "the service" of the testator while he was on holiday. That case seems to be conclusive against the members of the staff on both points. The five years' service must be continuous and may not be cumulative, and service with the forces may not be treated as part of it. The taking of a holiday with permission, which, in *In re Lawson* (9), left the male nurse still in the testator's service, is not like joining the forces with the directors' permission, which does not leave a member of the staff in the company's service. It may leave a person in "employment", as, in *In re*

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(4) (1892) 9 T. L. R. 11.
(5) [1921] 2 Ch. 99.
(6) [1919] 1 Ch. 218.
(7) [1948] Ch. 298.
(8) [1914] 1 Ch. 682.
(9) [1914] 1 Ch. 682.

Cole (10), it was held that it did. What is stipulated in the present case, however, is " service ", not " employment "; and, prima facie, it is not possible to be in the " service " of employers (in this case the company) contemporaneously with being in the forces unless there is a condition to that effect. Certainly the testator nowhere said that those serving in the forces should be considered to be at the same time in the service of the company; equally certainly, the directors of the company have not taken that view.

The court ought therefore to hold that service must be continuous and cannot be cumulative, that it must be actual " service " to the company, which it cannot be while the person concerned is in the forces, and, accordingly, that war service cannot be included in the qualifying period of five years.

E. J. Bagshawe for specific legatees. If, in *In re Lawson* (11), the gift to those who should have been in the testator's service for two years prior to his death was sufficient (as it was) to make Eve, J., decide that a continuous period of two years was necessary, the wording " who shall at my death have had not less " than five years' service " ought to suffice to make the court decide that a continuous period of five years is necessary. In neither of the two cases was continuity indicated in terms; the wording in the earlier case was not " for two years ' immediately ' " prior " to the testator's death. Prima facie, the words " not " less than five years' service " show just as strong a case for holding that continuity was required.

DANCKWERTS, J. There are a number of authorities on similar provisions in other wills which were considered by Jenkins, J., in *In re Marryat* (12). In that case there was a bequest to each employee " who shall have been in the service of such " company at my death for a period of five years and upwards " and shall not then be under notice ", and Jenkins, J., concluded that a continuous period was required to qualify for the legacy. In the bequest, however, was the word " period ", and obviously that was one reason inducing Jenkins, J., to reach the conclusion which he did. In *In re Lawson* (13), which was referred to in *In re Marryat* (14) and to which I have been referred by Mr. Fairbairn, for the tenant for life and the residuary legatees, there is no reference to the word " period "; but Eve, J., concluded that a continuous period of two years before the death of the testator was required to qualify, though he decided in favour of the legatee in that particular case because he held that the service need not be from day to day.

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(10) [1919] 1 Ch. 218.
(11) [1914] 1 Ch. 682.
(12) [1948] Ch. 298.
(13) [1914] 1 Ch. 682.
(14) [1948] Ch. 298.

In *Tyler* v. *London and India Docks Joint Committee* (15) the Court of Appeal also concluded that continuous service was necessary in the rather special circumstances of the rules in that case.

On the other hand, in *In re Drake* (16), P. O. Lawrence, J., held that the period need not be continuous. There the words were " who should have been in his service for five years but less " than ten years ", or " who should have been in his service for " ten years prior to his decease ". Therefore, there is some difference in the results which have been reached in these cases.

In my view, none of those cases is necessarily conclusive of the question which I have to decide in the present case, where the words are substantially different from the words in each of those cases. In my view, the qualification is simply that the legatee shall have had, at the date of the testator's death, not less than five years' service with the company. In my judgment, that denotes five years' aggregate service, and there is no reason whatever to imply, nor, indeed, is there indicated, a condition that the five years' service shall have been continuous. Accordingly, several periods may be added together so as to make a person qualify for the higher legacy, if the aggregate is not less than five years' service with the company.

As to the question whether periods of war service should be treated as periods of service with the company or as breaks in it, there were fourteen persons who came within the provisions of the resolution of the directors passed on November 11, 1940, but in fact only three of them received assistance under it. The resolution is not equivalent to saying that service in the forces is to be equivalent to service with the company for the purpose of the testator's will. All that it really amounted to was that the company out of their good will made payments, which I think they were not in the least bound to make, to the persons in question to help them with their expenses during the period of their war service. That factor has no material effect on the construction of the will.

In *In re Cole* (17), where the legatee had entered into the

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(15) 9 T. L. R. 11.

(16) [1921] 2 Ch. 99.

(17) [1919] 1 Ch. 218.

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service of a company and the terms of the will required him to enter the company's employ and remain in it until the age of thirty-three, it was held that as, with the consent of the directors, he had joined the forces, he had not ceased to be in the company's employ. That is different from "rendering service" to the company. Indeed, one of the points mentioned in the headnote to that case is that he did not cease to be in the employ of the company though he had not actively served the company. A person may be in employment without rendering service, but in the present case the condition is not employment, but service. A person who serves in the forces is not "in the service" of the company, unless the wording is very specially expressed so to provide, which it is not. Accordingly, the period of war service of those members of the staff, who would otherwise qualify for these legacies, cannot be included in the qualifying period of not less than five years required by the will.

Declarations accordingly.

Solicitors: *Collyer-Bristow & Co., for Ashington & Denton, Sheffield; Peacock & Goddard, for Broomhead, Wightman & Reed, Sheffield; Bell, Brodrick & Gray, for Rogers & Co., Birmingham.*

K. R. A. H.

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June 19.

In re WINDER'S WILL TRUST.
WESTMINSTER BANK LD. *v.* FAUSSET AND ANOTHER.

[1950 W. 4022.]

Will—Settled fund—Shares in company—Distribution of capital profits—Capital not income of settled fund.

After the passing of the Transport Act, 1947, a company sold their transport and road-haulage business to the British Transport Commission in consideration of an allotment of British Transport stock. On February 21, 1949, notice was given to the stockholders of a meeting to be held on March 17 to pass a resolution to distribute British Transport stock to persons who were ordinary stockholders of the company on February 21. The distribution proposed was 5*l*. British Transport stock for every 1*l*. of the stock of the company held by each stockholder on the company's register on the

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[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

relevant date. The payment was described in the resolution as being a special profits dividend payable out of the profits realized by the company on the sale of part of their undertaking. The distribution was to be made on April 1, but the company's stock was quoted ex dividend as from February 21. On February 27, six days after notice convening the meeting of March 17 had been given, a stockholder died. By his will his stock formed part of a settled fund, and the question was asked whether the British Transport stock, received in respect of the testator's holding in the company, was capital or income of that settled fund.

Held, that, although the distribution was not actually made until after the testator had died, the payment must be regarded as income that had accrued due before he died, for although, at the time of his death, he had only a contingent or future right to the British Transport stock, it was nevertheless part of his property, and, when the payment was received, it did not form part of the income of the residuary trust fund, but was capital of the fund.

In re Muirhead [1916] 2 Ch. 181 applied.

In re Sechiari (1950) 66 (Pt. 1) T. L. R. 531 distinguished.

ADJOURNED SUMMONS.

A. W. Winder made a will on January 15, 1948, appointing the Westminster Bank Ld. executors and trustees, and, after making various dispositions, he gave " the income of my residuary " estate " to his niece, the first defendant, for life, and after her death to a great niece, the second defendant, provided that she attained twenty-five years or married. There was a gift over on failure of that gift.

By a further clause, the testator gave his trustees " power to " treat all rents dividends and other periodical payments received " after my death as income it being my intention that as between " capital and income of my estate there shall be no apportionment " in respect of accruing income payments ". The testator died on February 27, 1949.

At his death, his estate included a holding of 200*l.* Thomas Tilling Ld. ordinary stock. After the passing of the Transport Act, 1947, but before the testator died, the company sold their transport and road-haulage business to the British Transport Commission in consideration of an allotment of British Transport 3 per cent. guaranteed stock, 1968 to 1973, at 101 per cent., with interest as from January 1, 1948. Notice of that agreement was given to the shareholders by the chairman of the company on November 8, 1948. In his statement he said that it was proposed to recommend that on April 1, 1949, a capital distribution should be made out of the allotment of British Transport stock to holders of ordinary stock of Thomas Tilling Ld. at the rate of 5*l.* of

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British Transport stock for each 1*l.* stock of the company. On February 21, a meeting was convened for March 17, to pass a resolution to make the distribution on April 1, 1949, to each ordinary stockholder on the register on February 21, 1949.

The payment was described in the resolution as being a special profits dividend payable out of the profits realized by the company on the recent sale of part of its undertaking to the British Transport Commission. As from February 21 the company's stock was quoted ex dividend. Six days after the notice on February 21 of the meeting to pass the resolution, the testator died.

The meeting was duly held, the resolution was passed, the dividend was accordingly paid on April 1, and the trustees of the testator's will received 1,000*l.* of British Transport 3 per cent. guaranteed stock in respect of the testator's holding. They took out this summons asking whether that stock ought to be retained as capital of the settled fund, or whether it should be distributed as income.

Wilfrid Hunt for the trustees.

Rink for the tenant for life of the residuary estate, the niece of the testator. As in *In re Sechiari* (1), the dividend is income. Although the dividend declared and paid after the testator died was to be paid to persons on the company's register on a date during the testator's lifetime, that date was material only to settle who were to be the recipients of the payment, if it was made; the stockholders had no right to anything until the resolution was passed, and it might not have been passed. The crucial date was the date of the declaration of the dividend, and that was after the testator died. The dividend was not expressed to be payable in respect of any period. It was not, as it might have been, a retrospective dividend payable as from a past date. Further, it is clear that the company had no power to alter the persons who were to take beneficial interests under the testator's will, even if they had purported to do so. [Counsel referred to *Hill* v. *Permanent Trustee Co. of New South Wales Ld.* (2).]

Finally, it is submitted that the resolution, in referring to persons on the company's register on February 21, must be taken to have intended to include their personal representatives or involuntary assigns. There is no suggestion that the personal representatives of a person who had died and was not on the register on that date would have been unable to take.

(1) (1950) 66 (Pt. 1) T. L. R. 531.

(2) [1930] A. C. 720.

Templeman for the testator's great-niece, the remainderman. The dividend was made payable in respect of a date or period during the testator's lifetime, although it was not actually paid until after the testator's death. Accordingly, what has been received by the trustees must be regarded as income that had accrued due before the testator's death. It is therefore capital of the estate. In *In re Muirhead* (3) it was established that, as from the date when the right to a dividend arose, it was necessary to look to the period in respect of which that dividend was paid. In that case, a dividend, paid after, but in respect of a period which had determined before, the death of the tenant for life, was held to be payable wholly to the estate of the deceased life tenant. In this case it was clear that the payment was in respect of a transaction which had been completed before the testator died, for not only were the persons to receive the dividend to be determined on a date before the testator died, but the chairman stated that the dividend was paid out of the profits realized on the recent sale of assets; and in stating that interest accrued from January 1, 1948, he implied that that date was the date of purchase by the British Transport Commission.

When the testator died, the right to this dividend, assuming that the resolution was going to be passed, was a separate asset of his estate. The stock was quoted ex dividend and would be so treated for assessment of death duty. The date of the actual declaration of the dividend was therefore irrelevant.

Rink, in reply, referred to *In re Jowitt* (4).

ROMER, J. [after stating the facts:] The question whether this capital profits dividend should be treated as income or as capital has been the subject of more than one application to the court, the first being *In re Sechiari* (5), in which I held that the dividend should be regarded as income, having regard to the principles laid down by the Judicial Committee of the Privy Council, following earlier authority, in *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (6).

I inserted in the order a protective provision for the purpose of enabling the parties, if so advised, to resort to any equitable jurisdiction which there might exist for apportioning the dividends as between capital and income. That jurisdiction might, as Vaisey, J., observed in *In re Kleinwort's Settlements* (7), be exercised if special circumstances were established. I am not concerned with that equitable jurisdiction in this case; the only question here is whether the principles which led to the decision in *In re Sechiari* (8) lead to a similar conclusion on this application.

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(3) [1916] 2 Ch. 181.
(4) [1922] 2 Ch. 442.
(5) 66 (Pt. 1) T. L. R. 531.
(6) [1930] A. C. 720.
(7) Ante, 860.

Mr. Rink, for the tenant for life, said that the principle of *In re Sechiari* (8) applies. He said that although the resolution, as a result of which this dividend was paid, was to make payment to members who were on the register of Thomas Tilling Ld. on February 21, that date is irrelevant. He says that the crucial date is that of the declaration of the dividend, a member having no vested right to anything until that date arrived and the declaration was passed. The resolution did not even purport to make the dividend payable retrospectively to February 21 but merely fixed the recipient, by reference to that date, for the sake of convenience.

Then he says, quite truly, that, even if the company had purported to alter the persons who were to take beneficial interests under this testator's will, they could not do it because in a matter of this kind it is not what the company do which determines matters as between the tenant for life and the remaindermen, but what the settlor does when he establishes the settlement. Mr. Rink says that this resolution was passed some time after the testator's death, the dividend consisting of the British Transport stock was not received until even later, and the mere fact that it is issued by reference to the state of the company's register on February 21, when the testator was alive, does not prevent it from being income payable to the tenant for life in accordance with the decision in *In re Sechiari* (8).

Up to a point I accept those propositions; but what I have to decide is whether, on the true construction of this will and in the events which happened, the tenant for life is entitled to the dividend or not. She can only be entitled to it if it can properly be described as "income of the testator's "residuary estate", for that is all that is given to her under the will.

Neither Mr. Rink nor Mr. Templeman, for the infant, was disposed to rely on cl. 8 of the will, which at first sight might be thought to have some bearing on the matter. They said, and I am disposed to think rightly, that that clause was not directed to this sort of matter, but was introduced for administrative convenience in regard to accruing income payments, not to a payment such as I have to consider here.

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(8) 66 (Pt. 1) T. L. R. 531.

The only question, one of simplicity in the stating as distinct from simplicity in the answering, is whether this stock can fairly be regarded as income of the residuary estate?

It appears to me that Mr. Templeman is right in saying that, although the distribution was not made until after the testator had died, it was made payable in respect of a date or period during the testator's lifetime, and accordingly, what was received must be regarded as income that accrued due before the testator's death and therefore it is capital of the estate.

Mr. Templeman referred to *In re Muirhead* (9), where a dividend, paid after the death of the tenant for life but in respect of a period which had determined before she died, was held to be payable wholly to the estate of the deceased life tenant; and so here, he says, it is plain from the statements that were made or which appear in the relevant circulars and resolutions that this stock was paid in respect of a transaction which had been completed before the testator died. The persons to receive the stock were to be determined on February 21, which was before the testator's death. The resolution says that the dividend is to be paid out of the profits realized on the recent sale of assets; and, finally, it is stated in the chairman's statement that interest accrues from January 1, 1948, from which it is to be fairly reasonably inferred that that was the date of purchase.

Mr. Templeman went on to say, applying *In re Muirhead* (9), that, as from the date when the resolution was passed and the right to the dividend arose, one looks to the period in respect of which it was paid. Mr. Templeman said, finally, and I think rightly, that, at the testator's death, the right to this dividend, if and when the resolution was passed, and everybody seems to have assumed that it would be passed, was a separate asset of his estate: the stock was quoted ex dividend and the dividend presumably would be treated as a separate asset for the purposes of duty, so that the date of the actual declaration of the dividend was irrelevant.

That was certainly so when the testator died. If he had sold his 200*l.* stock, he would have sold it ex dividend, in the absence of a special bargain. Later, there would have come to him a separate asset but which at that time existed in the form of a contingent or future right to an asset. That right formed part of his property just as much as other items of the estate; and it seems to me, in those circumstances and taking all the dates and other relevant considerations into account, that it is quite impossible to say that this British Transport guaranteed stock is income of the residuary estate. It formed an asset of the estate before the testator's death and therefore cannot be said to form part of the income of the residuary estate after his death. On that ground, it seems to me, the case is altogether removed from the area covered by *In re Sechiari* (10).

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(9) [1916] 2 Ch. 181.

Mr. Rink tried to displace the view that this dividend was capital of the estate by referring to *In re Jowitt* (11), a decision to the effect that the Apportionment Act, 1870, only applies if a special period is mentioned or is in question, and he submitted that no special period exists in relation to the declaration of this dividend; but I do not really think that is material. As I come to the conclusion that the right to this payment crystallized before the testator's death, it seems to me that it must necessarily follow that, when the payment was received, it could not form part of the income of his residuary trust fund but formed part of his capital estate for the purposes of his will.

Accordingly, I declare that on the true construction of the will and in the events which have happened, the 1,000*l.* British Transport guaranteed stock which the trustees received by way of capital profits dividend ought to be treated as capital for the purposes of the trusts of the will.

Declaration accordingly.

Solicitors: *Rose, Johnson & Hicks for Woolley, Bevis & Diplock, Brighton; Walker, Rowe & Clark for Close & Son, Camberley.*

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(10) 66 (Pt. 1) T. L. R. 531.

(11) [1922] 2 Ch. 442.

In re DUFF'S SETTLEMENTS. NATIONAL PROVINCIAL BANK LD. *v.* GREGSON AND OTHERS.

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July 4, 5, 16.

Evershed, M.R., Jenkins and Birkett, L.JJ.

[1950 D. 2214]

Company—Share premium account—Reduction—Payment to trustee—Capital and not income—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 56.

Settlement trustees were registered holders of 33,947 1*l.* shares in a company which, from time to time, allotted shares at a premium and, in accordance with s. 56 of the Companies Act, 1948, transferred the aggregate of the premiums to a share premium account.

In 1950 that account stood at 254,625*l.* 12*s.* 6*d.*, the company passed a resolution to pay thereout 2*s.* 6*d.* in respect of each fully paid share, on March 27 the court sanctioned the resolution and, pursuant to the resolution, the company paid to the trustees 4,243*l.* 7*s.* 6*d.* in respect of the trust holding. The trustees took out a summons to have determined whether, as between the tenants for life and remaindermen, that sum was capital or income.

Held, (1.) that s. 56 took the share premium account out of the category of divisible profit and prevented it from being distributed by way of dividend, thus making inapplicable the ratio decidendi of *In re Bates* [1928] Ch. 682, *Hill* v. *Permanent Trustee Company of New South Wales Ld.* [1930] A. C. 720, *In re Doughty* [1947] Ch. 263, and *In re Sechiari* (1950) 66 (Pt. 1) T. L. R. 531; (2.) that the section showed that where, as in the present case, the transaction was a distribution of all or part of the share premium account among shareholders, it was to be treated as if the company were reducing their capital by paying off paid up share capital, which notionally paid up share capital was to be treated as paid up on the shares participating in the distribution; (3.) that, in the present case, the effect of the section was that the company were to be considered as having, with the sanction of the court, paid off 2*s.* 6*d.* per share of the capital paid up on each of their issued shares by way of reduction of capital; that each fully paid 1*l.* share was to be treated as a fully paid share of 32*s.* 6*d.* reduced by a return of capital to a fully paid share of 30*s.* 0*d.*; that the sum distributed must be deemed to have left the company as paid up capital returned to the members; that the trustees' proportion of the distribution must similarly be treated in their hands as paid up share capital returned by the company; and that the shares participating in the distribution must, by virtue of s. 56, be treated as if their nominal amounts and the amounts paid up on them included the proportions attributable to them respectively of the share premium account: *Inland Revenue Commissioners* v. *Reid's Trustees* [1949] A. C. 361 considered; (4.) that, in the present case, whether the origin, or the mode and character of distribution, of

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the share premium account was considered, the 4,243*l.* 7*s.* 6*d.* was to be treated as capital and added to the corpus of the settled funds.

Decision of Harman, J., ante, 721, affirmed.

APPEAL from Harman, J. (1).

The plaintiff bank, as the trustees of several settlements, were the registered holders of 33,947 1*l.* shares in Highfields (Ceylon) Ld. From time to time the company allotted certain of its shares at a premium, and, in accordance with s. 56 of the Companies Act, 1948 (2), the aggregate of the premiums was transferred to a share premium account, which in 1950 stood at 254,645*l.* 12*s.* 6*d.*

In 1950 the company passed a special resolution to pay out of the share premium account 2*s.* 6*d.* in respect of each of the fully paid shares. The reduction was sanctioned by the court on March 27, 1950. In pursuance of that resolution 4,243*l.* 7*s.* 6*d.* was paid to the bank in respect of the trust holding.

The bank took out this summons to have determined whether that sum should be treated as capital or as income as between the tenants for life under the settlements and the remaindermen.

Harman, J., held that the 4,243*l.* 7*s.* 6*d.* ought to be treated as capital to be added to the corpus of the settled funds, and not as income distributable among the tenants for life. The tenants for life appealed.

R. H. Walton for the tenants for life. This sum of 4,243*l.* 7*s.* 6*d.* ought to be treated as income, as, before the coming into force of the Act of 1948, it would have been: *In re*

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(1) Ante, 721.

(2) Companies Act, 1948, s. 56, sub-s. 1: "Where a company issues "shares at a premium, whether for "cash or otherwise, a sum equal to "the aggregate amount or value of "the premiums on those shares shall "be transferred to an account, to be "called 'the share premium account', "and the provisions of this Act re- "lating to the reduction of the share "capital of a company shall, except "as provided in this section, apply as "if the share premium account were "paid up share capital of the com- "pany".

Sub-section 2: "The share premium "account may, notwithstanding any- "thing in the foregoing subsection, "be applied by the company in pay- "ing up unissued shares of the com- "pany to be issued to members of the "company as fully paid bonus shares, "in writing off (*a*) the preliminary "expenses of the company; or (*b*) the "expenses of, or the commission paid "or discount allowed on, any issue of "shares or debentures of the com- "pany; or in providing for the "premium payable on redemption of "any redeemable preference shares or "of any debentures of the company".

Sub-section 3: "Where a company "has before the commencement of "this Act issued any shares at a "premium, this section shall apply as "if the shares had been issued after "the commencement of this Act . . .".

Bates (3); *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (4); *In re Doughty* (5); *In re Sechiari* (6). Under s. 56 the moneys forming a share premium account are still to be used for income purposes. All that the section does is to impose, for the benefit of creditors, a particular method of dealing with a share premium account. It provides the mechanics for dealing with it. It prescribes, not that the share premium account is for all purposes to constitute, or to be deemed to be, paid up share capital, but simply that, save where the section otherwise provides, the Act is to apply as if it were paid up share capital. Even if it followed that sums in the share premium account could, in the hands of the company, be dealt with only as share capital, still it would be share capital in the hands of the company only until distribution, whereon it would become income in the hands of trustees. What has to be considered is whether, after distribution, the capital in the hands of the trustees is left intact: in the present case it is left intact, and what the trustees have in their hands after the distribution is precisely the same as what they had before it, namely, 33,947 fully paid 1*l.* shares, the nominal amount whereof is neither greater nor less than it was before: *Inland Revenue Commissioners* v. *Reid's Trustees* (7).

The correct view of a share premium account is that it is undivided profits, which is how Articles 128 and 129 of Table A treat it. That is shown, also, by the purposes for which, under s. 56, sub-s. 2, it can be used "notwithstanding anything in" sub-s. 1. Compare, also, s. 58, dealing with the creation of a capital redemption reserve fund on the redemption of redeemable preference shares. Sub-section 1 (*d*) provides that the provisions of the Act as to a company's share capital shall—save as the section itself provides—apply as if the capital redemption reserve fund were paid up share capital; and sub-s. 5 contains an exception whereby the capital redemption reserve fund can be used to pay up unissued shares to be issued as fully paid bonus shares. That is very like s. 56, sub-s. 2.

Shares can be paid up only to their full nominal amounts; and the fact that a share is issued at a premium does not give the share, or the holder of it, a special interest in the sum representing the premium by virtue of which that sum can be treated as capital. For example, if a company having ordinary shares of one class issued some of them at par, and others at a premium, all the shareholders would have equal interests in the assets representing the premiums.

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(3) [1928] Ch. 682.
(4) [1930] A. C. 720.
(5) [1947] Ch. 263.
(6) (1950) 66 (Pt. 1) T. L. R. 531.
(7) [1949] A. C. 361.

The 4,243*l.* 7*s.* 6*d.* received by the trustees cannot be anything but income, and ought so to be treated.

J. V. Nesbitt for the bank.

H. Lightman for the remaindermen. The facts of the present case are unusual. The 1*l.* shares were issued at a premium of 12*s.* 6*d.*, and five-thirteenths of the capital was credited to the share premium account. This application deals with one-thirteenth only, but it will decide how the remaining four-thirteenths are to be dealt with. The company have not the power to pay a dividend of 2*s.* 6*d.* per share out of the share premium account. They must come to the court for leave to distribute moneys in the account. Section 56 was enacted to give effect to the recommendations in the report of the Cohen Committee (Cmd. 6659); and the section sought to cure the mischief that, although premiums were in essence capital, companies treated them as income. Section 56 is new law, and ought not to be read in the light of old decisions. Harman, J.'s decision was correct, and the appeal ought to be dismissed.

Cur. adv. vult.

July 16. Jenkins, L.J., reading the judgment of the court, stated the facts, read s. 56, and continued:—There appears to be little doubt that if, before s. 56 of the Companies Act, 1948, came into operation, the company had distributed amongst its shareholders in cash a sum representing premiums received on the issue of shares, the proportion of such distribution attributable to any trust holding of shares would have been income and not capital as between persons successively interested under the trust. This result would, we think, clearly have followed from the principles enunciated and applied in such cases as *In re Bates* (8); *Hill* v. *Permanent Trustee Company of New South Wales Ld.* (9); *In re Doughty* (10); and *In re Sechiari* (11). The share premiums would have been profits available for dividend (see *Drown* v. *Gaumont-British Picture Corporation* (12), and if any part of them had been distributed by the company

(8) [1928] Ch. 682.
(9) [1930] A. C. 720.
(10) [1947] Ch. 263.
(11) (1950) 66 (Pt. 1) T. L. R. 531; [1950] 1 All E. R. 417.
(12) [1937] Ch. 402.

otherwise than in liquidation the amount received by trustees in respect of a trust holding would necessarily have been income in their hands, because it was neither a payment in reduction of paid up share capital nor an addition to the shareholders' capital investment in the company, but simply a cash distribution which, no matter how described, and notwithstanding that in the hands of the company it bore the character of a capital, not an income, profit could not in law be anything else in the hands of the recipients than income derived from their shareholdings.

The question on this appeal is whether the same result must be taken to have ensued in the case of the present distribution, notwithstanding the provisions of s. 56.

Mr. Walton, for the tenants for life, argued with force that s. 56 contained nothing which could properly be regarded as affecting the result. He pointed out that the section does not say that the share premium account is to constitute paid up share capital of the company, or is to be deemed for all purposes to be paid up share capital of the company, but merely that the provisions of the Act relating to the reduction of share capital are, except as provided in the section, to apply *as if* the share premium account were paid up share capital of the company. In other words (Mr. Walton argued) the share premium account is not converted into paid up share capital. Not being paid up share capital, it is only to be treated for certain limited purposes as if it were. He placed some reliance on the excepted purposes for which a company is left free by sub-s. 2 to apply its share premium account notwithstanding the terms of sub-s. 1, and in particular the paying up of unissued shares for issue as fully paid bonus shares, as demonstrating that the share premium account still retained the character of profit though treated for certain purposes as if it were paid up share capital. He contended that the section could not be regarded as having the effect of adding the amount of the share premium account to the paid up share capital, because it could not be said to be capital paid up on any particular shares or to any specific part of which any particular shares conferred any right; for shares can only be paid up to the extent of their full nominal amounts, and it cannot be said that the issue of a share at a premium of itself attaches to that share any special interest in the sum representing that premium by way of additional capital rights. This point he illustrated by the hypothetical case of a company with one class of fully paid ordinary shares, some issued at a premium and others at par, in

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which all the shareholders, whether their shares were originally issued at par or at a premium, would have equal interests in any assets representing the premiums received. He submitted, moreover, that the trustees had precisely the same capital investment in the company before and after the distribution, namely, 33,947 fully paid ordinary shares of 1*l.* each, neither increased by any capital accretion such as bonus shares nor reduced by any reduction in nominal amount or in capital paid up, and asked how in these circumstances the 4,243*l.* 7*s.* 6*d.* received by them on the distribution could be anything else than income. In this connexion he referred to *Inland Revenue Commissioners* v. *Reid's Trustees* (13). He called in aid articles 128 and 129 as to capitalization of profits contained in Table A in Sch. I to the Companies Act, 1948, which appear to treat a share premium account as equivalent for that purpose to a free reserve or balance standing to the credit of profit and loss account. Taking all these considerations together Mr. Walton invited us to hold that s. 56 merely imposes (for the protection of creditors) restrictions on the distribution or other application of the share premium account, without depriving a distribution, made in conformity with those restrictions, of sums representing share premiums, of its essential character as a distribution of income and not of capital.

We do not think the effect of s. 56 ought to be so limited. It is true that the section does not in terms convert the share premium account into paid up share capital, but merely makes the provisions of the Act relating to the reduction of share capital apply as if the share premium account was paid up share capital. But the provisions thus made applicable are the essential provisions on which the distinction between share capital and divisible profit depends, and on which the implied prohibition against the distribution of paid up share capital otherwise than in pursuance of a duly authorized reduction of capital is based. It is thus clear at all events that s. 56 does take the share premium account out of the category of divisible profit and prevents it from being distributed by way of dividend. This seems to us in itself to render the ratio decidendi of such cases as *In re Bates* (14); *Hill* v. *Permanent Trustee Co. of New South Wales* (15); *In re Doughty* (16); and *In re Sechiari* (17) inapplicable. Moreover, the terms of the section seem to us to show that where (as in the present case) the transaction in question is a distribution amongst

(13) [1949] A. C. 361.
(14) [1928] Ch. 682.
(15) [1930] A. C. 720.
(16) [1947] Ch. 263.
(17) (1950) 66 (Pt. 1) T. L. R. 531.

shareholders of the share premium account, or part thereof, that transaction is to be treated as if the company was reducing its capital by paying off paid up share capital. If it is asked on what shares this notionally paid up share capital is to be considered as paid up, our answer is that it is to be considered as paid up on the shares participating in the distribution, that is, assuming the distribution is made in accordance with legal rights, on those shares which would be entitled to participate in the share premium account in a winding up, or indeed in an issue of bonus shares effecting an actual capitalization of the share premium account, as expressly contemplated and permitted by s. 56 itself. Applying that view to the present case we think that the section means that the company is to be considered as having paid off (with the sanction of the court) 2*s*. 6*d*. per share of the capital paid up on each of its issued shares by way of reduction of capital. If it is asked how this can be, inasmuch as the shares remained before and after the distribution fully paid shares of 1*l*. each, our answer is that, for the purpose of applying the reduction provisions of the Act to a transaction such as this, the section requires that each fully paid 1*l*. share should be treated as if it were a fully paid share of 32*s*. 6*d*. reduced by a return of capital to a fully paid share of 30*s*. 0*d*. We do not see how else the provisions of the section can be given intelligible effect. The company being thus by force of the section deemed to have paid off notionally paid up capital, the sum distributed must, we think, clearly be deemed to have left the company as paid up share capital returned to the members, and not as distributable profit divided amongst the members by way of dividend. What reason is there for holding that the capital character with which the trustees' proportion of the amount was thus impressed when it left the company was effaced and replaced by an income character when it reached the hands of the trustees? For our part we can see none. We think the hypothesis enjoined by the section must follow the amount received by the trustees and determine its character and destination in their hands also. The cases to which we have referred show that the character, as a matter of company law, of any given distribution as it leaves a company determines its character in the hands of the recipient. The relevant company law in the present case seems to us to require that the distribution here in question should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital. It follows, to our minds,

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that the trustees' proportion of the distribution should similarly be treated in their hands as paid up capital returned by the company. We think that the argument based on *Inland Revenue Commissioners* v. *Reid's Trustees* (18) is met by the consideration that for the purposes of a distribution such as this the shares participating in it must by virtue of s. 56 be treated as if their nominal amount and the amounts paid up on them included the proportions attributable to them respectively of the share premium account. The provision in sub-s. 2 permitting the application of a share premium account in paying up bonus shares does not, in our view, assist the tenants for life. This merely enables a company to substitute actual capitalization for the notional capitalization produced by the section itself. The section, as we read it, produces the same result on a direct distribution of a share premium account as if the company had first gone through the formality of actual capitalization by bonus shares and then paid off the bonus shares by way of reduction of capital. Nor can we regard articles 128 and 129 of the 1948 Table A as of any substantial assistance to the argument for the tenants for life. For the purposes of those articles the distinction between a share premium account and free reserves or accumulated profits is irrelevant, inasmuch as all are equally available for the purposes of capitalization, save that a share premium account can only be applied in paying up unissued shares to be issued as fully paid bonus shares, a restriction duly recognized in the proviso to article 128. If the terms of s. 56 are concerned, as Mr. Walton submitted, with the "mechanics" of the distribution of premiums received on the issue of shares, still the "mechanics" are, in our judgment, an essential factor in determining the character as between capital and income of the sum distributed. A company, having an artificial person, can (as it has been laid down) make a distribution amongst its members (otherwise than in a winding up) in one of two ways—but only in one of two ways: that is, by a distribution of divisible profit, that is, by way of dividend; and by way of a return of capital pursuant to an order of the court upon a petition for reduction of capital in accordance with the Act. The question whether a given distribution lawfully made by a company is of the former or the latter description may thus justly be determined by reference to the method or mechanics of distribution, permitted or enjoined by the Act, which the company has adopted in regard to it; and the answer to that question must prima facie also determine the question whether the distribution is capital or income as between tenant for life and remainderman of a settled shareholding: see *per* Lord Russell in *Hill* v. *Permanent Trustee Company of New South Wales* (19).

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(18) [1949] A. C. 361.

We were referred in argument to the provisions in s. 58 of the Companies Act, 1948, as to the creation of a capital redemption reserve fund on the redemption of redeemable preference shares, which closely resemble those of s. 56, in so far as it is provided (by s. 58, sub-s. 1 (*d*)) that the provisions of the Act relating to the reduction of the share capital of a company shall, except as provided in s. 58, apply as if the capital redemption reserve fund were paid up share capital of the company with an exception (in sub-s. 5) similar to the one in s. 56, sub-s. 2, with respect to the share premium account, enabling the capital redemption reserve fund to be applied in paying up unissued shares of the company to be issued as fully paid bonus shares.

There appears to have been no case, at all events none was cited to us, in which the destination as between tenant for life and remainderman of a sum received in respect of settled shares upon a cash distribution of a capital redemption reserve fund has been considered, although s. 58 reproduces s. 46 of the Companies Act, 1929, and has thus in effect been in force for a matter of twenty-two years. The similarity between s. 58 and s. 56 in the respects here relevant can therefore throw no light on the present problem. At all events we do not see how it can be said that an application of the conclusion reached by Harman, J., and ourselves with respect to the distribution of a share premium account under s. 56 to the distribution of a capital redemption reserve fund under s. 58 would involve any impossibility or absurdity. Moreover, if any distinction is for this purpose to be drawn between a share premium account and a capital redemption reserve fund (a question which must be determined when it arises) it seems to us that, if anything, the share premium account provides the stronger case in favour of capital in any contest between tenant for life and remainderman. For, whereas a capital redemption reserve fund may have been provided out of an accumulation of ordinary income profits, a share premium account represents from first to last what is essentially a capital profit and not income in any ordinary sense of that expression; and where trustees have acquired shares for their trust at a premium, they will on their side have provided the amount of the premium out of capital moneys. A fund representing share premiums received by a company, if distributed in cash before s. 56 came into operation, would, as we have said, have been income in the hands of the recipient shareholders, notwithstanding its capital character when considered as a receipt of the company. But that was because, as the law then stood, such a fund constituted a profit available for distribution as dividend, and, except in liquidation, only capable of distribution on the ground that it was a profit so available. The rights of tenant for life and remainderman would thus have been determined in favour of the former by reference to the character of the distribution, the origin of the fund distributed being irrelevant. The effect of s. 56, however, is to make such a distribution equivalent in law to an actual return of paid up share capital and capable of being validly effected only through the medium of precisely similar reduction proceedings. It may therefore be said that s. 56 recognizes the essentially capital character of premiums received on the issue of shares, and gives effect to it by investing any distribution of the share premium account with the character of a capital distribution carried out by means of a notional reduction of paid up share capital. Thus, whether the origin of the share premium account or the mode and character of its distribution be looked at, it seems to us that as between successive interests in settled shares the claims of capital are unanswerable.

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(19) [1930] A. C. 720, 729, 730, 731, 733.

For these reasons we are of opinion that Harman, J., came to a right conclusion in this case, and that the appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Slaughter & May; Peake & Co.*

K. R. A. H.

DANCK-
WERTS, J.

1951
May 9.

In re GIBBS, DECD.
MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* INLAND REVENUE COMMISSIONERS.

[1951 G. 190.]

Will—Annuities—Residuary trust fund—Death of testator before coming into operation of Part III of Finance Act, 1949—"*Events "happening after commencement of this Part of this Act*"—*Legacy duty payable—Finance Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 47), *s.* 27.

A testator by his will, made in 1939, gave pecuniary legacies and bequeathed annuities free of duty to begin from his death. He directed his trustees to appropriate in their own names to each annuity certain sums from his personal estate, the income of each fund being primarily answerable for the annuity to which the fund was appropriated, and the capital secondarily answerable, if the income was insufficient. He bequeathed his real estate and his residuary personalty otherwise undisposed of to his trustees on trust to convert and invest them, and to pay out of the income of the investments (his "residuary trust fund") 800*l.* a year to his nephew's widow during widowhood, and to pay the rest (and, from the widow's death or re-marriage, all) of the income to the nephew's children in equal shares during their lives. Should any child die a bachelor or spinster, the trustees were to pay the part of the income of the trust fund to which that child had been entitled to the survivors in equal shares; and, should a child die married or having been married, further trusts of the capital of that part of the secondary trust fund to the income of which the child had been entitled were to become effective.

On May 17, 1940, the testator made a codicil, on December 1, 1946, he died, and, on January 30, 1947, the trustees made an appropriation to all the annuities save that of 800*l.*

On July 30, 1949, Part III of the Finance Act, 1949 (including s. 27) came into operation.

Section 27, sub-s. 1, provides that legacy duty shall not be charged on a legacy from a testator dying, or on a succession conferred, after the commencement of Part III, or on any other legacy or succession, in so far as, apart from the section, it would be payable in connexion with any event mentioned in sub-s. 2.

Sub-section 2 specifies certain events, adding to them any other event which, under the will or disposition, affects the right to the legacy or the succession or to the enjoyment of it, or changes the nature of all or of any part of the property comprised in it.

Sub-section 3 provides that, in sub-s.1, the words "payable in "connexion with any . . event" shall, in relation to legacy duty, include its being payable when the legacy is paid, delivered, retained, satisfied or discharged in connexion with the event, and that "legacy" shall include residue and share of residue.

Section 8 of the Legacy Duty Act, 1796, states how the value of an annuity is to be calculated and the duty on it charged, and provides that the duty shall be paid by four equal payments, the first to be made before or on completing payment of the first year's annuity, and the three others in like manner successively, before or on completing the successive payments of the three succeeding years' duty respectively.

The executors contended that, as the ascertainment of residue was still future at the commencement of the Act, it would be an event after the Act in connexion with which the legacies would be payable.

On a summons by the executors asking, among other things, whether legacy duty had become payable in respect of the annuities and the residuary estate in so far as they were not paid, delivered, retained, satisfied or discharged before July 30, 1949:—

Held, (1.) that, in the case of the annuities, the argument that an "event'" occurred after July 30, 1949, because duty became payable on the appropriation or retainer could not succeed, because the appropriation on January 30, 1940, caused legacy duty to become payable in respect of annuities to be calculated in accordance with s. 8 of the Legacy Duty Act, 1796; (2.) that it was not treating an annuity according to its true nature to contend that an "event" occurred on the anniversary of the testator's death in each year on which a new amount of annuity became payable and, in the case of the first four years, one set of instalments of legacy duty became payable, so that there were in each year fresh "events" within s. 27 and, after July 30, 1949, an "event" leading to exemption under s. 27; and that that argument ignored the true nature of an annuity, which accrued, not once a year, but from day to day, so that, in the present case, in view of the appropriation, the claim for exemption with regard to the annuities failed; *Scholefield* v. *Redfern* (1863) 2 Dr. & Sm. 173, applied; (3.) that the ascertainment of the residuary trust fund—to which fund alone the benefits receivable under the will related—was an administrative act and not the kind of "event" described in s. 27, which must be something affecting substantive rights; (4.) that the material event in the present case was the testator's death, which occurred before July 30, 1949, so that legacy duty would be payable in due course in connexion with the residuary estate, including the annual sum of 800*l.* given in trust for the nephew's widow.

ADJOURNED SUMMONS.

A testator by his will dated April 24, 1939, gave pecuniary legacies and bequeathed annuities, free of duty, to begin from the date of his death, and to retain the benefit of the investments appropriated to meet them as they should fall due. To each annuity he directed his trustees to appropriate in their own names certain sums out of his personal estate, the income of each such fund to be the primary fund for answering the annuity to which that fund was appropriated, and the capital of it to be the secondary fund for so doing should the income be insufficient. His real estate and the residue of his personal estate not otherwise disposed of he bequeathed to his trustees on trust for conversion and investment and to stand possessed of his residuary trust fund (the investments) on trust to pay out of the income of it 800*l*. a year to his nephew's widow so long as she remained his widow, and to pay the rest of the income, and after the widow's death or remarriage the whole of it, to the nephew's children in equal shares during their lives. On the death of any child a bachelor or spinster the trustees were to pay the part of the income of the trust fund to which that child was entitled to the survivors in equal shares; and the testator directed that there should come into operation, on the death of any child while married or having been married, certain further trusts of the capital of that part of the secondary trust fund to the income of which the child had been entitled.

On May 17, 1940, the testator made a codicil to the will; on December 1, 1946, he died, and on January 30, 1947, an appropriation was made to the respective annuities, as provided by the will, other than that of 800*l*. which was to be paid out of the residuary trust fund.

On July 30, 1949, there came into operation Part III of the Finance Act, 1949, which includes s. 27 (1).

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(1) Finance Act, 1949, s. 27, sub-s. 1: "Legacy duty and succession duty shall not be chargeable on "a legacy derived from a testator . . . "dying after the commencement of "this Part of this Act, or on a succession conferred after that commencement, nor on any other legacy or "succession in so far as the duty "would apart from this section be "payable in connexion with any such "event as is mentioned in the next "following subsection".

Sub-s. 2: "The events referred to in "the foregoing subsection are any of "the following events happening after "the commencement of this Part of "this Act, that is to say—(*a*) the "death of any person; (*b*) the determination or failure of any charge, "estate, interest or trust; (*c*) the exercise of a power of appointment; "(*d*) the making of any payment or "the application of any property, if "the duty would apart from this section be chargeable—(i) under s. 11 "of the Legacy Duty Act, 1796, or "under that section as applied by s. 32 "of the Succession Duty Act, 1853 "(which deal with benefits of uncertain amount receivable from time "to time); or (ii) under s. 25 of the "Succession Duty Act, 1853 (which "deals with premiums for the renewal "of a lease or the grant of a reversionary lease); (*e*) any other event "which, under the provisions of the "relevant will or disposition or the "rules governing the distribution of "the intestate's estate, affects the "right to the legacy or succession or "to the enjoyment thereof or which "changes the nature of the property "comprised therein or any part of that "property".

Sub-s. 3: "The reference in subsection 1 of this section to duty "being payable in connexion with an

By this summons the plaintiffs, as executors of the will and codicil, asked, among other things, whether legacy duty had become payable under the will and codicil in respect of the following, so far as the same were not paid, delivered, retained, satisfied or discharged before July 30, 1949, namely, the annuities given by the will and codicil and the residuary estate. At the date of the hearing the administration of the estate had not been

"event shall, in relation to legacy "duty, include its being payable when "the legacy is paid, delivered, retained, satisfied or discharged in "connexion with that event, and for "the purposes of this section the "expression 'legacy' includes residue "and share of residue".

Legacy Duty Act, 1796, s. 6: "And "be it further enacted, that the duties "hereby imposed shall, in all cases in "which it is not hereby otherwise "provided, be accounted for, answered, "and paid by the person or persons "having or taking the burthen of the "execution of the will or other testamentary instrument, or the adminis- "tration of the personal estate of any "person deceased, upon retainer for "his, her or their own benefit, or for "the benefit of any other person or "persons, of any legacy, or any part "of any legacy, or of the residue of "any personal estate or any part of "such residue, which he, she or they "shall be entitled so to retain, either "in his, her, or their own right or in "the right or for the benefit of any "other person or persons; and also "upon delivery, payment, or other "satisfaction or discharge whatsoever, "of any legacy, or any part of any "legacy, or of the residue of any personal estate, or any part of such "residue, to which any other person "or persons shall be entitled . . .".

Section 8: "And be it further "enacted, that the value of any legacy "given by way of annuity, whether "payable annually or otherwise, for "any life or lives, or for years or other "period of time, shall be calculated, "and the duty chargeable thereon "shall be charged, according to the "tables in the schedule hereunto annexed; and the duty chargeable on "such annuity shall be paid by four "equal payments, the first of which "payments of duty shall be made "before or on completing the payments of the first year's annuity, "and the three others of such payments of duty shall be made in like "manner successively, before or on "completing the respective payments "of the three succeeding years' annuity respectively; and the value of "any such annuity, if determinable "upon any contingency besides the "death of any person or persons, shall "be calculated without regard to such "contingency: Provided always, that "if any such annuity shall determine "by the death of any person, before "four years' payment of such annuity "shall become due and payable, then "and in such case the duty shall be "payable in proportion only to so "many payments of the said annuity "as actually accrued and became due "and payable . . .".

Section 12 (providing for calculation of duty at the appropriate rates); Proviso: "and all and every person "and persons who shall become absolutely entitled to any such legacy or "residue, or part of residue, so as to "be enjoyed in succession, shall, "when and as such person or persons "respectively shall receive the same, "or begin to enjoy the benefit thereof, "be chargeable with and pay the duty "for the same, or such part thereof as "shall be so received, or of which the "benefit shall be so enjoyed, in the "same manner as if the same had "come to such person or persons "immediately on the death of the "person by whom such property shall "have been given to be enjoyed, or in "such manner that the same shall be "enjoyed in succession".

completed, the residuary estate had not been ascertained, and no assent had been executed by the executors of the trusts of the will.

Cyril King, K.C., and *Jackson Wolfe* for the plaintiffs, the executors.

Gerald Upjohn, K.C., and *J. H. Stamp* for the Commissioners of Inland Revenue.

DANCKWERTS, J. [after stating the facts]. With regard to the annuities, other than the annual sum of 800*l.* to be paid out of the residuary trust fund, on January 30, 1947, an appropriation was made to the respective annuities as provided by the will. In the case of the annuities, therefore, the argument that an event occurred after the material date, July 30, 1949, because duty became payable on the appropriation or retainer, or whatever it may be, though they were charged in respect of the death of the testator, could not succeed, because the appropriation on January 30, 1947, had caused legacy duty to become payable in respect of annuities to be calculated in accordance with s. 8 of the Legacy Duty Act, 1796.

Mr. Jackson Wolfe, however, put forward, in the case of the annuities, an argument with which I must deal. He contended that an event occurred on the anniversary of the testator's death, on December 1 in each year, on which a new amount of annuity and, in the case of the first four years, one set of instalments of legacy duty, became payable. Accordingly, in each successive year fresh "events" occurred within the meaning of s. 27 of the Finance Act, 1949, and so, at any rate in the case of those "events", as he described them, which occurred after July 30, 1949, there was an event which caused exemption, so far as material, under s. 27 of the Finance Act, 1949. That, in my judgment, is not treating an annuity according to its true nature. An annuity accrues (at any rate since the Apportionment Act, 1870), not once a year, but from day to day. If the annuitant happens to die during one of the appropriate years, his estate does not lose the whole benefit of that year's annuity but receives a proportionate part of it. As was held by Kindersley, V.-C., in *Scholefield* v. *Redfern* (2), the gift in the will of an annuity of 400*l.* a year is not a gift of a series of legacies of 400*l.* payable at the end of each year. In my judgment, therefore, that argument of Mr. Jackson Wolfe ignored the true nature of an annuity.

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(2) (1863) 2 Dr. & Sm. 173.

As to s. 8 of the Legacy Duty Act, 1796, and the proviso for relief from further legacy duty or part thereof in the case of the annuitant's dying before the expiration of four years from the death of the testator, those were simply provisions for relief in what was conceived to be hardship, and, in my view, do not affect the true construction of the section. Accordingly, in view of the appropriation made before July 30, 1949, in the case of the annuities, when the matter was finished, so far as the annuities were concerned, for the purpose of tax, in my judgment that claim to exemption under s. 27 of the Finance Act, 1949, with regard to the annuities must fail.

I turn now to the trusts of the residuary trust fund, including the provision for the payment of 800*l.* a year to the widow of the testator's nephew. The argument against the claim of the Inland Revenue was that there cannot be said to be any right or claim to the residuary estate or to the enjoyment of it until the residuary estate is ascertained by process of administration. Until that occurs all that the persons interested in the residuary estate have, according to law, is a right to have the estate of the testator, or it may be in the case of intestacy the estate of the intestate, duly administered. Therefore, when finally the residuary estate is ascertained, and still more when the executors assent to the trusts of the residuary estate and, therefore, put off the character of executors and assume that of trustees, with the consequences which ensue, as, for instance, in *Attenborough* v. *Solomon* (3), there is a change in the rights, title and position of the persons beneficially interested in the residuary estate. That has been laid down by the House of Lords and other courts in a series of cases, notably *Sudeley* v. *Attorney-General* (4), *Barnardo's Homes* v. *Special Income Tax Commissioners* (5), and *Corbett* v. *Inland Revenue Commissioners* (6), from which it appears that until the residuary estate has been ascertained by administration the beneficiaries entitled under the trusts of the will cannot claim that they have any right to any particular assets forming part of the testator's estate, or that the income which the executors may acquire in respect of the residuary estate is in any way the income of the beneficiaries, at any rate for the purposes of income tax. Expressions have been used by certain of the learned Lords dealing with the matter which go as far as saying that until ascertainment the residuary estate has no existence. Therefore, it is said on behalf of the executors in the present case that until ascertainment there is no right to the residuary estate, and that the ascertainment of the residuary estate is an "event" within s. 27 of the Finance Act, 1949, and that consequently there is an "event" which happened after the appropriate date, so that the section applies to the whole of the residuary estate and the beneficial interests which arise under it.

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(3) [1913] A. C. 76.

(4) [1897] A. C. 11.

(5) [1921] 2 A. C. 1.

(6) [1938] 1 K. B. 567.

That argument receives some support from the will in the present case, where the whole of the real estate of the testator and the residue of his personal estate is given on trust for conversion, then to pay the liabilities and legacies, and, finally, to invest. Then, and not until then, is there created under the trusts of the will the "residuary trust fund", and the benefits under the material clauses in the will relate only to that residuary trust fund and to nothing else. Therefore, it is said, until the residuary trust fund is ascertained there has not occurred the event on which the beneficiaries become beneficially entitled to their interests.

That argument seemed very attractive to me at one time; but, on examining this section carefully, in my judgment, it is not that kind of event which is being described. First, sub-s. 2, which defines the events referred to in sub-s. 1, enumerates a number of things which are not administrative events, though whether the term which was used by Mr. Upjohn in his argument, which was "actual events", is quite accurate I am not sure; but they are "events" of a kind different from the mere completion of the administration of the estate.

Again, in sub-s. 2, para. (*e*), which is the most important one for the present purpose, the words are, "any other event which, "under the provisions of the relevant will or disposition or the "rules governing the distribution of the intestate's estate, affects "the right to the legacy or succession or to the enjoyment thereof "or which changes the nature of the property comprised therein "or any part of that property". It is, I think, evident, as was contended by Mr. Upjohn, that that sub-paragraph is referring to matters which are not administrative but which affect the beneficial interests of persons concerned, either under the relevant will or under the rules governing the distribution of an intestate's estate.

It was hardly necessary to cite authority for the proposition that in the case of the distribution of an intestate's estate there is a distinction between the rules governing the distribution which may depend on one set of laws and the rules which govern the administration of the estate in a particular country. The distinction in the case of an intestate's estate in the paragraph in question must, I think, be deliberate. I think that the references to the provisions of the relevant will or disposition are, again, references to the beneficial provisions in the will or disposition and do not include the administrative requirements and rules which the law imposes with regard to a particular estate or trust. Notwithstanding the argument put forward by Mr. King that there must be read into the will all that the law would apply or imply, apart from that which is set out expressly in the will, it seems to me that the title of the residuary legatee to a residuary estate remains the same both before and after the completion of administration, notwithstanding that it is not until it is complete that he can say that any particular asset or any particular income is his, and not merely part of the general estate of the testator. Sub-s. 3, which refers back not to sub-s. 2, which deals with the events, but to sub-s. 1, seems to show that the argument put forward by Mr. Upjohn that the administrative act was not an event within the meaning of the sub-section is plainly right. It would have been so easy for the legislature, if they had so intended, to say that the reference to duty being payable in connexion with an event shall be a reference to duty being payable in connexion with the payment, delivery, retainer, satisfaction or discharge of the legacy. That would have brought in the rules about payment in the sections of the Legacy Duty Act, 1796. That, however, is not what the sub-section provides. The sub-section refers to the duty's being payable in connexion with the event. Then, when it deals with delivery and retainer, the words are, " shall, in relation to legacy duty, include its being payable " when the legacy is paid, delivered, retained, satisfied or dis- " charged in connexion with that event ". In other words, the event is something different from the delivery, retainer, satisfaction, discharge or payment.

Accordingly, that sub-section does not, in my judgment, support the contentions which have been put forward on behalf of the plaintiffs, the executors. In the result, therefore, I conclude that the material event in the present case is the death of the testator, which occurred before July 30, 1949. It seems to me, therefore, that legacy duty will be payable in connexion with the residuary estate in due course, including the annual sum of 800*l.*

given on trust for the widow of the testator's nephew, and that the claim to exemption is not made out.

Declaration accordingly.

Solicitors: *Arthur W. Coleman; Solicitor of Inland Revenue.*

K. R. A. H.

DANCKWERTS, J.
1951
GIBBS, DECD., *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* INLAND REVENUE COMMISSIONERS.

LEEMAN *v.* STOCKS.

[1950 L. 2444]

ROXBURGH, J.
1951
April 16, 17.

Vendor and Purchaser—Sale by public auction—Memorandum of agreement—Date for completion inserted before sale—Vendor's initials and surname inserted by auctioneer also before sale—Purchaser's name added by auctioneer after sale—Signature over stamp by purchaser after sale at auctioneer's request—Allegation by vendor of no contract—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

At a public auction sale certain premises were included by a vendor who was not present, and whose solicitor was not present, at the sale. The auctioneer borrowed from a solicitor who was present but was not interested in the premises in question a form for sale by private treaty which that solicitor edited, putting in the date for completion, September 16, 1950. The auctioneer put in the vendor's initials and surname, all this being done before the sale.

The plaintiff being the highest bidder, the auctioneer put in his name and address as purchaser, the description and price of the premises, and the purchaser's solicitor's name. He then asked the purchaser to sign the document, which the purchaser did over a stamp. The auctioneer did not sign it, nor did the purchaser ask him to do so. The auctioneer took the document away, saw the vendor and told him of the sale, but did not show him the document. The vendor did not express dissatisfaction. Neither he nor the auctioneer "signed" the document in the ordinary sense.

On September 6, 1950, the vendor's solicitor told the purchaser's solicitor that there was no contract. On October 9 the purchaser brought against the vendor an action for specific performance which came on for trial on April 16, 1951. The vendor by his defence denied the agreement, contending that there was no memorandum in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925. The purchaser in his reply contended that the vendor or, alternatively, his agent and solicitor, had orally ratified the agreement. At the hearing, the auctioneer said in evidence that he had required the purchaser's signature so that the purchaser might be bound by the contract.

Held, (1.) that the auctioneer, who was the agent of both parties, intended the document to be binding on the vendor; (2.) that he had authority to put before the purchaser, as he did, a document containing the name of the vendor as that of the party with whom the contract had been made, so as to put before the purchaser the terms of the contract for him to agree them in writing, which the purchaser did; (3.) that, although the vendor's name was not in the first instance inserted with reference to a contract with the purchaser, when the document was put before the purchaser for signature, the vendor's name was in it in relation to a contract which had come into being and was binding, but was unenforceable without a memorandum satisfying s. 40 of the Law of Property Act, 1925; (4.) that, when the auctioneer obtained the purchaser's signature, neither he, acting on the vendor's behalf, nor the purchaser intended any other signature ever to be added, but that both intended the document with the purchaser's signature to be the final written record of the contract; *Schneider* v. *Norris* (1814) 2 M. & S. 286, and *Evans* v. *Hoare* [1892] 1 Q. B. 593 applied; (5.) that the evidence outside the language of the agreement, which was conclusive if admissible, was admissible because, although the form of the agreement was important, the circumstance that a sufficient memorandum would not be held to be existing in the face of a document in a form such as that in the present case was neither conclusive nor paramount if there were evidence to the contrary which the court accepted; (6.) that the court could investigate the circumstances to see if the document came into being as a perfect instrument and, if on the evidence it found that it did, was not prevented from so holding by any impediment in law; *Hubert* v. *Treherne* (1842) 3 M. & G. 743 (sub nom. *Hubert* v. *Turner* (1842) 4 Scott N. R. 486) applied, and accordingly there was a sufficient memorandum to bind the vendor.

ACTION.

The vendor included premises in a public auction sale advertised for 7 p.m. on August 16, 1950. The vendor's solicitor was not present at the sale. The auctioneer borrowed from another solicitor, who was not acting for any of the parties but was interested in another property, a form for sale by private treaty, with a number of provisions inapplicable to the vendor's property. That solicitor edited the document and put in it the date for completion, September 16, 1950. The auctioneer inserted as the vendor's name, " W. E. Stocks ", all these things being done before the sale which began shortly after 7.30.

The plaintiff made the highest bid—1,140*l*. The auctioneer then inserted in the document the highest bidder's (*i.e.*, the plaintiff purchaser's) name and address, a description of the premises and the price. He then obtained from the purchaser his solicitor's name and added it to the document. The document then read: "Memorandum of agreement made this 16th "day of August, 1950, between W. E. Stocks (the vendor) of the "one part and Frank Leeman . . . (the purchaser) of the other "part whereby it is agreed as follows: (1.) The vendor will sell "and the purchaser will purchase [the property] for the sum of "1,140*l*. . . . (2.) The property is sold subject to the common "form conditions of sale of the Lincolnshire Incorporated Law "Society . . . so far as they are not inconsistent with these "conditions. (3.) The vendor is selling as absolute owner. . . . "(7.) Completion . . . shall take place on the 16th day of "September, 1950. . . . As witness the hands of the parties "hereto the day and year first before written. Purchaser's "Solicitor, R. A. C. Symes & Co., Scunthorpe".

At the auctioneer's request, the purchaser signed the document over a stamp. The auctioneer did not sign it, nor did the purchaser ask him to sign it or any counterpart of it. The auctioneer kept and took away the document, saw the vendor, and told him that he had sold the property for 1,140*l*. The vendor did not express dissatisfaction. The auctioneer did not produce the document to the vendor. Asked, during the hearing of the action, why he had required the purchaser's signature, he answered that it was in order that the purchaser should be bound by a contract. Neither the auctioneer nor the vendor "signed" the document in the ordinary sense of the word.

On September 6, 1950, the vendor's solicitor informed the purchaser's solicitors that there was no contract. On October 9 the purchaser brought an action against the vendor for specific performance.

On April 16, the action came on for trial. The vendor, by his defence, denied the agreement and contended that there was no memorandum in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925. In his reply, the purchaser alleged that the agreement had been orally ratified by the vendor; or, alternatively, by his agent and solicitor, on August 16 and 17, 1950, respectively.

Viscount Hailsham for the purchaser. The contention that there is no agreement is ill-founded, for an oral contract came into being at the moment when the property was knocked down to the purchaser. Equally baseless is the contention that there is not a memorandum sufficient to satisfy s. 40 of the Law of Property Act, 1925. The court has the auctioneer's own admission that he desired the purchaser's signature " in order that the " purchaser should be bound by a contract ". There is, however, far more than that. The auctioneer was the agent for both parties. Thus, the vendor, who did not demur when the auctioneer told him of the sale, himself, by his agent the auctioneer, obtained the purchaser's signature. The auctioneer did no more than he was authorized to do. He put before the purchaser this document in which was the name of the vendor as the person who had put the property up for sale and with whom, therefore, the purchaser, having bought the property, had a contract, and the purchaser signed it. Thereupon, it became a sufficient memorandum within s. 40 of the Law of Property Act, 1925: see *Schneider* v. *Norris* (1); *Evans* v. *Hoare* (2). Neither the auctioneer nor the purchaser intended or contemplated that any other signature should be added. The document was to be the memorandum of the contract just as it was, with the vendor's initials and surname written out at the top and the purchaser's signature over a stamp.

Accordingly, it is proper that the court should decree specific performance.

G. M. Parbury for the vendor. The auctioneer wrote in the vendor's surname and initials before the auction. He did not do so, and could not have done so, knowing that this particular purchaser would buy the property. Assuming that the property was sold, there would of course necessarily be a purchaser, and it was solely in the expectation that it would be sold that he wrote in the vendor's name.

Also, in *Evans* v. *Hoare* (3) what the court held to be a sufficient memorandum was an informal document, really a letter, beginning with the word " Gentlemen ", and with the words " Yours obediently " before the plaintiff's signature. Here the document is formal and, since it is not signed by the vendor, does not satisfy s. 40 of the Law of Property Act, 1925. By its very terms it contemplates that both parties shall sign it. The words are " As witness the hands of the parties hereto ". Neither the signature of the vendor nor that of his agent was appended. Accordingly,." as witness the hands of the parties

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(1) (1814) 2 M. & S. 286.
(2) [1892] 1 Q. B. 593.
(3) [1892] 1 Q. B. 593.

"hereto" is inaccurate. To accept the contention for the purchaser that both he and the auctioneer, as the vendor's agent, intended the document to be the memorandum of the contract would be to go far beyond what was decided in *Evans* v. *Hoare* (4).

Viscount Hailsham in reply. That the auctioneer, when he wrote in the vendor's surname and initials, could not know who was going to be the purchaser is immaterial. The point is that when the purchaser, at the auctioneer's request, signed, there was already a contract. Therefore, the sole question for the court is whether the document is a memorandum sufficient to satisfy s. 40 of the Law of Property Act, 1925.

It is a formal document only in the sense that it started life, so to speak, as a blank form for sale by private treaty. First, the solicitor who supplied it edited it and put in the date for completion. Next, the auctioneer added the vendor's name and initials before sale and the purchaser's name and his solicitor's name after it; so that, however formal the document may have been per se, it was treated in a most informal manner.

True, it was not "signed" by both parties; but it was certainly intended by them, and by the auctioneer, to be a sufficient memorandum. All the evidence shows that. The vendor cannot set up "no contract" when his agent, the auctioneer, has said in evidence that the whole object of obtaining the purchaser's signature was to bind him by a contract. All these matters the court can take into consideration as showing that there was a contract. It is not prevented from doing so by the fact that the vendor did not sign. As it stands, and without any further evidence, the document is not a sufficient memorandum. The further evidence is, however, available for the court and is conclusive in favour of the purchaser. It is evidence which the court will accept, and therefore the court will not allow the absence of the vendor's signature to prevent it from finding that the document satisfies s. 40 of the Law of Property Act, 1925, and pronouncing a decree of specific performance: *Hubert* v. *Treherne* (5).

ROXBURGH, J. The question is whether when the vendor, by his agent the auctioneer, procured the purchaser to sign the document to bind the purchaser by a contract, he was not by his same agent, the auctioneer, recognizing the writing of his own name which was written at the beginning of the document as the affixing of his mark to the document.

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(4) [1892] 1 Q. B. 593.

(5) (1842) 3 M. & G. 743; 4 Scott N. R. 486.

There is authority on this subject. First, there is *Schneider* v. *Norris* (6). In the course of his judgment in that case Lord Ellenborough, C.J., said: "I cannot but think that a construc-"tion, which went the length of holding that in no case a "printing or any form of signature could be substituted in lieu "of writing, would be going a great way, considering how many "instances may occur in which the parties contracting are unable "to sign. If indeed this case had rested merely on the printed "name, unrecognized by, and not brought home to the party as "having been printed by him, or by his authority, so that the "printed name had been unappropriated to the particular con-"tract, it might have afforded some doubt, whether it would not "have been entrenching upon the statute to have admitted it. "But here there is a signing by the party to be charged by words "recognizing the printed name as much as if he had subscribed "his mark to it, which is strictly the meaning of signing, and by "that the party has incorporated and avowed the thing printed to "be his; and it is the same in substance, as if he had written "Norris & Co. with his own hand. He has by his handwriting "in effect said, I acknowledge what I have written to be for the "purpose of exhibiting my recognition of the within contract".

Next is *Evans* v. *Hoare* (7), in many ways nearer to the present case. The plaintiff had entered the defendants' service as ledger clerk at a certain salary. The report states: "On "February 19, 1890, the following document was drawn up by a "clerk of the defendants named Harding, who was acting with "the defendants' authority, and presented by Harding to the "plaintiff for signature, and signed by the plaintiff. '5 Camp-"'bell Terrace, Cannhill Road, Leytonstone, E., February 19, "'1890, Messrs. Hoare, Marr & Co., 26, 29 Budge Row, London, "'E.C.'"—they were the defendants—"'Gentlemen, In con-"'sideration of your advancing my salary to the sum of 130*l*. per "'annum, I hereby agree to continue my engagement in your "'office for three years, from and commencing January 1, 1890, "'at a salary at the rate of 130*l*. per annum aforesaid, payable "'monthly as hitherto. Yours obediently, George E. Evans'", that was the plaintiff.

The question arose whether there was a sufficient memorandum in writing to charge the defendants. The case came on in the Mayor's Court and went up to a Divisional Court on appeal. Denman, J., said (8): "In fact, the document was "drawn up by one Harding, who was authorized by the defen"dants to draw it up and take it, in its present shape in all "other respects, for the plaintiff's signature. It appears to me "that the case falls within the principle of the decisions cited in "favour of the plaintiff, especially *Schneider* v. *Norris* (9)", and he mentioned two other cases. Then he said: "Nor can I "doubt that both Harding and the defendants intended that this "document, when signed by Evans, should be the final memo"randum of the contract binding upon the defendants as well "as the plaintiff". Likewise, in the present case I have no doubt that the auctioneer, who was the agent of both parties, intended this document to be the final memorandum of the contract, binding the vendor and the purchaser.

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(6) 2 M. & S. 286, 288.

(7) [1892] 1 Q. B. 593.

Denman, J., continued: "Mr. Witt contended that the cases "relied upon were all cases where the document was sent out "by the person charged. I do not think that this is necessary, "if by the expression 'sent out' is meant more than submitted "for signature to the other party. If the party sued has autho"rized an agent to lay before the party suing a document "containing his name in full as that of the party with whom "the contract is made, so as to announce to the other party that "they are offering him certain terms if he will agree to them in "writing, and he thereupon signs, I think that there is a "sufficient 'agreement or memorandum thereof, signed by a "'party authorized thereunto' within s. 4 of the Statute of "Frauds".

Premising, as I do, that writing "W. E. Stocks" is as good as writing the vendor's full Christian names and surname, I think that that passage from Denman, J.'s judgment exactly applies to the facts in the present case. The auctioneer had authority to lay before the purchaser a document containing the vendor's name in full as that of the party with whom the contract is made. The words "so as to announce to the other party that "they are offering him certain terms if he will agree to them in "writing" do not quite fit, for in the present case, the contract had already been made, but I can see no difference there; "and "he thereupon signs". That is what the purchaser did.

Cave, J., said (10): "I am of the same opinion. . . . "The real point to be decided is, whether the document in

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(8) [1892] 1 Q. B. 593, 596.
(9) 2 M. & S. 286.
(10) [1892] 1 Q. B. 593, 597.

"question is a memorandum or note in writing of an agree-"ment signed by the party to be charged, or by some other "person lawfully authorized, within the meaning of s. 4 of "the Statute of Frauds. The Statute of Frauds was passed "at a period when the legislature was somewhat inclined "to provide that cases should be decided according to fixed "rules, rather than to leave it to the jury to consider the "effect of the evidence in each case. This, no doubt, arose to "a certain extent from the fact that in those days the plaintiff "and the defendant were not competent witnesses. Several "cases were referred to in the course of the argument, which it "was contended could not be distinguished from the present "case; but it is difficult to ascertain whether the circumstances "of the different cases are the same, or rather whether the "circumstances in which the different cases are similar or dis-"similar are material to the point under consideration. No "doubt, in attempting to frame a principle, one is obliged to "depart somewhat from the strict lines of the statute. I am of "opinion that the principle to be derived from the decisions is "this. In the first place, there must be a memorandum of a "contract, not merely a memorandum of a proposal".

Here there is no doubt about that, because the oral contract was concluded by the fall of the hammer. The only question is whether there is a sufficient memorandum to satisfy s. 40 of the Law of Property Act, 1925. "Secondly", said Cave, J., "there "must be in the memorandum, somewhere or other, the name "of the party to be charged, signed by him or by his authorized "agent. Whether the name occurs in the body of the memo-"randum, or at the beginning, or at the end, if it is intended "for a signature there is a memorandum of the agreement within "the meaning of the statute. In the present case it is true that "the name of the defendants occurs in the agreement; but it is "suggested on behalf of the defendants that it was only put in "to show who the persons were to whom the letter was addressed. "The answer is that there is the name, and it was inserted by "the defendants' agent in a contract which was undoubtedly "intended by the defendants to be binding on the plaintiff; and, "therefore, the fact that it is only in the form of an address "is immaterial."

Mr. Parbury sought to escape from the ambit of those decisions by submitting, first, that the vendor's name was not in the first instance inserted with reference to a contract with the purchaser. True, it was not. It was inserted before the auction and before the auctioneer knew who would be the highest bidder. It was inserted in anticipation of the result of the auction sale, but that seems to me to be a distinction without a difference. When the document was put before the purchaser for signature the name was in it in relation to a contract between the purchaser and the vendor which had then come into existence and was a binding contract, though without a memorandum to satisfy the Statute of Frauds it would not be actionable.

Secondly, Mr. Parbury pointed out that the letter in *Evans* v. *Hoare* (11) was an informal document, whereas the document in this case is formal. That may be true, but, although it was formal, the auctioneer used it with great informality.

The point, however, which has given me much ground for reflection, is Mr. Parbury's next point, that the document contemplates by its own terms that it should be signed by both parties. That is quite true if the document is regarded in isolation, but it is equally certain that when the auctioneer obtained the purchaser's signature, neither the purchaser nor the auctioneer, acting on behalf of the vendor, ever intended any other signature to be added. It was the intention of both the purchaser and the vendor's agent, the auctioneer, that this should be the final written record of the contract.

Mr. Parbury, however, contended that, by so finding the facts, I am extending the ambit of *Evans* v. *Hoare* (11) to an unwarranted extent. I do not agree. I find support for my conclusion in *Hubert* v. *Treherne* (12). The plaintiff came to an arrangement with the defendants to convey certain coal for them—they were a gasworks—for a certain consideration. That was an oral arrangement. It is stated (13): "A draft of "articles of agreement was accordingly prepared by order of the "directors of the company, and the following minute was entered "in their books:—'2nd of April, 1839. The agreement between "'the company and Mr. Thomas Hubert, for carrying our coals "'from ships in the Pool to Thames Bank Wharf, for a period "'of three years was read and approved, and a fair copy thereof "'directed to be forwarded to Mr. Hubert'". The articles were as follows: "Articles of agreement made, concluded, and fully "agreed upon, this 25th day of March, 1839, between Thomas

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(11) [1892] 1 Q. B. 593.

(12) (1842) 3 M. & G. 743; and sub nom. *Hubert* v. *Turner* (1842) 4 Scott N. R. 486.

(13) 3 M. & G. 743, 749.

"Hubert of Millbank Street, in the city of Westminster, lighterman, of the one part, and Edmund Treherne, Walter Hawkins, "and Nathaniel Saxon, trustees and directors of The Equitable "Gas Light and Coke Company, of the other part". Then there is a lengthy formal draft, which ends: "And for the due performance of this agreement, each of the said parties hereto, bindeth "and bind himself and themselves unto the other and others of "them, by these presents. As witness our hands". Then it is stated: "These articles were not subscribed by the plaintiff or "by the defendants, or by any other person", but a fair copy was handed to Mr. Hubert. But, for some reason which is not material to the present case, the court was not satisfied, notwithstanding the minute which I have read, that the handing of the fair copy to the plaintiff was authorized.

The position in *Hubert* v. *Treherne* (14) was at once like and unlike the position in the present case. So far as the form of the agreement was concerned the resemblance is close. Plainly, in that case the agreement per se contemplated signature by both parties. Plainly, in the present case the agreement per se likewise contemplates signature by both parties. But there is this important difference, that in *Hubert* v. *Treherne* (14) there was no evidence outside the language of the agreement. Here there is evidence which is, in my judgment, quite conclusive, if admissible. I think there is no doubt that *Hubert* v. *Treherne* (14) is an authority that evidence is admissible and that, while the form of the agreement is a matter of such importance, that if there is no other evidence a memorandum would not be held to be in existence in the face of a document in such a form, that authority does not treat that important circumstance as conclusive, or, indeed, as paramount if there is evidence to the contrary which the court accepts.

The judgments are short. Tindal, C.J., said (15): "To hold "that the mere introduction of the names of the parties was sufficient, would be almost to repeal the statute. Suppose this "agreement had been prepared not by the secretary of the company, but by their attorney; could it have been contended that "the insertion by him of his clients' names would have been a "signature within the statute? Yet I am not aware that the "power of an attorney differs from that of a secretary or "any other person who may be employed to prepare such an

(14) 3 M. & G. 743; 4 Scott N. R. 486.

(15) 3 M. & G. 743, 753.

" instrument. Then look at the form of these articles of agree- " ment, which conclude thus: ' As witness our hands '. These " words evidently show that the names of the contracting parties " were meant to be subscribed, and that it was not intended that " the insertion of the names in the body of the instrument should " operate by way of signature ". If that were all, no doubt that decision would greatly assist the vendor.

Coltman, J., however, said (16): " It is very important that " this statute should not be frittered away. Here, it appears " that it was intended that the signature of the parties should be " affixed. This differs from the case of a bill of parcels delivered " out in the usual manner as a complete and perfect instrument. " It is said the parties treated the articles of agreement as a " perfect instrument ". Therefore, he plainly recognizes that evidence of that matter is admissible. He continues: " It is not " certain that the plaintiff saw the articles; and there was no " sufficient evidence of any authority to give out the copy on " behalf of the directors ". So that, plainly, he might have reached a different conclusion if the plaintiff had seen the articles and there was conclusive evidence of authority to give out the copy on behalf of the directors.

Then, again, Erskine, J., was even more explicit. He said (16). " It does not appear that these articles of agreement were signed " by the defendants, or by an agent thereunto lawfully authorized " by them. We cannot help seeing that it was intended that " the signature of the parties should be added. I am not, " however, prepared to say that if it had been shown that there " was authority to give out the fair copy of the articles, the " names inserted at the commencement of the instrument would " not have been sufficient. But there was no evidence that the " company had issued the instrument as a perfect agreement. " It was not shown that the secretary had any authority from " the directors to transmit the fair copy to the plaintiff. There " was therefore no evidence of an agreement in writing signed " ' by the party to be charged or by some other person by him " ' thereunto lawfully authorized ' ".

That seems to me to make it clear that the court can investigate the circumstances to see whether the document came into being as a perfect instrument, and that, if, on the evidence, it finds that it did, it is not prevented from so holding by any impediment in law.

(16) 3 M. & G. 743, 754.

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Accordingly, I hold that there is a memorandum sufficient to bind the vendor, and I make the usual decree for specific performance in a purchaser's action.

Judgment for the plaintiff.

Solicitors: *Joynson-Hicks & Co., for R. A. C. Symes & Co., Scunthorpe; Sharpe, Pritchard & Co., for E. D. Tyssen-Drakes, Caister.*

K. R. A. H.

DANCKWERTS, J.
1951
June 11; 18.

Affirmed. [1952] 1 Ch. 138

In re LOVE (J. W.).

Ex parte THE OFFICIAL RECEIVER. TRUSTEE OF THE PROPERTY OF THE BANKRUPT *v.* KINGSTON-ON-THAMES COUNTY COURT REGISTRAR.

[612 of 1949.]

Bankruptcy—Judgment creditor—No notice of act of bankruptcy—Completion of execution by seizure and sale before making of receiving order—Application by trustee in bankruptcy for repayment of part of proceeds of sale—Refusal of application—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 37, 38, 40.

By s. 40, sub-s. 1, of the Bankruptcy Act, 1914: "Where a "creditor has issued execution against the goods or lands of a "debtor . . . he shall not be entitled to retain the benefit of the "execution . . . against the trustee in bankruptcy of the debtor, "unless he has completed the execution . . . before the date of the "receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of "any available act of bankruptcy by the debtor".

By sub-s. 2: "For the purposes of this Act, an execution against "goods is completed by seizure and sale. . . ."

By sub-s. 3: "An execution levied by seizure and sale on the "goods of a debtor is not invalid by reason only of its being an "act of bankruptcy, and a person who purchases the goods in good "faith under a sale by the sheriff shall, in all cases, acquire a "good title to them against the trustee in bankruptcy".

The Minister of National Insurance obtained against the debtor a judgment for 60*l.* 7*s.* 3*d.*, being arrears of contributions, and obtained a warrant of execution, the costs of execution being 1*l.* 6*s.* 0*d.*, making a total of 61*l.* 13*s.* 3*d.* The debtor had previously been ordered to pay 10*l.*, being the amount of fines imposed on him by the county court for contempt. A month after the judgment for the debt and the issue of the warrant, the registrar of the county court, who was the high bailiff and so the officer in charge of execution, seized the debtor's household furniture and sold it for 101*l*. 15*s*. 0*d*., out of which he paid the 61*l*. 13*s*. 3*d*. to the Minister and, by virtue of s. 170 of the County Courts Act, 1934, kept the 10*l*. the amount of the fines. Later the debtor was adjudicated a bankrupt, and the official receiver, as trustee in the bankruptcy, asked the Minister to repay the 61*l*. 13*s*. 3*d*., which he did, and the registrar to repay the 10*l*., which he would not.

On a motion by the trustee in the bankruptcy for a declaration that, at the date of the execution, the debtor's goods and chattels were vested in him as trustee, and for an order that the registrar should pay to him, as trustee, the 10*l*. as part proceeds of the sale:—

Held, (1.) that, as s. 40 was one of a group of sections bearing the description "effect of bankruptcy on antecedent and other "transactions", the correct view, which gave coherency to the provisions of the Act in accordance with that description, was that s. 40 was not wholly restrictive, and that a creditor who had received payment by virtue of an execution duly completed in accordance with s. 40 was entitled to rely on s. 40 and was not affected by the general provisions of ss. 37 and 38; (2.) that, accordingly, the trustee was not entitled to demand payment of the 10*l*. received by the registrar. *In re Andrew* [1937] Ch. 122; *In re O'Shea's Settlement* [1895] 1 Ch. 325, and *Wild* v. *Southwood* [1897] 1 Q. B. 317 considered.

MOTION.

On September 8, 1949, the debtor committed an act of bankruptcy by failing to comply with a bankruptcy notice. On November 11, 1949, a petition was presented. On December 14, 1949, a receiving order was made, and on January 5, 1950, the debtor was adjudicated a bankrupt. All these matters were in the High Court.

On October 10, 1949, judgment was entered in Kingston-on-Thames County Court for the Minister of National Insurance against the debtor for 60*l*. 7*s*. 3*d*., being arrears of contributions due from the debtor. At the same time there was granted to the Minister a warrant of execution, the costs of the execution being 1*l*. 6*s*. 0*d*. and the total sum therefore 61*l*. 13*s*. 3*d*. On October 4, 1949, the debtor had been ordered to pay 10*l*., the amount of the fines imposed on him by the county court for contempt.

On November 4, 1949, the registrar of the county court (who was also the high bailiff and so the officer in charge of execution) seized the debtor's household furniture under warrants of execution dated October 17, 1949. On November 15, 1949, he sold it for 101*l*. 15*s*. 0*d*., out of which he paid the judgment debt to the judgment creditor and, by virtue of s. 170 of the County Courts Act, 1934, retained the 10*l*. amount of the fines.

The official receiver asked the Minister to repay the 61*l*. 13*s*. 3*d*., which the Minister did. He asked the registrar to repay the 10*l*., which the registrar refused to do.

By this motion the official receiver, as trustee of the debtor's property, asked for (1.) a declaration that, at the date of the execution levied by the registrar on the debtor's purported goods and chattels, those goods and chattels were vested in him as trustee; (2.) an order that the registrar should pay to the trustee the sum of 10*l*., part proceeds of the sale of the goods which the registrar had converted; (3.) an order that the registrar should pay to the trustee the trustee's costs of the motion, to be taxed; and (4.) such further or other order as to the court should seem just.

Muir Hunter for the trustee. That the debtor's goods and chattels were, at the date of the execution, vested in the trustee is clear from s. 37, sub-s. 1, of the Bankruptcy Act, 1914, which concerns the relation back of the trustee's title, and from s. 38 of the Act, which shows what property of a bankrupt is divisible among his creditors (1). Here, the trustee's title relates back to September 8, 1949, when the debtor failed to comply with a bankruptcy notice. Whether, on November 4 and 15, 1949—the dates respectively of the seizure and the sale—the furniture was or was not the debtor's property, it must be treated as having then been in law the property of the trustee. The seizure and sale must therefore have been ineffective, so that s. 40, sub-s. 1, does not justify the registrar's retaining the 10*l*. Once there has been adjudication, the creditors are entitled to have the debtor's property distributed in accordance with s. 18 of the Act. That is the policy of the bankruptcy legislation, and it cannot be carried out if a judgment creditor is allowed to avail himself of s. 40 as is sought to be done in the present case.

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(1) Bankruptcy Act, 1914, s. 37, sub-s. 1: "The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition . . . ".

Section 38: "The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars:—(*a*) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge . . .".

An early enactment against transactions to defraud creditors was the statute 13 Eliz. c. 5, passed in 1571. It is described in the preamble as being "for the avoiding and abolishing of . . . "fraudulent . . . gifts, grants, alienations, conveyances . . .", and the wording of s. 1 is "Be it therefore declared, ordained "and enacted, that . . . every . . . gift, grant, alienation . . . "and conveyance of lands, tenements, hereditaments, goods and "chattels, or of any of them . . . shall be from henceforth "deemed and taken (only as against that person or persons, his "or their heirs, successors, executors, administrators and assigns ". . . whose actions, suits, debts, accounts, damages, penalties, "forfeitures, heriots, mortuaries and reliefs, by such . . . fraudu- "lent devices and practices as [is] aforesaid, are, shall or might "be in any wise . . . defrauded) to be clearly and utterly void ". . .". One effect of the Act was that, as soon as an act of bankruptcy had been committed, the one who had committed it could no longer deal with his property just as he liked to the detriment of his creditors.

True, s. 95 of the Bankruptcy Act, 1869, protected certain transactions, i.e., made them "valid, notwithstanding any prior "act of bankruptcy". The Bankruptcy Act, 1883, however, does not contain any such provision; and neither s. 45 of the Act of 1883 nor s. 40 of the Bankruptcy Act, 1914 (the corresponding section), "protects" the creditor. All that those two sections do is to provide what he may not do unless he has fulfilled a certain condition. It has been held that a charging order under s. 14 of the Judgments Act, 1838, on stock or shares or money in court belonging to a judgment creditor is not a "transaction" protected by s. 49 of the Bankruptcy Act, 1883, corresponding to s. 45 of the Bankruptcy Act, 1914, which concerns the protection of bona fide transactions without notice: *In re O'Shea's Settlement* (2). That decision was followed in *Wild* v. *Southwood* (3), where Vaughan Williams, J., held that a charging order under s. 23 of the Partnership Act, 1890, on a judgment debtor's interest in a partnership, being a proceeding in invitum, was not a "transaction" protected by s. 49 of the Bankruptcy Act, 1883. Vaughan Williams, J., also took the view that s. 45 of the Act of 1883 was "restrictive" and s. 49 "protective". As s. 45 corresponds with s. 40 of the Act of 1914, the position is that s. 40 is "restrictive".

(2) [1895] 1 Ch. 325.

(3) [1897] 1 Q. B. 317.

Also, in *In re Pollard* (4) it was held that the issue of a writ of sequestration to enforce an order for the payment of a debt into court, coupled with the receipt of money of the debtor by the sequestrator, did not of itself make the creditor a secured creditor within the meaning of the Act of 1883; and it was held also that the money paid into court had passed to the trustee as part of the property of the debtor divisible among his creditors.

In the present case, the 10*l.*, being the amount of fines for contempt of court, is a debt due to the Crown. Section 151 of the Bankruptcy Act, 1914, however, provides: " Save as provided " in this Act, the provisions of this Act relating to the remedies " against the property of a debtor . . . shall bind the Crown ". That section was considered in *In re H. J. Webb & Co. (Smithfield, London) Ld.* (5). That case concerned companies' winding up, and the Court of Appeal held that the Crown's prerogative right in a winding up to payment of its debts in priority to all the other creditors of the company had been abrogated by the Companies (Consolidation) Act, 1908. The court, however, examined also bankruptcy legislation, and Lord Sterndale, M.R., took the view that s. 151 made it impossible for the Crown to exercise its former rights in bankruptcy.

Also, s. 26, sub-s. 1, of the Crown Proceedings Act, 1947, provides: " Subject to the provisions of this Act, any order made " in favour of the Crown against any person in any civil pro- " ceedings to which the Crown is a party may be enforced in the " same manner as an order made between subjects and not " otherwise . . .".

On the authorities, the trustee is entitled to the declaration for which he asks, and to payment of the 10*l.* by the registrar.

Denys Buckley for the registrar. The warrants under which the registrar on November 4, 1949, seized and on November 15, 1949, sold the household furniture were issued on October 17, 1949. Under s. 26, sub-s. 1, of the Sale of Goods Act, 1893, a writ of execution binds a judgment debtor's goods " as from the " time when the writ is delivered to the sheriff to be executed "; and under sub-s. 2 " the term ' sheriff ' includes any officer " charged with the enforcement of a writ of execution ". Those words apply fully to this case, so that the registrar is the " officer " concerned and the goods are bound by the writ of execution from October 17, 1949.

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(4) [1903] 2 K. B. 41.

(5) [1922] 2 Ch. 369, 385.

There has been strict compliance with the wording of s. 40, sub-s. 1, of the Act of 1914. "The creditor has issued execution "against the goods" of the debtor and "he has completed the "execution . . . before the date of the receiving order". That is all that is required. On October 17, 1949, the goods were the debtor's property; and the contention that they were not, but were the trustee's, is said to be supported by the making of the receiving order, which was on December 14, 1949, and by the adjudication, which was on January 5, 1950, both dates being well after that of the warrants.

The questions arising in the present case are not wholly covered by authority. True, the act of bankruptcy was committed before the seizure of the goods; but, on the true construction of s. 40 of the Act of 1914, the execution complies with that section, and so is protected by sub-s. 1.

In re O'Shea's Settlement (6), *Wild* v. *Southwood* (7) and *In re Pollard* (8) do not cover this point. The argument for the trustee postulates that s. 40 is wholly restrictive, and not protective at all. It is, however, quite as arguable that it is just as protective as restrictive. It concerns, in terms, executions completed "before the date of the receiving order", i.e., before s. 37 comes into play at all. It was not until the receiving order had been made that the goods were to be deemed to have belonged to the trustee from the date of the act of bankruptcy. At the date of seizure and sale they belonged in law to the debtor; and the relation back, under s. 37, cannot affect s. 40.

The words "the benefit of the execution" in s. 40, sub-s. 1, refer, not to money, but to the charge which a creditor obtains by the issue of execution. Sums paid by a debtor before the date of a receiving order against him are not "the benefit of the "execution", and the judgment creditor is entitled to retain them as against the trustee in bankruptcy: *In re Andrew* (9), approving *In re Godwin (T. H.)* (10) and *In re Samuels* (11). Thus, the registrar, in retaining the 10*l*., did not "retain the "benefit of the execution".

As to s. 151 of the Act of 1914, having regard to *In re Thomas* (12), it is not desired to contend in this court that it does not extend to s. 37 and make it binding on the Crown. It is, however, at least debatable whether it does or does not, and it is

(6) [1895] 1 Ch. 325.
(7) [1897] 1 Q. B. 317.
(8) [1903] 2 K.B. 41.
(9) [1937] Ch. 122.
(10) [1935] Ch. 213.
(11) [1935] Ch. 341.
(12) (1888) 21 Q. B. D. 380.

therefore desired to reserve the question in the event of argument in another court. In this court reliance will be placed on the contentions which have been made for the registrar, with emphasis on the protective nature of s. 40. The registrar seized the goods and sold them, and retained the 10*l.*, the amount of the fines, before the date of the receiving order and without notice of the debtor's act of bankruptcy. That is enough to protect him, and he is not bound to pay the 10*l.* to the trustee.

Hunter replied.

Cur. adv. vult.

June 18. DANCKWERTS, J., read the following judgment:—The trustee's claim is based on the proposition that by virtue of ss. 37 and 38 of the Bankruptcy Act, 1914, and the relation back of the trustee's title to the act of bankruptcy committed on September 8, 1949, on which the receiving order was made on December 14, 1949, the goods and chattels which were seized were the property of the trustee and not of the debtor at the date of the seizure.

It will be observed that the date of the seizure (November 4, 1949, under warrants dated October 17, 1949) was after the date of the act of bankruptcy, but the execution was completed by seizure and sale before the date of the receiving order (December 14, 1949). Assuming that the fines amounting to 10*l.* represent debts which were due to the Crown, a question which might arise on the present application would be whether, in any case, the provisions of ss. 37 and 38 are effective against the Crown. However, Mr. Buckley, on behalf of the registrar, while wishing to keep the point open in case of an appeal, was not prepared to press it before me, in view of the decision in *In re Thomas* (13). Mr. Muir Hunter would have been prepared to argue that the matter is also concluded in the Court of Appeal by *In re Webb (H. J.) & Co. (Smithfield, London) Ld.* (14) (which is, of course, a company case); and he relied also on the provisions of s. 26, sub-s. 1, of the Crown Proceedings Act, 1947. In view of Mr. Buckley's attitude, I need not consider this question.

Section 26 of the Sale of Goods Act, 1893, settles the time when the goods of a judgment debtor are bound by a writ of execution—" as from the time when the writ is delivered to the " sheriff to be executed ". By sub-s. 2, " the term ' sheriff ' " includes any officer charged with the enforcement of a writ of

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(13) 21 Q. B. D. 380.

(14) [1922] 2 Ch. 369.

DANCKWERTS, J.

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LOVE (J. W.), *In re.*

"execution". In the present case the registrar, as the high bailiff, is the officer so charged, and the material date appears to be October 17, 1949. Section 40 of the Bankruptcy Act, 1914, is the first in a group of sections bearing the title "Effect of bankruptcy on antecedent and other transactions". [His Lordship read s. 40 and continued:] No question of notice of the presentation of any bankruptcy petition or of the commission of any available act of bankruptcy arises in the present case. On the actual facts of the present case the terms of s. 40 are completely fulfilled. The execution against the goods of the debtor was completed by seizure and sale of the goods on November 15, 1949, before the date of the receiving order, which was made on December 14, 1949.

Moreover, it has been held by the Court of Appeal in *In re Andrew* (15), approving *In re Godwin (T. H.)* (16) and *In re Samuels* (17), that the words "the benefit of the execution" in s. 40 do not refer to moneys actually received by the judgment creditor in whole or partial satisfaction of his debt, but refer to the charge which a judgment creditor obtains by the issue of the execution, so that, to the extent that a judgment creditor has received payment of his debt (whether in part or in whole), there is nothing which can be disturbed by the provisions of s. 40. In *In re Andrew* (18), however, the payments which the judgment creditor received were made before May 28, 1935, when the debtor committed an act of bankruptcy (of which it would appear that the judgment creditor had notice), and the possible effect of the relation back of the trustee's title was not considered by the Court of Appeal.

There is no doubt that in actual fact at the dates of seizure and sale in the course of the execution in the present case the goods were the property of the debtor; but Mr. Muir Hunter contended that by reason of the provisions of s. 37 the goods must be treated in law as having been at that date the property of the official receiver (as the trustee in bankruptcy), and so there was a wrongful seizure and sale (notwithstanding the terms of s. 40); and he further contended that this result is required by the policy of the Bankruptcy Acts, which requires an equal division of the bankrupt's property among all his creditors (unless otherwise specifically provided) through the trustee, in accordance with the terms of s. 18 of the Act, in the event of adjudication.

(15) [1937] Ch. 122.

(16) [1935] Ch. 213.

(17) [1935] Ch. 341.

(18) [1937] Ch. 122.

This result is achieved by applying the provisions of s. 38 of the Act, which provides that "the property of the bankrupt "divisible amongst his creditors" shall not comprise certain things (which are immaterial for the purposes of the present case) but shall comprise "(*a*) All such property as may belong to or be "vested in the bankrupt at the commencement of the bankruptcy, "or may be acquired by or devolve on him before his discharge", and s. 37, which provides that: "The bankruptcy of a debtor . . . "shall be deemed to have relation back to, and to commence at, "the time of the act of bankruptcy being committed on which "a receiving order is made against him, or, if the bankrupt is "proved to have committed more acts of bankruptcy than one, "to have relation back to, and to commence at, the time of the "first of the acts of bankruptcy proved to have been committed "by the bankrupt within three months next preceding the date "of the presentation of the bankruptcy petition . . .". Certainly as long ago as the Act of 1571 the principle of preventing one creditor achieving an advantage over another creditor of an insolvent trader appears in the bankruptcy legislation. Under the Act of 1571, in theory at any rate, a trader from the moment of committing an act of bankruptcy was deprived of the power of free disposition of his property to the prejudice of his creditors. Later Acts have tended to limit the period during which a bankruptcy might upset prior events, and the relation back for a period of twelve months provided for in the Act of 1869 seems to have been inconveniently long. It was also found necessary to introduce certain protective provisions to save genuine transactions in the ordinary course of business, of which the present s. 45 of the Act of 1914 is an example. One of the matters which has been canvassed is whether s. 40 of the Act of 1914 is such a protective section or is merely "restrictive", whatever that may mean. The provisions of ss. 40, 41 and 45 of the Act of 1914 correspond to ss. 45, 46 and 49 of the Act of 1883. Exactly similar provisions were not contained in the Bankruptcy Act, 1825, or the Act of 1869. But s. 95 of the Act of 1869 provided that certain "transactions", including executions executed in good faith by seizure and sale before the date of the order of adjudication and without notice of an act of bankruptcy, should "be valid, notwithstanding any prior act of bankruptcy". This has been described as a "protective provision", and, a similar provision having been omitted from the Act of 1883, it has been suggested that the provisions of the Act of 1883 corresponding to s. 40 of the Act of 1914 indicate a change of policy.

My attention was called to certain decisions in regard to the provisions of the earlier Acts. In *In re O'Shea's Settlement* (19) the Court of Appeal decided that a charging order under s. 14 of the Judgments Act, 1838, on stock or shares or money in court belonging to a judgment debtor, was not a " transaction " protected by s. 49 of the Bankruptcy Act, 1883 (which corresponds to s. 45 of the Act of 1914). The court seems to have thought that an execution could not be a " transaction " for the purposes of the section, but it appears to have been overlooked that in the Act of 1869 the legislature treated an execution as being within the term " transaction by and in relation to the property of a " bankrupt ". Section 45 of the Act of 1883 (which corresponds to s. 40 of the Act of 1914) was not relied on in that case.

In *Wild* v. *Southwood* (20) Vaughan Williams, J., applied the decision of the Court of Appeal in *In re O'Shea's Settlement* (21) to the case of a charging order under s. 23 of the Partnership Act, 1890. So far as these two cases depend on the meaning of " transaction " in s. 49 of the Act of 1883, they do not assist very much in regard to the provisions of s. 40 of the Act of 1914. But Vaughan Williams, J., also expressed his views in regard to s. 45 of the Act of 1883 (corresponding to s. 40 of the Act of 1914), which he described as " a restrictive section ", as compared with s. 49 of the Act of 1883 (s. 45 of the Act of 1914), which he referred to as " the protective section ". In the course of his judgment Vaughan Williams, J., said (22): " What is the right " of the execution creditor? His right is to seize the goods or " property of the bankrupt, and to levy execution thereon. He " has no right to seize or levy execution on the property of any one " else. Now, at the date when the first step towards getting " execution, or anything in the nature of execution, was taken, " was the interest of the bankrupt in the partnership property his " property or not? If it was his property, the execution creditor " had a right to go against it; if it was not, the creditor had no " such right. The first step towards obtaining the charging order " was the taking out of the summons on April 20, 1896, and at " that date the bankrupt's interest in the partnership had ceased " to be his interest. It had vested in the official receiver, and " became the property of the trustee in bankruptcy in the events

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(19) [1895] 1 Ch. 325.

(20) [1897] 1 Q. B. 317.

(21) [1895] 1 Ch. 325.

(22) [1897] 1 Q. B. 317, 319.

"which happened. This law of relation back, which makes "the title of the trustee vest as from a date antecedent to the "transaction or event which took place without any petition in "bankruptcy having occurred or a receiving order having been "made, operates no doubt very hardly in many cases, and there- "fore various Acts of Parliament have contained protective "sections to relieve those persons who would be injured by the "stringency of that law. Apart from these protective sections, "it is plain that this execution cannot hold good against the "trustee in bankruptcy whose title relates back to a period "anterior to it". The judge then considered whether the charging order came within the protective provisions of s. 49 of the Bankruptcy Act, 1883 (now s. 45 of the Act of 1914).

I was referred to *In re Pollard* (23), but it seems to me that it was merely decided in that case that, on the facts relating to a writ of sequestration, there had been nothing equivalent to "seizure and sale" at the material date for the purposes of s. 45 of the Act of 1883 (corresponding to s. 40 of the Act of 1914). I do not find that case of assistance, therefore.

In substance, I think that Mr. Muir Hunter's argument is based on the proposition put forward by Vaughan Williams, J., in *Wild* v. *Southwood* (24), that by virtue of the rules as to the property of the bankrupt divisible amongst his creditors in bankruptcy relating back to "the commencement of the bankruptcy" the property seized in execution may turn out to have been the property of the trustee in bankruptcy and not the bankrupt at the material date. It is true that, as pointed out by Mr. Buckley, this position depends upon a fiction superimposed on the true facts by subsequent events, namely, the receiving order and the adjudication in bankruptcy. But, if the provisions of the bankruptcy law require this operation, then it must be applied, notwithstanding the hardship which may thereby be caused. It is a position which is created by the artificial provisions of the Bankruptcy Acts. The process described by Vaughan Williams, J., in *Wild* v. *Southwood* (24) seems to me to be the result of the provisions now contained in ss. 37 and 38 of the Bankruptcy Act, 1914.

But I have difficulty in following the argument that s. 45 of the Act of 1883 and s. 40 of the Act of 1914 were and are wholly restrictive and not at all protective. And why should the

(23) [1903] 2 K. B. 41.

(24) [1897] 1 Q. B. 317.

conclusion be drawn (as apparently it has been drawn) that the Act of 1883 was intended in this respect radically to alter the position as contained in s. 95 of the Bankruptcy Act, 1869, which gathered together several provisions in a manner which was evidently intended to protect the transactions therein mentioned against the rigour of the bankruptcy law?

I do not reach this conclusion. I think that the Act of 1883 was not intended radically to alter the law but was a regrouping of the relevant provisions. Similarly, in the Act of 1914, s. 40 is one of a group of sections bearing the description "Effect of "bankruptcy on antecedent and other transactions"—it will be observed, incidentally, that the word "transaction" is used in the Act of 1914 to describe the events to be mentioned in all these sections. The words "Restriction of rights of creditor under "execution or attachment" are, it is true, to be found in a side-note to s. 40. Unless s. 40 is intended to be a declaration of the position of a judgment creditor who has levied execution and not merely a restrictive provision, however, it seems to me that it is calculated to mislead judgment creditors in an unfortunate manner. The normal and reasonable inference surely is that, if the judgment creditor has completed the execution by seizure and sale without any notice of an act of bankruptcy, he is then safe from the risk of losing his money by reason of a subsequent bankruptcy on the part of the debtor. It appears to me most unfortunate if the result of the general provisions found earlier in the Act is to deprive a judgment creditor, whose case falls exactly within the terms of s. 40 in regard to a completed execution, of the money which he has duly received. I do not think that I am compelled to reach such a result. In my view, s. 40 is not wholly restrictive, and a creditor who has received payment by virtue of an execution duly completed as mentioned in s. 40 of the Act is entitled to rely on the provisions of that section and is not affected by the general provisions of ss. 37 and 38 of the Act. In my view this gives a desirable coherency to the provisions of the Bankruptcy Act in accordance with the description which precedes ss. 40 to 47 of the Act. Accordingly the trustee is not entitled to demand payment of the sum of 10*l.* received by the registrar and the application fails.

Declaration accordingly.

Solicitors: *Solicitor, Board of Trade; Treasury Solicitor.*

K. R. A. H.

WYNN-PARRY, J.

1951
April 12;
May 8;
June 6.

In re CUNLIFFE-OWEN, DECD.
MOUNTAIN *v.* COMBER

[1950 C. 4800]

Revenue—Will—Death duties to be paid out of residue—Incidence of foreign duty—Estate duty—Testamentary expenses—English duties on foreign personalty—Canadian succession duty—Relief from double taxation—Credit allowed as result of double taxation—How apportionable among beneficiaries—Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (*S. R. & O.* 1946, *No.* 1884)*—Procedure with regard to concession in respect of South African succession duty.*

A testator, who died on December 14, 1947, by cl. 7 of his will, dated November 22, 1947, directed that "so much of the death "duties payable . . . in respect of all legacies . . . as shall be "equal to the death duties at the rates in force at the date of this "my will shall be paid and discharged out of my residuary estate". A summons was taken out to have determined the question, among others, whether certain pecuniary legacies ought, as between such legacies and the residuary estate, to bear certain foreign duties.

Held, that on the true construction of the will the scope of cl. 7 was limited to the United Kingdom and that the legacies ought to bear Union of South Africa succession duty, Province of Quebec succession duty, and Dominion of Canada succession duty, and any interest on those duties, but no other duties.

In re Norbury [1939] Ch. 528 followed.

In re Quirk [1941] Ch. 46; and *In re Frazer* [1941] Ch. 326 considered.

By cl. 6 of the will the testator bequeathed to trustees 15,000*l*. for the benefit of a legatee on trusts to raise 2,500*l*. and pay thereout duties on the sum bequeathed. The court was asked to determine whether, in the event of that sum being insufficient, recourse could be had, as against residue, to the provisions contained in cl. 7. By cl. 9, the testator directed that "subject to the payment of my "funeral and testamentary expenses and debts and the legacies "and annuities given free of duty by this my will . . . and "all estate duty and succession or legacy duty payable on my real "estate . . . and the duties on any legacies or annuities given free "of duty by this my will . . ." his trustees should hold the proceeds of sale of his residuary estate on certain trusts.

Held, that cl. 6 was self-contained, and that, if there were any such deficiency, it must be borne in full by the legatee.

Before the order made on the summons was drawn up, and when the minutes were being drafted, a further question arose. The summons was, therefore, restored to the list to have determined how a "credit", which was allowed under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, was to be disposed of by the executors.

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Held, that, on the construction of cl. 9, the testator had not displaced the general rule that estate duty payable on foreign personalty was not a testamentary expense and that (a) any sums paid to the legatee under cl. 6 or applied in payment of any duties under the direction to pay duties contained in that clause ought to be treated as paid out of the assets of the testator's estate situate in Canada in respect of the estate duty on which double taxation relief was accorded and the other assets of the estate in the proportions which the values of these classes of assets as valued at the testator's death in the United Kingdom respectively bore to one another; (b) the legatee under cl. 6 was entitled as between himself and the persons interested in the residuary estate to a part of the benefit of any credit granted in pursuance of the double taxation relief allowance against estate duty imposed in the United Kingdom in respect of assets situate in Canada, proportionate to that part of those assets proper to be treated as applicable in payment of any sums payable under cl. 6; (c) the remainder of any such credit enured, as between the persons interested in the residuary estate for those persons according to their respective interests in it; and (d) any amount exigible in respect of South African succession duty, allowed, by way of concession, to be deducted from South African personalty, should be dealt with by the executors on a formula similar to that indicated with regard to the credit given in respect of the estate duty payable on the personal estate situate in Canada.

ADJOURNED SUMMONS.

The testator, Sir Hugo Cunliffe-Owen, who died on December 14, 1947, by his will dated November 22, 1947, gave certain pecuniary legacies, and, by cl. 6, gave to the trustees 15,000*l*. on trust to pay thereout to John William Sholto Comber on each distribution of the capital of the residuary estate such a sum as should bear the same proportion to 12,500*l*. as such distributed capital should bear to the total residuary estate and to raise and pay out of the said sum of 15,000*l*. the duties thereon. By cl. 7, the testator directed that, subject to the provisions of cl. 6, " so much of the death duties payable with " reference to my death in respect of all legacies . . . as shall " be equal to the death duties at the rates in force at the date " of this my will shall be paid and discharged out of my " residuary estate " on trust as to one-half for Marjorie Clara Jessie Cunliffe-Owen for her life and, subject thereto, in trust for his children in manner therein mentioned, and as to the other half in trust for her absolutely.

At the date of his will and for many years previously, the testator owned substantial holdings of United States of America, Canadian (including Quebec) and South African securities and investments. He had travelled extensively, was well acquainted with financial and commercial conditions in many countries, and frequently bought and sold investments in various countries.

A summons was taken out by one of the executors to have determined whether and to what extent the legacies referred to ought, as between those legacies and the residuary estate, to bear (a) estate duty imposed in Great Britain payable in respect of realty in England; (b) estate duty imposed in Great Britain payable in respect of movable property situated abroad at the date of the death of the testator; (c) Union of South Africa estate duty; (d) Union of South Africa succession duty; (e) United States of America federal estate tax; (f) Province of Quebec succession duty; (g) Dominion of Canada succession duty; (h) any interest on any of the above mentioned duties.

Denys Buckley for the plaintiff.

E. I. Goulding for a legatee, John William Sholto Comber. The death duties referred to in cl. 7 mean not merely duties of any kind in Great Britain, but duties of any kind leviable in any country in the world. The prima facie rule of construction is that, when a testator speaks of death duties, he is confining himself to death duties payable under English law: see *In re Norbury* (1). The court ought, however, to know the attendant circumstances. In *In re Quirk* (2) Morton, J., appears to have had in mind the necessity of ascertaining what kind of man the testator was: see Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills (5th ed.), p. 9. The court, being entitled to know what manner of man the testator was, is entitled to take notice of the fact that his life was conducted in a cosmopolitan manner. That being so, it is clear that he intended any foreign death duties to be paid, not by the legatees, but out of residue.

Pennycuick, K.C., and *J. A. Wolfe* for Marjorie Cunliffe-Owen. The duties referred to in cl. 7 and cl. 9 of the will are confined to duties in the United Kingdom and do not include any foreign death duties. The determination of this question depends on the construction of this particular will. The foreign duties are payable out of the foreign assets as a whole. If the testator had wished that the foreign duties should be paid by the legatees, he should have given an express direction in the will to that effect. Clause 7 relieves the legatees of all English duties and nothing more.

(1) [1939] Ch. 528.

(2) [1941] Ch. 46.

Christie, K.C., and *Jackson Wolfe* for the three children of the testator. *In re Frazer* (3) reinforces the decision of Bennett, J., in *In re Norbury* (4). The expression "the death duties at "the rates in force at the date of this my will" cannot apply to duties all over the world. There is nothing in the will to alter the incidence of the duties other than the English duties.

G. B. Parker for infant defendants interested in residue. Further light is thrown on this question by cl. 9. The duties payable out of residue, which are referred to in that clause in the expression "the duties on any legacies or annuities given free "of duty" are, having regard to the context, clearly confined to United Kingdom death duties.

WYNN-PARRY, J. The first question which I propose to consider is whether the phrase "the death duties" which appears in cl. 7 of the will refers only to the United Kingdom death duties, or whether it extends to foreign death duties payable in respect of foreign assets owned by the testator. The clause in question reads as follows:—[His Lordship read cl. 7 and continued:] Clause 6, to which cl. 7 refers, is a clause by which a sum of 15,000*l.* is bequeathed by the testator to his trustees on certain trusts in favour of the defendant John William Sholto Comber, and which in effect amounts to this, that as from time to time the residuary estate is distributed then a proportionate sum, with a maximum of 12,500*l.* placed on it, is to be transferred to that beneficiary, and there is a provision that the sum of 15,000*l.* is to be held "in addition to raise thereout and pay the duties of "the said sum". So that the scheme is that the testator envisaged the beneficiary as receiving 12,500*l.*, the remaining 2,500*l.* being used to pay legacy duty. As has been pointed out, this sum of 2,500*l.* represents the legacy duty which would have been payable if the testator had died immediately after the making of the will, namely, at the rate of 20 per cent.

The only other provision in the will to which I need refer for present purposes is the opening passage of cl. 9, which recites: [His Lordship read it and continued:] Then follow directions as to the constitution and dealing with what the testator described as "my residuary estate".

There is a rule of construction that prima facie a direction such as is found in cl. 7, by which duties are thrown on the residuary estate in exoneration of legacies, whether specific or

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(3) [1941] Ch. 326.

(4) [1939] Ch. 528.

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pecuniary, is to be construed as referring only to United Kingdom death duties. That rule is stated by Bennett, J., in *In re Norbury* (5). That was a simple case where a testator, domiciled in England, by an English will bequeathed, free of duty, the sum of 15,000*l.* to his trustees on trust to pay the income to a named beneficiary whose address was given in Berlin. It was established that under German law, as then in force, a tax known as the Inheritance Tax, was payable by her in respect of such legacy, and she claimed that the expression " free of duty " and the gift of the legacy to her included freedom from such inheritance tax.

Bennett, J., in a short judgment, said: " I am told that there " is no direct authority upon the question raised for decision by " the summons now before me. The point is not covered by the " decision of the Court of Appeal in *In re Scott* (6)". That was the only case to which his Lordship was referred. Bennett, J., continued: " An English testator must be presumed to know " something about the duties the English law imposes both upon " his estate and upon beneficiaries under his will when he dies; " but not many of them, I suppose, know much, if anything, about " death duties imposed by the laws of foreign countries. Nor, I " suppose, would many of them contemplate some additional " burden being imposed upon their estates by a change of residence on the part of a person to whom a legacy had been given. " In the absence of authority, I hold that, where an English " testator by an English will gives a pecuniary legacy ' free of " ' duty ', the only duties payable out of his estate in respect of " the legacy are duties imposed by English law, unless there are " words in the will which make it clear that duties imposed by " the law of a foreign country are to be paid thereout ".

That, as will be seen from the facts, was a case where the testator was dealing only with property situate, or notionally situate, in England, and there is to be noted this difference between that case and this, that, as the evidence shows, the testator in the present case had a very large amount of property in other countries, in particular in South Africa, the United States of America and the Dominion of Canada. The evidence further establishes that he was actively concerned during his life with the management and administration of that property and that he concerned himself in minimizing, so far as he could, the burden of taxation in the various countries, and had also concerned

(5) [1939] Ch. 528.

(6) [1915] 1 Ch. 592.

himself with the incidence of death duties as regards that foreign property.

In re Norbury (7) was considered by Morton, J., in *In re Quirk* (8). Morton, J., expressly stated his approval of and agreement with the judgment of Bennett, J., in *In re Norbury* (9), but found that there were particular circumstances, which created a sufficient contrast to enable him to distinguish the case before him from *In re Norbury* (9). There he was concerned with the will of a British subject who stated that his domicile was in England, but who was ordinarily resident in Turkey, and who left certain immovable property in France and died in Switzerland. The question was whether a demise free of death duties of that immovable property in France resulted in that duty being payable out of the estate and not by the devisee.

Towards the end of his judgment Morton, J., stated several grounds on which he found it possible to distinguish the case before him from *In re Norbury* (9). He said (10): " In the first " place there is the fact that at the date of the will and at the " date of the testator's death there was no duty payable in respect " of this land other than the ' mutation ' duty. In the second " place the observation of Bennett, J., that not many English " testators would ' contemplate some additional burden being " ' imposed on their estates by a change of residence on the part " ' of the person to whom a legacy had been given ' has no application to a case such as the present, where the gift is one of " an immovable property. . . . In the third place, this testator " was a man who, as appears from his will, was ordinarily resident " in Turkey and owned real property in France. I think that he " was more likely to have in mind duties payable in a foreign " country than a testator who was resident in England and owned " no property abroad ".

I take that last passage as indicating that Morton, J., notwithstanding the last sentence of the judgment of Bennett, J., in *In re Norbury* (11), felt free to investigate the question whether or not, having regard to the attendant circumstances, the scope of such a phrase as " free of all duties " was limited so as only to throw on the residue United Kingdom duties, or had any wider scope. Indeed, I think that that conclusion must follow from the earlier reasoning in the short judgment of Bennett, J., and I take the view that such a phrase as that which I have to consider may, in appropriate circumstances, be given a wide scope rather than a narrower scope by reason of the attendant circumstances, if they are sufficiently compelling, and even in the absence of express words in the will referring to duties imposed by the law of foreign countries.

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(7) [1939] Ch. 528.

(8) [1941] Ch. 46.

(9) [1939] Ch. 528.

(10) [1941] Ch. 51.

(11) [1939] Ch. 528.

Finally, I should refer to *In re Frazer* (12). That case concerned a testator who, by his will, directed his trustees out of the income of his residuary trust fund to pay to his widow such a sum as would together with the income received by her under his marriage settlement, produce an annual income for her of 2,000*l.*, "free of all taxes (including income tax) and duties". Some time after his death his widow married again and went to live in Kenya Colony. She claimed that the gift in the will free of all taxes, including income tax, operated to throw on the testator's residuary estate the income tax payable by her in respect of the income under the law of that colony.

Farwell, J., held against that contention. After reading the judgment of Bennett, J., he says in the course of his judgment (13): "I feel a difficulty. The term 'all taxes' is very "wide and prima facie certainly would include a tax imposed, "in respect of the income, by any country in which the lady "happened to be living. But that is not the conclusion to "which I think I ought to come. I think that I should adopt "the reasons given by Bennett, J., although I am not suggesting "that his decision covers this case or is itself a decision which I "am in any way bound to follow. I think that when the "testator gave the lady an income and directed that the amount "of it should be calculated free of payment of all taxes including "income tax and duties, he was only contemplating such taxes "and duties as were properly payable from time to time under "the laws of this country and that he did not contemplate or "intend to include a tax to which the lady has become liable "solely by reason of her change of residence after his death". I read that passage as supporting the view which I have expressed that, notwithstanding the words at the end of Bennett, J.'s judgment in *In re Norbury* (14), "unless there are words in the "will which make it clear that duties imposed by the law of a "foreign country are to be paid thereout", a wider scope to such words as are found in cl. 7 can be given if the attendant circumstances are sufficiently compelling. I take the view, however, that, before giving to such words as "the duties" the wider scope contended for by Mr. Goulding, the court should be satisfied that the attendant circumstances are of a really compelling nature.

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(12) [1941] Ch. 326.
(13) Ibid. 330.
(14) [1939] Ch. 528.

Here, as I say, the evidence establishes that the testator had widely spread foreign interests and had, among other activities, been concerned in obtaining advice as to how to minimize the incidence of death duties on those various assets. But in my view that evidence, taken by itself, is not enough to constitute such a compelling circumstance as to justify me in departing from the rule laid down by Bennett, J., as the rule prima facie to be followed in a case like this, and I think there is great force in the contention which has been put forward by Mr. Pennycuick and Mr. Christie that, had the testator desired to exonerate the beneficiaries and throw the burden of foreign death duties on the residue, nothing would have been simpler than for him to have inserted express words in his will to deal with this matter.

I think, however, that there is another circumstance which prevents me from giving to the words " the death duties " in cl. 7 the wide scope contended for, and that emerges from the submission which was made to me by Mr. Parker and based on the construction of the opening passage of cl. 9. It will be observed that in that clause the testator, having provided that subject to the payment of his funeral and testamentary expenses —which latter phrase would include estate duty on the personalty in the United Kingdom—and subject to his debts and the legacies and annuities given by his will, dealt with specific duties, namely, " all estate duty and succession or legacy duty payable on my " real estate (including chattels real)". That estate duty and succession or legacy duty, in the context, can, in my view, only mean United Kingdom estate duty and succession or legacy duty. And then, following upon that phrase which I have so construed, comes the phrase " and the duties on any legacies or annuities " given free of duty by this my will or any codicil hereto ". That is a perfectly usual clause. I think, in the context, that the phrase " the duties on any legacies or annuities given free of " duty " provides the clue to the meaning or scope of the phrase " the death duties " appearing in cl. 7. It is as if cl. 7 had been so constructed as to contain a direction that all the benefits given by the testator's will referred to in cl. 7 had been given free of duty. If it comes only to that, then there is even less ground than otherwise might be the case for saying that there is any context in the will which would justify any more extended meaning being given to the phrase " death duties " than must be given to it if the rule enunciated by Bennett, J., in *In re Norbury* (14) is applied.

For those reasons, in my view the scope of the phrase "the "death duties" in cl. 7 is limited to United Kingdom death duties, and the legacies will bear Union of South Africa Succession Duty, Province of Quebec Succession Duty, Dominion of Canada Succession Duty, but no other duties, and any interest on such duties.

[His Lordship then considered a question which arose on the construction of cl. 6 of the will, and summarized his judgment as follows:—]

The point is a short one, and its answer really depends on one's first impression. In my judgment the true view is that cl. 6 is a self-contained clause and that in that clause the testator decided to exhaust his bounty as regards the exoneration of the legatee (J. W. S. Comber) from liability for duties; and that if there is any deficiency through the sum of 2,500*l.* not being sufficient, the legatee cannot have recourse, as against residue, to the provision in cl. 7.

Before the order made on this summons was drawn up, and when the minutes were being drafted, an entirely new question arose. The summons was, therefore, restored to the list to have that question determined, namely, how a credit allowed under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (15), was to be disposed of by the executors.

(15) By the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, it is declared (para. 2), "(*a*) that the "arrangements specified in the agree-"ment set out in the schedule to this "order have been made with the "Government of Canada with a view "to affording relief from double "taxation in relation to estate duty "payable under the laws of the "United Kingdom and duty of a "similar character imposed under the "laws of Canada, and (*b*) that it is "expedient that those arrangements "should have effect".

Article 1 of the schedule to the order provides: "(1) The duties "which are the subject of the present "agreement are: (a) In the United "Kingdom, the estate duty imposed "in Great Britain, and (b) In "Canada, the succession duty im-"posed by Canada".

Article 5 (1) provides: "Where one "contracting government imposes "duty by reason of a deceased person "domiciled in some part of its terri-"tory at the time of his death, that "contracting party shall allow against "so much of its duty (as otherwise "computed) as is attributable to pro-"perty situated in the territory of the "other contracting government a "credit (not exceeding the amount of "the duty so attributable) equal to so "much of the duty imposed in the "territory of the other contracting "government as is attributable to "such property".

Denys Buckley for the plaintiff. The question is whether the estate is entitled to the benefit of the relief in respect of the Canadian taxation or whether Marjorie Cunliffe-Owen is entitled to a greater advantage, as she had to bear a heavy rate of duty in Canada. The only duty affected by this question is Canadian succession duty. There is a substantial difference between the two countries as regards the amount of duty payable. [Counsel referred to Finance (No. 2) Act, 1945, s. 54.]

Pennycuick, K.C., and *J. A. Wolfe*, for Marjorie Cunliffe-Owen. For every 1*l.* of Canadian succession duty paid 1*l.* of English estate duty is remitted. The question is how the benefit of this remission should be apportioned between the several beneficiaries. This legatee has paid Canadian duty out of her own pocket, and has absolved the whole of the estate from certain duty. There is an equitable principle that a beneficiary who has made a payment which has been to the advantage of the estate as a whole should have the benefit of the advantage which the estate has had. It cannot be right that, when one beneficiary pays a sum out of his pocket in this way, and another beneficiary has not done so, both should benefit equally out of the estate. This legatee has, by the payment of a sum of money, absolved the estate from payment of duty in respect of 15,000*l.* of Canadian assets. There is no authority on this question. This dual taxation is sui generis. It is only possible to apply a general principle: see *In re Joel* (16).

Christie, K.C., and *Jackson Wolfe* for the three children of the testator. The executors have discharged the liability imposed on the estate by the Canadian law. The duty had to be paid before they could deal with the Canadian assets. If the duties have in fact been paid in Canada, the executors, who pay English estate duty, are entitled to reduce the estate duty payable by the amount of the remission.

The executors have to pay the duties on the English personalty and also on the Canadian personalty before the residue can be ascertained. It is a question of construction whether "testamentary expenses" in this will include Canadian duties. As a matter of principle the Canadian duty should be a testamentary expense. There is no precise authority that foreign duty is a testamentary expense. In *In re Scull* (17), however, it has been held that the duty on overseas property is not a testamentary expense.

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(16) [1943] Ch. 311.

(17) (1917) 87 L. J. (Ch.) 59.

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Here Marjorie Cunliffe-Owen has paid a large amount of Canadian succession duty as a stranger-in-blood. A remission of English estate duty is granted in respect of this Canadian succession duty. English estate duty payable on Canadian personalty is a testamentary expense and, as such, is payable before the residue is distributed. In *In re Clemow* (18) it was decided that estate duty is a testamentary expense. In *O'Grady* v. *Wilmot* (19) the question whether estate duty is a testamentary expense was considered. That is not a decision which prevents the court from coming to any conclusion which the court thinks proper as to the meaning of "testamentary expenses" in the present will.

In *In re Scull* (20), in which it was held that there was no indication in the will that certain American investments were to be exonerated from their rateable proportion of estate duty, it is clear that those securities were held not to pass to the executors "as such". So far as construction is concerned in the present case, the ordinary meaning must be given to testamentary expenses, namely, all duties which the executor has to pay in the performance of his duty. The executors have to pay this duty in the first place; then, in due course, they would have the benefit of the remission. No specific part of the estate goes to any specific legatee and, consequently, there is no one on whom the executors can call for any part of the funds. The principle that a remission of this sort falls into the "pool" is shown in *In re Joel* (21). [Counsel also referred to *In re Hadley* (22) and *In re Avery* (23).]

E. I. Goulding for J. W. S. Comber. The duty is a testamentary expense included in the estate duty, which is payable in one lump sum out of the general estate. There is also a point on the construction of the language used in cl. 9 of the will. The testator clearly had estate duty in his mind when he referred to duty on his real estate.

G. B. Parker for infant defendants interested in the residuary estate. It is clear that the relief goes to estate duty and that these foreign securities passed to the executors "as such", the expression "as such" meaning "by virtue of their position as "executors". An English grant extends to foreign property for the purpose of "getting it in". When it has been "got in"

(18) [1900] 2 Ch. 182, 194.

(19) [1916] 2 A. C. 231, 258, 267, 274.

(20) (1917) 87 L. J. (Ch.) 59.

(21) [1943] Ch. 311, 319.

(22) [1909] 1 Ch. 20.

(23) [1913] 1 Ch. 208.

the executors deal with it. [He referred to Dicey's Conflict of Laws (6th ed.), p. 336, r. 58, and p. 338, and to *In re Scott* (24).]

Pennycuick, K.C., in reply. The position before the Finance Act, 1894, was that probate duty was payable only in respect of property which passed to the executor virtute officii. The law on the point is summarized in Dymond on Death Duties (11th ed.), p. 26. In *In re Owers* (25) estate duty was held not to be a testamentary expense. That is the accepted view today: see Dymond on Death Duties (11th ed.), p. 344.

Cur. adv. vult.

June 6. WYNN-PARRY, J., in a written judgment, stated the further question and continued:—I have already held that, on its true construction, the direction in cl. 6 of the will to pay the duties on the sum there mentioned does not extend to, inter alia, Canadian succession duty, but does extend to all other death duties wheresoever payable in reference to the death of the testator, including estate duty imposed in Great Britain, in respect of movable property situate abroad at the testator's death, which but for that direction would be payable by Mr. Comber; and further that if and so far as the provision made for payment of these latter duties shall be insufficient to pay the same in full they must be borne by Mr. Comber personally.

As regards Canadian succession duty, the expert evidence establishes that this duty assessed in respect of any succession under the will of a testator is payable by the successor. No part of this duty is payable ultimately out of the residuary estate. In the case of successions to the residuary estate or any share or interest therein the Canadian succession duty thereon is payable by the individual successors as in the case of a pecuniary legacy, and if paid by the executors is recoverable from the individual successors. I have, therefore, already held that Canadian succession duty ought to be charged against the respective shares in the residuary estate bequeathed by cl. 9 of the will. Canadian succession duty is assessed at rates which vary, inter alia, with the relationship of the successor to the testator: and as Miss Cunliffe-Owen was not a relation of the testator, she has had to bear Canadian succession duty at a higher rate than is exigible in the cases of the other residuary legatees, all of whom are children of the testator.

(24) [1916] 2 Ch. 268, 277.

(25) [1941] Ch. 17.

In these circumstances I have to decide whether or not Mr. Comber is entitled to share in the relief accorded in respect of the testator's estate by the double taxation relief agreement to which I have referred.

As between Miss Cunliffe-Owen on the one hand and the other residuary legatees on the other hand, I have to decide whether any credit arising by virtue of the double taxation relief agreement, after providing for any part thereof to which Mr. Comber may be held to be entitled, enures as between the persons interested in the residuary estate according to their respective interests therein or among them in proportion to the amount of Canadian succession duty borne by them respectively.

It was argued that the phrase "testamentary expenses" includes the whole of the estate duty payable in respect of the testator's personal estate wherever situate, and for this proposition reliance was placed on *In re Clemow* (26). It is true that the language of the judgment appears to be wide enough to support this proposition, but it is to be observed that it does not appear from the report that any estate duty on foreign personalty was involved. In any event it cannot be doubted, since the decision of the Court of Appeal in *In re Scull* (27), following the reasoning of the House of Lords in *O'Grady* v. *Wilmot* (28), that, apart from any direction in the will to the contrary, the estate duty payable on foreign personalty is not a testamentary expense, because the foreign personalty does not come to the hands of the executor virtute officii; it is a charge on that personalty.

Turning to cl. 9 of the will, I am unable to find any sufficient direction to displace the application of the general rule to which I have referred. It was argued that as the testator has thrown on residue, in addition to what on its true construction is to be regarded as covered by the phrase "testamentary expenses", such further burdens as "all estate duty and succession and "legacy duty payable on my real estate (including chattels real) "and the duties on any legacies or annuities given free of duty", he cannot have meant to exclude the estate duty payable in respect of foreign personalty, and that therefore the phrase "testamentary expenses" should be given a wide meaning. I cannot accept this argument. In my view one must approach the construction of the opening words of cl. 9 with the general rule in mind and then inquire to what extent, if at all, the

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(26) [1900] 2 Ch. 182.

(27) 87 L. J. (Ch.) 59.

(28) [1916] 2 A. C. 231.

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testator has displaced it. On this basis one must construe the phrase "testamentary expenses" as prima facie including, as regards estate duty, only estate duty on the personalty situate in the United Kingdom. Now, when one reads further, one finds that the testator has expressly thrown on residue the estate duty on free realty: but this estate duty is not a testamentary expense: *In re Sharman* (29). To my mind this circumstance precludes me from holding that the phrase "testamentary "expenses" should be construed as including the estate duty on foreign personalty.

The result is that, in accordance with the general rule, the beneficiaries concerned will eventually bear the estate duty on the foreign personalty, Mr. Comber to the extent that I have already held, and those interested in the residuary estate the remainder.

The credit which is given under the double taxation relief agreement is a credit in respect of the estate duty payable in respect of the personal estate situate in Canada, which estate duty, as I have held, will have to be borne eventually by Mr. Comber and the residuary legatees. It therefore follows, to my mind, that this credit should enure, not for the benefit of the testator's estate generally but for the benefit of the persons who have to bear the estate duty on the Canadian personalty.

As far as Mr. Comber is concerned, there will be a provision in the order that any sums paid to him under cl. 6 of the will or applied in payment of any duties under the direction to pay duties contained in that clause ought to be treated as paid out of assets of the testator's estate situate in Canada in respect of the estate duty on which double taxation relief is accorded, and the other assets of the estate in the proportions which the values of these classes of assets as valued at the testator's death for the purposes of estate duty in the United Kingdom respectively bear to one another. There will be a further provision in the order that Mr. Comber is entitled as between himself and the persons interested in the residuary estate to a part of the benefit of any credit granted pursuant to the double taxation relief agreement, to which I have referred, against estate duty imposed in the United Kingdom in respect of assets of the estate situate in Canada proportionate to that part of such assets proper to be treated as applicable in payment of any sums payable under cl. 6 of the will.

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(29) [1901] 2 Ch. 280.

There is left the question how the remainder of any such credit should be apportioned between Miss Cunliffe-Owen on the one hand and the remainder of the residuary legatees on the other hand. On behalf of Miss Cunliffe-Owen it was argued that the division should be made by reference to the amount of the Canadian succession duty borne by each residuary legatee. I cannot accept this argument. I have held that in this case the residuary legatees must bear the estate duty on the Canadian personalty. They will bear this duty according to their interest in the residuary estate. I have already held that any credit given under the double taxation relief agreement is to be treated as a credit in respect of the estate duty payable in respect of the personal estate in Canada. In my view, therefore, the only logical course is to apply the benefit in the shape of any credit in the same way as the division of the burden is ascertained, that is, by reference to the respective interests of the residuary legatees in the residuary estate. There will therefore be a declaration in the order that the remainder of any such credit enures as between the persons interested in the residuary estate for such persons according to their respective interests therein.

The only other duty in respect of which I heard argument was South African succession duty. The position as regards this duty is different from that as regards Canadian succession duty in that there is no double taxation relief agreement covering South African succession duty. Nevertheless, the Inland Revenue, by way of concession, allow the amount exigible in respect of South African succession duty to be deducted from the value of the South African personalty; that is, they allow that duty to be treated as a debt. According to the expert evidence, South African succession duty assessed in respect of any succession is payable by the successor, and if paid by the executors is recoverable by them from the successor. No part of the duty is payable ultimately out of the residuary estate. The duty is assessed at rates varying with the relationship of the successor to the testator. The question therefore arises how the amount of South African succession duty allowed by way of the concession to which I have referred should be apportioned. In my judgment the same reasoning should apply as in the case of the credit given in respect of Canadian succession duty. Mr. Comber will be entitled to share in the amount of such concession on a similar formula to that which I have already indicated, and the residuary legatees will be entitled to have the remainder apportioned between them according to their respective interests in the residuary estate.

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Declaration accordingly.

Solicitors: *W. Gordon Hill; Charles Russell & Co.*

J. L. D.

In re BRASSEY'S DEED OF APPOINTMENT. COUTTS & CO. *v.* INLAND REVENUE COMMISSIONERS.

[1950 B. 3322.]

C. A.

1951 *June* 18, 19, 20.

Evershed, M.R., Jenkins and Birkett, L.JJ.

Revenue—Estate duty—Property deemed to pass—Settlement—Policies on the settlor's life purchased by settlement trustees—Payment of premiums out of trust income—Death of settlor—Cesser of interest—Accrual of benefits to tenant for life and remaindermen—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7.

By a disentailing deed made between a father, his son, and certain trustees, the son's entailed interest in certain settled funds was barred, and the funds were limited upon such trusts as the father and son should jointly appoint, with a limitation over in default of appointment.

The father and son in exercise of their joint power executed a deed of appointment and resettlement of the funds, whereby the father was excluded from all further interest in the settled funds. The deed of appointment provided that the trustees should purchase from the father certain policies on his life, and should, out of the trust income, pay the premiums necessary for keeping them on foot. Subject to this and to other outgoings, the trustees were to hold the balance of the income upon protective trusts for the benefit of the son for life. The deed contained a number of further provisions under which the son was given powers of appointment in favour of his children, remoter issue and any wife who might survive him, with ultimate trusts in favour of the father's three daughters.

The father died in 1946, and his life policies then fell in. The son had had no children and had not exercised any of the powers of appointment given to him and the interest in remainder in the settled funds was vested in the three daughters of the father.

On the death of the father, estate duty was claimed in respect of the slice of the trust funds of which the income was required to pay the premiums on the father's life policies, the Crown contending that it constituted property in which persons had an "interest ceasing on the death of the deceased", and that "benefits accrued by the cesser of such interest", within the meaning of s. 2, sub-s. 1 (*b*) of the Finance Act, 1894.

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On the hearing of a summons asking whether estate duty was so leviable, Romer, J., held that duty was payable under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. On appeal:—

Held, that the remaindermen had an "interest" in the trust income and a corresponding interest in the trust fund of which the income was the fruit; that that was an interest in property within s. 2, sub-s. 1 (*b*); and that that interest ceased on the father's death, and duty became payable under s. 2, sub-s. 1 (*b*), on the slice of the trust fund required by its income to produce the annual premiums.

There is no distinction in principle between the case where property passes under s. 1 by reason of the determination on the deceased's death of a trust for accumulation and the case where under s. 2 property is deemed to pass by reason of the fact that a trust to apply income in the payment of premiums ceases.

In re Hodson's Settlement [1939] Ch. 343; *Westminster Bank Ld.* v. *Attorney-General* [1939] Ch. 610, followed.

Attorney-General v. *Lloyds Bank Ld.* [1935] A. C. 382, considered.

Decision of Romer, J., ante, 351, affirmed.

APPEAL from Romer, J. (1).

By a disentailing deed dated August 6, 1935, made between Captain Brassey, his son Hugo Brassey and certain trustees, the entailed interest of Hugo in the funds then subject to the trusts of a previous resettlement of 1897 was barred and those funds were limited upon such trusts and subject to such powers and provisions as Captain Brassey and Hugo Brassey should jointly appoint, with a limitation over in default of such appointment upon the trusts of the settlement of 1897.

On August 8, 1935, a deed of appointment and resettlement (hereinafter called "the 1935 resettlement") was entered into by Captain Brassey of the first part, Hugo Brassey of the second part and Coutts and Company and Sir Henry Brassey as trustees of the third part. In exercise of the power conferred on them by the disentailing deed, Captain Brassey and Hugo Brassey irrevocably appointed that the investments and the cash therein specified should be held by the plaintiffs and Sir Henry Brassey as the then trustees, upon such trusts and subject to such powers and provisions as Captain Brassey and Hugo should appoint and in default of any such appointment under the trusts and subject to the powers and provisions thereinafter declared, that was to say: the trustees were directed to pay and apply the cash in making certain payments and purchasing from Captain Brassey four policies on his life issued by the Clerical, Medical and General Life Assurance Society to secure the payment of 40,000*l*. on his death.

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(1) Ante, 351.

The trustees were directed to stand possessed of the investments thereby appointed upon trust out of the income to pay the premiums and other moneys necessary for keeping on foot the four policies on Captain Brassey's life and to hold the balance of the income, after making certain other payments, upon protective trusts for the benefit of Hugo during his life. After the death of Hugo, the trustees were to stand possessed of the capital and future income of the trust fund constituted by the 1935 resettlement in trust for all or such one or more of the children or remoter issue of Hugo, as Hugo should by deed revocable or irrevocable appoint, and, in default of and subject to any such appointment, in trust for all or any the children or child of Hugo who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares. If there should be no child of Hugo who should attain a vested interest, the trustees were directed to hold the trust fund for such person or persons and for such purposes as Hugo should by will or codicil appoint.

Hugo was given power to appoint the income of the trust fund to any wife who might survive him during her life or any less period.

In the event of the failure of all the beneficial trusts of the 1935 resettlement, the trust fund was held upon the trusts of the resettlement of 1897, under which the trust fund was held upon trust for Hugo in tail and, subject to his interest, upon trust for Captain Brassey's testamentary appointees, with an ultimate trust in favour of Captain Brassey's three daughters in tail.

Captain Brassey died on November 14, 1946. From the date of the 1935 resettlement until the date of his death, the annual premiums on the policies on Captain Brassey's life amounting to 1,976*l*. 13*s*. 4*d*. each year were paid by the trustees out of the income of the trust fund, and the balance of such income (subject since Captain Brassey's death to his widow's jointure) had been paid to Hugo. Hugo had been married but had no issue and had not exercised the power of appointment in favour of a surviving wife conferred on him by the resettlement in 1935. In default of issue of Hugo who should attain a vested interest under the resettlement of 1935 and of his exercising the testamentary power of appointment thereby conferred on him, the property comprised in the resettlement would devolve upon the three daughters of Captain Brassey as the residuary legatees under his will.

On Captain Brassey's death the Estate Duty Office claimed duty in respect of the slice of the trust fund required by the income thereof to pay the premiums on the policies of assurance on his life. That claim was founded on s. 2, sub-s. 1 (*b*), of the Finance Act, 1894 (2).

By this summons the plaintiffs, the trustees of the resettlement of 1935, asked whether estate duty became payable on the death of Captain Brassey under s. 2, sub-s. 1 (*b*), of the Act of 1894. Romer, J., held that estate duty was payable under s. 2, sub-s. 1 (*b*), and under s. 7, sub-s. 7, duty was payable on the slice of the trust fund required to produce the amount of the premiums. The plaintiffs appealed.

Cozens-Hardy Horne for the plaintiffs. It is submitted that Romer, J., was wrong in holding that s. 2, sub-s. 1 (*b*), applies to this case. Lord Macnaghten's speech in *Cowley* v. *Inland Revenue Commissioners* (3) shows that this case is not within the intendment of that provision. "Interest" there means a right to receive income, such as the right of an annuitant. It does not cover the case of a person who has a contingent interest in capital to have income accumulated. The interest cannot be divided into a number of lesser interests. [He referred to *Attorney-General* v. *Beech* (4) and *In re Norfolk (Duke)* (5).] Property in s. 2, sub-s. 1 (*b*), means the whole of the property not merely a slice. Having regard to s. 7, sub-s. 2, unless there is a right to receive income there can be no application of the slice theory under s. 7, sub-s. 7.

Pennycuick, K.C., and *J. H. Stamp* for the Crown. Romer, J., reached a correct conclusion in this case. Before Captain Brassey's death the income was being applied in paying premiums for the benefit of the remaindermen. After his death that slice of income became payable for the benefit of different persons. The case is governed by the decisions in *In re Hodson's Settlement* (6) and *Westminster Bank* v. *Attorney-General* (7). There is no reason why the method of valuation laid down in s. 7, sub-s. 7, should not apply to this case.

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(2) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death "of the deceased shall be deemed to "include the property following, that "is to say . . . (*b*) Property in which "the deceased or any other person "had an interest ceasing on the death "of the deceased, to the extent to "which a benefit accrues or arises by "the cesser of such interest . . .".

Section 7, sub-s. 7: "The value of "the benefit accruing or arising from "the cesser of an interest ceasing on "the death of the deceased shall— "(*a*) if the interest extended to the "whole income of the property, be "the principal value of that property; "and (*b*) if the interest extended to "less than the whole income of the "property, be the principal value of "an addition to the property equal to "the income to which the interest "extended".

(3) [1899] A. C. 198, 210.

(4) [1898] 2 Q. B. 147.

(5) [1950] Ch. 467.

J. H. Stamp following. It appears from *Scott* v. *Inland Revenue Commissioners* (8) that a claim lies under s. 2, sub-s. 1 (*b*). The price of creating a life interest is that the corpus will be liable to duty on the determination of the interest. *In re Hodson's Settlement* (9) is relied on for the proposition that the reversioners had an interest in the income, which ceased at the death of Captain Brassey. It is not possible to split the word "interest". This is strictly analogous to a s. 1 case. The right to require the premiums to be paid was an "interest" which ceased. The reversioners had a right to enforce the payment of the premiums, they accordingly had an interest within s. 2, sub-s. 1 (*b*). Interest must be given its ordinary meaning.

Cozens-Hardy Horne in reply. It is submitted that it is not enough for the Crown to say that some person may hereafter come into existence who may take an interest. If that interest is worth nothing no benefit arises. It is necessary to distinguish between a trust to pay premiums and a trust to accumulate income. A policy is an item of the trust with outgoings in the form of premiums. It is always part of the trust fund. Where there is a trust to accumulate, the trustees are bound to do so.

Section 2, sub-s. 1 (*b*), is concerned with changes of beneficial interests and not with maintaining the respective rights of tenant for life and remaindermen. A policy is not a form of accumulation, it is an investment. The decisions in *In re Hodson's Settlement* (9) and *Westminster Bank* v. *Attorney-General* (10) concern a passing under s. 1. The principle there laid down does not apply to s. 2, sub-s. 1 (*b*).

EVERSHED, M.R. This appeal has raised the question whether duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, is exigible on the death of Captain Brassey on November 14, 1946. [His Lordship stated the facts and continued:] The claim under s. 2, sub-s. 1 (*b*), is not, however, a claim to exact duty upon the sum of 40,000*l.*, being the policy moneys paid on Captain Brassey's death. Mr. Pennycuick, for the Commissioners of Inland Revenue, explained that the benefit that arose by receiving the policy moneys is, for present purposes, irrelevant. There is perhaps a certain irony in that concession, for Mr. Pennycuick and Mr. Stamp have made it clear that the somewhat obscure provisions of the Finance Act, 1894, are apt to work in a rather mysterious way. Observe the facts of the present case: during the period between 1935 and 1946, being the residue of Captain Brassey's life, a sum of 1,977*l.* was yearly diverted from Hugo's enjoyment and employed in the payment of the premiums to the Clerical, Medical and General Life Assurance Society. On the death of Captain Brassey that diversion ceased and the 40,000*l.* was received. But, if the Crown's claim is right, as I have felt constrained to conclude that it is, the duty exigible which arises out of the provisions relating to the policies appears to amount to a sum of 60,000*l.* to 70,000*l.*, not less than 50 per cent. more than the capital value of the policies, a result which, by depriving Hugo of 1,977*l.* a year, the trustees in the due performance of their obligations have managed to achieve. If the trustees had been given prophetic vision, they might have thought with justice that they would have best served the interests of their beneficiaries by consigning the policies to the flames on the day following the execution of the resettlement and thereafter declining to pay any premiums. As Mr. Stamp pointed out, they would have run the substantial risk that, if Captain Brassey had not survived this conflagration by three years, they would have been even worse off than they are now. But, given sufficient prophetic vision, they would, in the event, have enabled Hugo to enjoy the 1,977*l.* a year of which he was deprived, and would have succeeded in enriching the trust estate by the sum of about 25,000*l.* I have said all this because such a result seems startling, and I was, for my own part, impressed with the argument which Mr. Cozens-Hardy Horne put before us for the taxpayer that it was a result which the sections could not be said to have contemplated, and that in particular there was here a non-fulfilment of the essential condition which s. 2, sub-s. 1 (*b*), imposes, namely, that an interest enjoyed by some person ceased on the death of the deceased. But, stating in a sentence my conclusion and the reasons for it, I have felt constrained in the light of the decisions of this court in *In re Hodson's Settlement* (11) and *Westminster Bank Ld.* v. *Attorney-General* (12), to agree with Romer, J., for the reasons which he gave that the necessary conditions for the application of the section have been fulfilled.

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(6) [1939] Ch. 343.
(7) [1939] Ch. 610.
(8) [1937] A. C. 174.
(9) [1939] Ch. 343.
(10) [1939] Ch. 610.

(11) [1939] Ch. 343.

(12) [1939] Ch. 610.

In the course of his judgment Romer, J., put the matter thus (12A): "Accordingly, if the trustees, in disregard of their "trust obligations, had paid the whole of the trust income to Hugo "Brassey, there can be no doubt but that the court would, at the "instance of the remaindermen, have intervened and compelled "them to devote sufficient of the income to the maintenance of "the policies. From this it follows, in my judgment, that the "remaindermen had pro tanto an 'interest' in the trust income "and a corresponding 'interest' in the property, i.e., the trust "fund, of which that income was the fruit. I am unable to avoid "the conclusion that this was an interest in property within the "purview of s. 2, sub-s. 1 (*b*), or that that interest ceased on "the death of Captain Brassey; and in my view the fact that the "right was vested in them in their capacity of reversioners is of "no real materiality. It was contended on behalf of the plain-"tiffs that it is not permissible to split up the rights of the "remaindermen and, by doing so, to identify some immediate "interest and isolate it from their title to possession of the pro-"perty, which was reversionary and nothing else. I cannot, "however, accept this contention. The fact that the remainder-"men's right to the possession and the enjoyment of the property "was and is future does not and cannot alter the further fact that "a right to insist on income being applied to premiums (like a "right to enforce accumulation, as to which see *Westminster* "*Bank Ld.* v. *Attorney-General* (13)), is a valuable ancillary "right which confers an immediate interest in the property from "which the income is derived". I agree with that passage.

But, out of respect to the argument of Mr. Cozens-Hardy Horne, I feel that it would not be right to leave the matter with a mere affirmation of that conclusion, and I therefore proceed to state the considerations which have led me to that result, and particularly to make reference to one point which emerged at the end of the argument, namely, the application Aye or No of the case of *Attorney-General* v. *Lloyds Bank Ld.* (14).

By way of premise, I think it necessary to read the relevant language of s. 2, sub-s. 1 (*b*), and also to refer to s. 7, sub-s. 7. [His Lordship read those provisions and continued:] Para. (*b*) of s. 7, sub-s. 7, has been referred to before now as somewhat enigmatic in its language. It has enshrined what is known as "the slice theory" in the cases under this Act. For present

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(12A) Ante, 358.
(13) [1939] Ch. 610.
(14) [1935] A. C. 382.

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purposes the point to be made is that, though the subject-matter to be taxed is property to the extent to which a benefit arises, that benefit is assessed by looking at the extent of the interest which has ceased. Where, as here, the interest stated to have ceased is an interest in a certain part of the income of the trust estate, then one treats, as the subject-matter to be taxed (being the value of the benefit accruing or arising) a proportion of the whole trust premises rateably equivalent to the proportion which the sum of income in question bears to the total income. It is in that way that the apparently startling result is achieved that, though these premiums produced a sum of 40,000*l*., they represented a share of total income which is expressed, when the same proportion of capital is calculated, by a figure of 104,000*l*. or 105,000*l*. If the conditions are satisfied, that result seems inevitable. Mr. Stamp indeed said that, if you attempt to create limited interests of this character in trust premises, you inevitably and as an arithmetical certainty give rise to a claim for duty on a capital sum which is far greater in value than the limited interest which you create. Whether that is arithmetically true and whether, if true, it is just, I cannot say, and it is unnecessary for me to try to determine the problem. But that such results may emerge is now perhaps painfully apparent. But from what I have read it is of the essence of the matter, as Mr. Pennycuick conceded, that two conditions must be satisfied: (1.) an interest ceasing on the death of the deceased, and (2.) a benefit accruing or arising by the cesser of the interest.

I have already indicated that, if the matter had been free from authority which I think binds this court, I might have felt inclined or disposed to say that the sort of interest which is defined in this case as so ceasing was not within the intendment of s. 2, sub-s. 1 (*b*), and I perhaps should have derived some comfort from the passages in Lord Macnaghten's speech in *Cowley* v. *Inland Revenue Commissioners* (15), to which Mr. Cozens-Hardy Horne alluded. The interest here is of this character: it is not a right to enjoy actual income paid to some person. Such a case is not uncommon and falls within s. 2, sub-s. 1 (*b*); for example, where a testator or settlor provides for the payment of an annuity, say 100*l*. a year, during a life. When the life drops, the interest of the annuitant ceases, because he then ceases to enjoy that 100*l*. a year. Here the only persons who had the privilege of receiving sums year by year from the trustees were the Clerical,

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(15) [1899] A. C. 198, 210.

Medical and General Life Assurance Society. All are agreed that they should be disregarded under sub-para. (*b*) of the section for any purpose. You have to find some beneficial interest under the settlement. The way it has been formulated is this—I borrow Mr. Stamp's language—that if it is found that someone has the right to have some sum of income withdrawn or diverted from the person who would otherwise be entitled to receive it and applied for purposes from which they will ultimately derive a benefit, then that person has an interest within the meaning of para. (*b*).

I have stated what were the relevant limitations under the settlement, and it is apparent that, during the remainder of Captain Brassey's life, there was a class of persons, for whose benefit this provision in the instrument was inserted, who had a right to have the sum of 1,977*l.* so to say withdrawn from trust circulation and put into the building up of these policies. These persons were numerous: they consisted of all those persons for whose benefit eventually the capital of the trust might be held; Hugo's issue and children; Hugo's general testamentary appointees; Hugo's widow; Hugo himself as tenant in tail; Captain Brassey's general appointees; and Hugo's three sisters as tenants in tail respectively under the settlement of 1897.

Hugo had had no issue at the date of the death of Captain Brassey. So of this numerous class of persons interested many were non-existent. But, as Mr. Pennycuick observed, I think rightly, since there were some persons in existence within that class, namely, Hugo's sisters, it is impossible to say, if in other respects the argument is good, that there were no persons having such a right as I have tried to define, namely, the right to have these annual sums so diverted and applied.

But there still remains the question whether the interest, defined as Mr. Stamp defined it, is such an interest as s. 2, sub-s. 1 (*b*), contemplates. Mr. Cozens-Hardy Horne argued that the interest contemplated, and alone contemplated by the section, was the interest of the nature of a beneficial enjoyment of some sum of income or some other property; whereas here it is merely a right to enforce the trust.

It is at that point, as it seems to me, that the two cases in this court to which I have already referred are relevant, and indeed, as I think, compelling. They both related to trusts for accumulation. In both there was a trust for accumulation either of the whole of the income of the settled fund or of the whole less some fixed sum payable to an annuitant; and after the death of the settlor there were trusts whereby certain persons, children and more remote issue of named individuals, became entitled in succession to limited interests and to the capital of the funds, including the accumulated funds.

That is the essential feature of those cases. There was this difference. In *Hodson's* case (16), which was decided first, the claim arose only as regards the application of s. 1 of the Finance Act, 1894, to the accumulated fund; but in the second case, the *Westminster Bank* case (17), the claim, also under s. 1, related to the whole capital of the trust premises, including the accumulated fund. But, for present purposes, that distinction is immaterial. Both were claims under s. 1. The importance of the cases, for the present purpose, is this: in *In re Hodson's Settlement* (16) the judgment of the court was, as it was in the *Westminster Bank* case (17), delivered by Clauson, L.J. He exhaustively considered a number of decisions (including the case of *Attorney-General* v. *Lloyds Bank Ld.* (18)), and he examined closely the structure of s. 1 of the Act and the necessary conditions to its application. He quoted the celebrated passage from Lord Parker's speech in *Attorney-General* v. *Milne* (19) that the expression " passing on " the death " used in s. 1 of the Act is to denote some actual change in title or to possession of the property as a whole.

The Lord Justice then continued (20): " In the present case " the property as a whole is the accumulations fund: and it would " appear prima facie that, applying Lord Parker's words, it is not " open to this court to hold otherwise than that on Mr. Hodson's " death the accumulations fund passed. Up to the death the " income was subject to a trust for accumulation for the ultimate " benefit of the lady and her children. Upon the death this trust " ceased and the lady became thenceforward for the rest of her " life the sole beneficiary in the income of the fund. It is true " that before the death the lady had an interest of a contingent " character in the income of the fund, since she had a right to " have it accumulated so as to provide a fund the fruit of which " would, if she survived Mr. Hodson, come to her; but this " circumstance would not prevent the change in the beneficial " possession of the property as a whole which took place on " Mr. Hodson's death from operating as a ' passing ' of the " property on his death ".

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(16) [1939] Ch. 343.
(17) [1939] Ch. 610.
(18) [1935] A. C. 382.
(19) [1914] A. C. 765, 779.
(20) [1939] Ch. 343, 357.

Later, Clauson, L.J., said (21): "In our judgment, this court "is bound, in view of the later authorities, to hold that the view "taken by this court in *Attorney-General* v. *Lloyds Bank Ld.* (22) "of the principles to be applied in such cases as the present must "now be recognized to have been deficient, in that it failed to "bring out the crucial point that, in order to arrive at a correct "decision, attention must be focused upon a comparison between "the persons beneficially interested in the fund the moment "before the relevant death and the persons so interested the "moment after the death, and upon the question whether the "death effected an alteration in rights as distinguished from "merely removing the possibility of an alteration. Accordingly, "if the persons beneficially interested are the same before and "after the death, and the death merely removes the possibility "of an alteration of their rights, as was, in the view of the House "of Lords, the case in *Attorney-General* v. *Lloyds Bank Ld.* (22), "there is no passing: whereas in the present case, while the "beneficiaries are no doubt the same, before as after the death, "but the death brings one set of trusts of income to an end and "shifts the beneficial interest in the income to the possession of "one who (though no doubt previously a contingent beneficiary) "had no beneficial interest in possession before the death, there "is a 'passing' within s. 1 of the Act".

To those references I add one further citation—and it is of vital importance—from the *Westminster Bank* case (23). There, as I have said, the facts differed for the present purpose only in this, that the whole fund and not merely the accumulated fund was in question. The Lord Justice said (24): "In our judgment "the reasons which led us to hold that the accumulations fund, in "the case of *In re Hodson's Settlement* (25), passed under s. 1 "on the settlor's death, must lead to the same conclusion as "regards the originally settled funds and the accumulated funds "in question in this case, setting aside for the moment any "question as regards the policies. Previously to her death, the "children of Mrs. van der Goes had an interest in the income "of these funds, since they had a right to have that income "accumulated so as to provide an accumulated fund the fruit of "which would come to them, and the children of those children "had a corresponding right to have it accumulated so as to provide

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(21) [1939] Ch. 343, 367.
(22) [1935] A. C. 382.
(23) [1939] Ch. 610.
(24) Ibid. 616.
(25) [1939] Ch. 343.

"an accumulated fund the capital of which would, in default of "appointment to the contrary, come to them".

In light of those references, it seems to me that, unless there is some distinction between s. 1 in this regard and s. 2, sub-s. 1 (*b*), it is not open to this court to say anything but this: that the class of persons whom I have stated, represented, so to speak, by the three sisters of Hugo, had immediately before Captain Brassey's death the right to have these annual sums withdrawn and paid in keeping up the policies, and that such a right is "an "interest" within the language of the section under consideration.

I have already read that part of Romer, J.'s judgment where he founded his conclusion on the assertion of that proposition. Since the result of keeping up these policies has turned out financially so disastrous, one cannot avoid wondering whether any court would have enforced any such right. But, as I have already said, the disaster would have been even blacker if the policies were abandoned, unless Captain Brassey survived the abandonment for three years. I think, therefore, that it cannot for that reason be said that this right is one which no court would have enforced and therefore can be disregarded for the purposes in question. If, then, the interest is of the character I have stated, I cannot satisfactorily formulate or discern any distinction in principle between a provision to accumulate during the settlor's life so much a year out of income by investing in the ordinary way on the one hand, and a provision to keep up policies which will mature on the death of the settlor on the other hand. In principle, the operation seems to me to be the same—a provision for building up a fund of capital which will become part of the trust premises for all purposes on the settlor's death.

I am still passing over the question whether there is some difference between s. 1 and s. 2, sub-s. 1 (*b*), in this regard, in order that I may complete what I think to be the consequences which necessarily flow from what I have so far said.

The interest which I have defined ceased on the death of Captain Brassey. What, then, was the benefit which accrued or arose? I think it was the circumstance that this 1,977*l*. was no longer withdrawn from what I have called trust circulation, but became immediately available for the enjoyment of the person entitled, under the protective trusts, to the income of the trust premises. It therefore follows that the benefit accruing or arising must be valued in the manner stipulated by s. 7, sub-s. 7, and one arrives arithmetically—upon this no question has been raised before us—at the figure, which I have already stated, of 105,000*l.*

I add a word about the *Lloyds Bank* case (26) to which Mr. Cozens-Hardy Horne referred, though perhaps I have anticipated what can be said about it by my citation from Clauson, L.J.'s judgment in *In re Hodson's Settlement* (27). If it could be said that before and after the relevant date the person or persons—if there were more than one—interested under the settlement were the same—and their respective interests if they were more than one were also the same—then I think it may necessarily follow from the *Lloyds Bank* case (26) that any passing, actual or notional, for the purposes of estate duty would be negatived. But it does not seem to me that those conditions can be found in the present case. Before Captain Brassey's death there was a number of persons interested under the settlement. After the death many of them were the same persons, though their interests were not entirely the same. In addition, other interests had arisen. In the first place there was the widow of Captain Brassey, who became entitled to a jointure of 3,000*l.* per annum out of income. Further, by his will Captain Brassey in fact exercised his general power of appointment, so that his three daughters, Hugo's three sisters, ceased to have an interest as tenants in tail respectively under the settlement of 1897 and became on the failure of prior limitations between them absolutely entitled by virtue of the appointment. Therefore, there was no such identity of persons and interests as I think would make the *Lloyds Bank* case (26) applicable so as to defeat the Crown's claim here.

The last point to which I wish to refer is this: as Mr. Cozens-Hardy Horne pointed out, both the *Hodson* case (27) and the *Westminster Bank* case (28) arose under s. 1; that is to say, in both cases the question was one of the passing of property, using that word in the sense in which Lord Parker defined it in his speech in *Attorney-General* v. *Milne* (29). In this case it is one of notional passing. It is true that the particular language which we have to construe here appears in para. (*b*) of s. 2, sub-s. 1, and there is no corresponding language in s. 1. But to my mind that does not affect the result, namely, that what Clauson, L.J., said in giving the judgments of the Court of Appeal in the *Hodson* case (27) and the *Westminster Bank* case (28) is equally applicable when this paragraph has to be considered. It would indeed be curious if it were otherwise. Mr. Cozens-Hardy Horne quoted the reference in Lord Macnaghten's speech in the *Cowley* case (30) to the effect that s. 2 is designed, putting it broadly, to bring within the actual grasp of the Act cases which were within its spirit though they fell outside the precise language of s. 1.

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(26) [1935] A. C. 382.
(27) [1939] Ch. 343, 355.
(28) [1939] Ch. 610.
(29) [1914] A. C. 765.

Consider for a moment such a case as illustrated by the present case, but one where there is not a specific sum to be laid aside each year in the way of accumulations but the whole of the income less an annuity; or take what is perhaps a simpler example, the case where what is directed to be accumulated is not X*l*. a year out of the income but a fraction of the total income, say one-tenth out of a total income of say 1,000*l*. per annum. In such a case as that it would appear to follow from the decision in the *Westminster Bank* case (31) that a corresponding portion of the trust fund would pass. It would seem to me to be strange that if, instead of providing that one-tenth of the income should be accumulated, it were said that 100*l*. a year (which is in effect the same thing) should be accumulated, the result would be that there would be neither an actual nor a notional passing under s. 1 or s. 2. In both types of case the effect of ss. 1 and 2, I think, is to say that one must treat as "passing" the requisite portion of the fund, the income of which has been applied in that particular way of accumulation.

Reverting to the formula which I have already used, a certain sum of income has been withdrawn from trust circulation in order to build up a fund for the benefit of those entitled in the future. It seems to me that, when the general scheme of the Act is regarded, there is no real basis for supposing that something which is regarded as an interest for the purpose of determining whether there has been a passing, or something which precisely corresponded to it, should not be regarded as "an interest" within s. 2, sub-s. 1 (*b*), for the purposes of a notional passing. In order that there may be a passing, to quote from Clauson, L.J., there must be a real change in the title to or the possession of the trust premises, the property passing. Such a result is achieved by saying that before the relevant death there was an "interest" different from that which followed it, which former interest ceased at the death. If that is so, I find it impossible to say that rights which can be properly, and must be held in this court to be properly, described as an interest which ceases so as to give rise

(30) [1899] A. C. 198.

(31) [1939] Ch. 610.

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to a passing cannot be properly regarded as an interest within the meaning of the language of s. 2, sub-s. 1 (*b*). I find it impossible to say that the fact that *Hodson's* case (32) and the *Westminster Bank* case (33) are s. 1 cases renders inapplicable and not binding upon this court the conclusions which I think necessarily flow from the language which I have quoted, particularly in the *Westminster Bank* case (33), from Clauson, L.J.'s judgment.

For these reasons, I have felt compelled to come to the conclusion that this appeal fails. However erratic, as has been apparent in this respect, may be the actual working of the terms of the Act, and however financially disastrous has proved to be the due performance of their duties by the trustees under the trust, I see no escape from holding that the duty claimed is properly exigible.

JENKINS, L.J. For the reasons stated by Romer, J., and by the Master of the Rolls, to which I cannot usefully add anything, I agree that the claim made in this case for duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, is well founded, and, accordingly, that this appeal fails and should be dismissed.

BIRKETT, L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Norton, Rose, Greenwell & Co.; Solicitor of Inland Revenue.*

B. A. B.

(32) [1939] Ch. 343.

(33) [1939] Ch. 610.

LITTMAN *v.* BARRON (INSPECTOR OF TAXES).

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April 30;
May 2, 3;
June 15.

Cohen, Singleton and Jenkins, L.JJ.

Revenue—Income tax—Assessments on "excess rents" in case of "short leases"—Loss on other properties held on short leases and only in some cases re-let—Claim to deduction or set-off—"Transaction"—"Profits"—"Excess"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 27, *sub-s.* 1*—Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 15, *sub-s.* 1.

A taxpayer was the owner of twenty-eight leasehold properties. He had sublet twenty-three of them at rents exceeding those at

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which he took them, and also exceeding the amounts of their respective assessments under Sch. A to the Income Tax Act, 1918; two were let at rents lower than the rents payable by him to the respective head lessors; and he had failed to sublet the remaining three, though he had tried to do so. The leases were all "short leases" within the meaning of s. 13 of the Finance Act, 1940, and leases to which s. 15 of that Act applied. He was assessed to income tax under Sch. A on the annual value of the properties; and also, with regard to the twenty-three properties, in respect of what are termed the excess rents derived from them under Case VI of Sch. D in pursuance of s. 15 of the Finance Act, 1940.

The taxpayer claimed to be entitled to a deduction in respect of losses which he had sustained in respect of the other five properties by virtue of s. 27, sub-s. 1, of the Finance Act, 1927:—

Held, (by Cohen and Singleton, L.JJ.; Jenkins, L.J., dissenting) that the taxpayer was entitled to make the deduction by reason of s. 27, sub-s. 1, of the Finance Act, 1927. The excess rents subject to tax by s. 15 of the Finance Act, 1940, were not, as was contended for the Crown, merely an additional value of the land, retaining the characteristics of income from property in land but brought into charge for the purpose of administrative convenience under Case VI of Sch. D, but were annual profits and gains taxable under Sch. D.

Further, as regards the properties in respect of which the taxpayer suffered a loss, he incurred that loss in a "transaction of such "a nature that, if any profits had arisen therefrom, he would "have been liable to be assessed in respect thereof under Case VI "of Sch. D", within the meaning of sub-s. 1 of s. 27. The "transaction" was, in the case of each of the five properties, the acquisition of the property and the subsequent management of it. If the expression "profits" in sub-s. 1 of s. 27 were used in its ordinary commercial sense, it was clear that the sub-section could not here apply, since, using the formula prescribed by s. 15, it was quite possible that, although there was in a given year a commercial profit, no assessment could be made under Case VI, because the Sch. A assessment was higher than the rent receivable from the sub-tenant. In such a case it could not be truly said that the transaction was of such a nature that, if any profit had arisen from it, the immediate lessor would have been liable to be assessed. But, although there could not be a loss unless there were a commercial loss, the reference to profit in sub-s. 1 of s. 27 was not to commercial profit, but to a profit taxable under Sch. D. In considering, therefore, whether a particular transaction gave rise to a profit liable to be taxed under Case VI of Sch. D the court must apply the rules to be found in the Act of 1918, and the amending Acts, to ascertain, as regards any particular transaction, whether there was such a profit.

Per Jenkins, L.J. (dissenting): Accepting the taxpayer's contentention for the purposes of the present case that each acquisition by him of one of the properties was to be regarded as a "transaction" giving rise to a profit in any year in which income derived from reletting exceeded outgoings under the superior lease and also wherein he sustained a loss in any year in which the reverse was the case, whether through re-letting at an inadequate rent or through failure to re-let at all, nevertheless these five transactions were not "of "such a nature that, if any profits had arisen therefrom" the taxpayer "would have been liable to be assessed in respect thereof "under Case VI of Sch. D", within the meaning of sub-s. 1 of s. 27. The references to profit and loss in that sub-section were directed to profit and loss in the commercial sense. But there might be a commercial profit without any "excess" under sub-s. 1 of s. 15, or, again, the "excess", if any, might be only a fraction of the commercial profit. The "excess" charged with tax under sub-s. 1 of s. 15 bore no immediate relation to the immediate lessor's profit for the year in the commercial sense of that word. The reasoning for the taxpayer would enable him, in effect, to substitute the word "excess" for the word "profits" in sub-s. 1 of s. 27. The truth was that the use of Case VI of Sch. D was mere machinery, and sub-s. 1 of s. 15 was directed not to taxation of commercial profits, but to more effective taxation of annual value.

Decision of Wynn-Parry, J. [1951] W. N. 170, reversed.

APPEAL from a decision of Wynn-Parry, J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The case was argued solely by reference to the facts as they existed in the year ending April 5, 1943. The taxpayer had appealed against assessments for that and the two preceding years.

The taxpayer was the owner of twenty-eight leasehold properties. He had sublet twenty-three of them at rents exceeding those at which he took them, and also exceeding the amounts of their respective assessments under Sch. A to the Income Tax Act, 1918, the aggregate excess of rents receivable over Sch. A assessments amounting to 4,830*l.*; two were let at rents lower than the rents payable by him to the respective head lessors; and he had failed to sublet the remaining three, although he had tried to do so, the aggregate deficiency of rents receivable as compared with rents payable in respect of the five properties amounting to 3,575*l.* He was assessed to income tax under Sch. A on the annual value of the properties; and also, with regard to the twenty-three properties, in respect of what may be conveniently, though not entirely accurately, referred to as the excess rents derived from them under Case VI of Sch. D in pursuance of s. 15 of the Finance Act, 1940 (2).

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(1) [1951] W. N. 170.

(2) Finance Act, 1940, s. 15, sub-s. 1: "If, as respects any year of "assessment, the immediate lessor of "a unit of assessment is entitled in "respect of the unit to any rent pay-"able under a lease or leases to which "this section applies, he shall be

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The taxpayer did not dispute the Crown's right to assess him in respect of those excess rents, but he claimed to be entitled to a deduction in respect of losses which he said he had sustained in respect of the other five properties. He claimed that deduction under s. 27, sub-s. 1, of the Finance Act, 1927 (3). The leases were all "short leases" within the meaning of s. 13 of the Finance Act, 1940 (2), and leases to which s. 15 of that Act applied.

The contentions for the taxpayer before the Special Commissioners were: (1.) That the taxpayer was engaged in a transaction within s. 27 of the Finance Act, 1927, namely, the acquisition and management of the five properties.

(2.) Alternatively, that the taxpayer was engaged in five such transactions, namely, in respect of each of those properties.

"chargeable to tax under Case VI of "Sch. D in respect of the excess, if "any, of the amount which would "have been the amount of the assess-"ment of the unit for the purposes of "Sch. A, as reduced for the purpose "of collection, if the annual value of "the unit had been determined (in "accordance, in whatever part of the "United Kingdom the unit is situated, "with the Rules applicable to Sch. A "set out in Sch. I to the Income Tax "Act, 1918) by reference to that rent "and the other terms of the lease or "leases, over whichever is the greater "of—(*a*) the actual amount of the "assessment of the unit for the pur-"poses of Sch. A, as reduced for the "purpose of collection; or (*b*) the "amount of any rent payable by "the immediate lessor in respect of "the unit under any short lease or "short leases".

Sub-s. 4: "A lease shall be deemed "to be a lease to which this section "applies if, and only if, the following "conditions are fulfilled with respect "to it—(*a*) that it is a short lease; "(*b*) that the land comprised in it "is or forms part of a single unit of "assessment; (*c*) that the rent under "it is payable to the immediate lessor "of that unit; (*d*) that the estate or "interest of the immediate lessor of "that unit is not, as respects any "part of that unit, subject to any "short lease which comprises also "land not wholly within that unit, "being a lease, the rent under which "is payable to that immediate "lessor".

Section 13, sub-s. 1: ". . . 'Long "'lease' means a lease granted for "a term exceeding fifty years, other "than a lease which is or takes effect "as a lease for a term of years deter-"minable after the death or marriage "of any person; 'short lease' means "a lease which is not a long lease; ". . .".

(3) Finance Act, 1927, s. 27, sub-s. 1: "Where, in any year of assess-"ment a person sustains a loss in any "transaction . . . being a transaction "of such a nature that, if any profits "had arisen therefrom, he would have "been liable to be assessed in respect "thereof under Case VI of Sch. D, "he may claim that the amount of the "loss sustained by him shall, as far "as may be, be deducted from or set "off against the amount of any profits "or gains arising from any trans-"action in respect of which he is "assessed for that year under the said "Case VI, and that any portion of "the loss for which relief is not so "given shall, as far as may be, be "carried forward and deducted from "or set off against the amount of any "profits or gains arising from any "transaction in respect of which he is "assessed under the said Case VI for "any of the six following years of "assessment".

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(3.) That in respect of each of the first two of those properties the taxpayer sustained a loss in an amount represented by the excess of the rent paid by him over the supposed annual value computed according to s. 15 of the Finance Act, 1940.

(4.) That in respect of each of the remaining three of those properties the taxpayer sustained a loss equal to the rent paid by him.

(5.) That if sums in excess, in each instance, of the net Sch. A assessments had been received by the taxpayer in respect of the five properties, those sums would have been profits in amounts computed in accordance with s. 15 of the Finance Act, 1940 (there called an excess), and those profits would, by the express terms of s. 15, have been assessable under Sch. D, Case VI.

(6.) That the sums in question in this appeal were the amounts of losses sustained by the taxpayer on transactions of such a nature that, if profits had arisen from them, the taxpayer would have been liable to be assessed in respect of them under Case VI of Sch. D.

(7.) That the taxpayer was entitled to carry forward the sums in question in this appeal, and to deduct from them, or set them off against, the amounts of the profits or gains forming the subjects of the assessments under appeal.

Before the Court of Appeal, the taxpayer's counsel admitted that the dealings with each property must be regarded as a separate transaction. The first contention, therefore, was not before the court.

The Crown's contentions were: (1.) That the holding by the taxpayer of the five properties, some of which he sublet, and some of which remained vacant, was not a transaction or transactions.

(2.) That, even if there were in this case any such transactions, they were not of such a nature as is described in s. 27, sub-s. 1, of the Finance Act, 1927; that "if any profits had arisen there-" from he would have been liable to be assessed in respect thereof " under Case VI of Sch. D . . .", because those profits, if any, would have been covered by the Sch. A assessment.

(3.) That s. 15 of the Finance Act, 1940, did not charge profits as such, but a sum described as the excess of an amount calculated in accordance with the provisions of the section over other prescribed amounts, and was therefore inapplicable in considering what relief should be given under s. 27 of the Finance Act, 1927.

The Special Commissioners and Wynn-Parry, J., both decided

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in favour of the Crown, in substance on the ground that, whether or not there was a transaction within the meaning of s. 27, it was not " a transaction of such a nature that, if any profits had arisen " therefrom ", the taxpayer would have been liable to be assessed in respect of those profits. They took the view that s. 27 contemplated loss and profit ascertained in the commercial sense and that excess rents ascertained in the artificial way required by s. 15 of the Act of 1940 could not be said to be profits within the meaning of s. 27, sub-s. 1, of the Finance Act, 1927.

The taxpayer appealed.

Millard Tucker, K.C., and *N. E. Mustoe* for the taxpayer.

Sir Frank Soskice, A.-G., and *R. P. Hills* for the Crown.

The arguments sufficiently appear from the judgments and from the contentions of the parties as above set out.

Cur. adv. vult.

June 15. The following judgments were read:—

COHEN, L.J. [after referring to the facts and the contentions:] The subjects debated before us were:—1. What was the nature of the excess rents which were subjected to tax by s. 15 of the Act of 1940? Were they, as the Attorney-General contended, merely an addition to the annual value of the land retaining the characteristics of income from property in land, but brought into charge for the purposes of administrative convenience under Case VI of Sch. D, or were they, as Mr. Millard Tucker argued, annual profits and gains taxable under Sch. D? 2. As regards the properties in respect of which the taxpayer suffered a loss, could he be said to have incurred that loss in a transaction of such a nature that if any profits had arisen therefrom he would have been liable to be assessed in respect thereof under Case VI of Sch. D? The second question raised two subsidiary points: (1.) What was the transaction from which the profits could be said to be derived? (2.) What was the meaning of the expression " profits " in s. 27?

In support of his argument on the first point, the Attorney-General went shortly through the history of income tax and pointed out that, from the beginning until 1930, the only method of taxing income from the ownership of land was under Sch. A on the annual value. When in the 1920's the Crown sought to tax a property company under Sch. D, the claim was at once rejected by the House of Lords in the case of *Fry* v. *Salisbury House Estate Ld.* (4). Lord Atkin said (5): "I think that this "case should be decided in favour of the respondents upon the "simple ground that annual income derived from the ownership "of lands, tenements and hereditaments can only be assessed "under Sch. A and in accordance with the rules of that Schedule. "In my opinion it makes no difference that the income so derived "forms part of the annual profits of a trading concern. For the "purpose of assessing such profits for the purpose of Sch. D "the income so derived is not to be brought into account. The "option of the Revenue Authorities to assess under whichever "Schedule they prefer in my opinion does not exist and is inconsistent with the provisions of the Income Tax Acts throughout "their history". The decision was only of importance to the Revenue as regards London properties the annual value of which was fixed under the Valuation (Metropolis) Act, 1869. The annual value of other properties is measured by r. 1 of the rules applicable to Sch. A and is the actual rent if the hereditaments were let at a rack-rent within seven years of the assessment, or if not, the rack-rent which they were actually worth subject to the statutory allowances. Under this rule there could not be substantial divergence between annual value as ascertained under the rule and the true rack-rent. The trouble as regards London properties was met by s. 31 of the Finance Act, 1930, which in effect made the rules for ascertaining annual value theretofore applicable to the rest of England applicable also in London. The sanctity of Sch. A was, however, maintained and all income from the ownership of land continued to be taxed under that Schedule.

Section 15 of the Act of 1940 was, said the Attorney-General, introduced for a different reason. The war was on and it was anticipated that it would be impossible to carry out the quinquennial valuation of properties due to be carried out in 1941. If that were so and nothing were done, it would necessarily mean that the Crown would suffer a substantial loss of revenue. This, said the Attorney-General, was the reason for s. 15. That reason did not require an infringement of the sanctity of Sch. A and we ought not so to construe s. 15 as to involve that sacrilege. He sought to reinforce this argument by a reference to the language of s. 15 itself. Sub-s. 1 made assessment under Sch. A the basis of ascertainment of the higher figure in the subtraction sum by which the amount of the excess was to be ascertained.

(4) [1930] A. C. 432.

(5) Ibid. 454.

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Mr. Millard Tucker replied that we must construe the section from its language and not by a research into ancient history. He took us at length through the provisions of the Income Tax Act, 1918, and pointed out that (a) no matter what be the Schedule under which the tax is levied, it is always a tax on income and that annual value is merely the prescribed method of measuring that income in the case of tax levied under Sch. A (see *per* Lord Atkinson in *Coman* v. *Rotunda Hospital, Dublin* (*Governors*) (6)); (b) the terms profits, or profits and gains, are used indiscriminately in a number of sections of the Income Tax Act, 1918, and the amending Acts, and in contexts in which they must include excess rents taxed under s. 15 of the Act of 1940, for instance, s. 100 of the Act of 1918; for, if not, the amount of the excess rents would not have to be included in the statement required under that section. He also pointed out that Parliament in 1940 had drawn a purely artificial distinction between short and long leases, the latter under s. 13 being leases for a term exceeding fifty years other than a lease for a term of years determinable after the death or marriage of a person. So far as long leases are concerned, Parliament had made a drastic alteration as regards the method of taxation of income derived from properties, for s. 17, sub-s. 2, provided: "Rules 1 and 4 of No. VIII of Schedule A shall not "apply to any payment to which this section applies, but any "such payment shall, so far as it does not fall under any other "Case, be charged with tax under Case VI of Schedule D and "be treated for the purposes of such of the provisions of the "Income Tax Acts as apply to royalties paid in respect of the "user of a patent as if it were such a royalty". That being so, there was no reason for refusing to give to s. 15 the meaning which its language prima facie bore. That section directed that the taxpayer should be assessed in respect of the excess, if any, as therein defined under Case VI of Sch. D. Looking at the relevant provisions of the Act of 1918, they define Case VI as covering "tax in respect of any annual profits or gains not falling "under any of the foregoing Cases, and not charged by virtue of "any other Schedule". Anything assessed under Case VI, said Mr. Tucker, must therefore be a profit, and the true effect of s. 15 is that it directs a tax on profits, the amount of such profits being ascertained by working out the arithmetic prescribed by the section.

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(6) [1921] 1 A. C. 1, 25.

I have come to the conclusion that up to this point Mr. Tucker is right, but it does not necessarily follow that the taxpayer is entitled to the relief he seeks under s. 27. He can only deduct the loss he suffered in respect of his dealings with any particular property if the second question is also answered in his favour, that is to say, if the loss he seeks to set off arises from a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of Sch. D. The Attorney-General says that there is nothing which can be said to be a transaction. He asks: "What "is the transaction?" Not, he says, the acquisition, for that does not per se involve profit or loss, and, so far as the sale and purchase of land is concerned, s. 15 is irrelevant. Not the letting of the property, since that will not help the taxpayer, at any rate in cases where the property is unlet. He pointed out by reference to the list of subjects of charge brought into Case VI by amending Acts, which appear on p. 169 of the Stationery Office reprint of the Act, that there are a number of such subjects of charge which cannot be said to have arisen from a transaction which was of a commercial nature or give rise to loss or profit in the commercial sense; for example, excessive housekeeper relief resulting from apportionment of a double claim. He submitted that s. 27 had been introduced as a result of such decisions as *Ryall* v. *Hoare* (7) and *Lyons* v. *Cowcher* (8). The effect of these decisions was to make the profits of isolated transactions of a commercial nature taxable under Case VI, and without s. 27 the taxpayer would have been without redress if in a subsequent year a similar transaction resulted in a loss. I am prepared to accept the Attorney-General's explanation of the origin of s. 27, but it does not seem to me necessarily to lead to the conclusion that s. 27 does not apply in the present case.

Mr. Tucker submitted that the transaction is the acquisition of the property and the subsequent management of it. Plainly, as Mr. Tucker points out, the transaction need not be in the year of assessment; the only question is whether in the year of assessment loss or profit results from it. There is, therefore, no reason for not looking back to the original acquisition as part of the transaction. The transaction as a whole covers a number of acts: (1.) the acquisition of the property, (2.) payment of the head rent, (3.) the attempt to sublet, (4.) in two cases the actual subletting, (5.) the receipt of the rent from the sub-tenant.

(7) [1923] 2 K. B. 447.

(8) (1926) 10 Tax Cas. 438.

I have come to the conclusion that on this point also Mr. Tucker is right, and that the losses in question arose in the case of each property from a transaction consisting, as it is put in the case stated, in the acquisition and management of the property concerned.

A more difficult point, however, is as to the meaning to be put on "loss" and "profit" in s. 27. The argument of the Attorney-General may be stated as follows. Both words must be used in their ordinary commercial sense. If that be so, it is clear that s. 27 cannot apply, since, using the formula prescribed by s. 15, it is quite possible that although there is in a given year a commercial profit, no assessment could be made under Case VI because the Sch. A assessment was higher than the rent receivable from the sub-tenant. In such a case it could not be truly said that the transaction was of such a nature that if any profit had arisen therefrom the immediate lessor would have been liable to be assessed. Mr. Tucker suggested that this argument was based on a misreading of the word "assessed". "To be assessed" meant, according to him, "to have his liability calculated", and a taxpayer would have been assessed even though the result might be a nil assessment. In support of his argument, Mr. Tucker relied on the decision in *Harling* v. *Celynen Collieries Workmen's Institute* (9), but I do not think that case affords any assistance, as the court was considering the meaning of the expression "year of assessment", not of the word "assessed". A year may well be a year of assessment, though, owing to the result of the year's trading being a loss, no assessment is actually made on the taxpayer. I think Mr. Hills gave the right answer to this argument when he said that, although the Inland Revenue authorities may at times issue a "nil assessment", that is merely a convenient method of informing the taxpayer that no charge is being made. In its literal meaning "nil assessment" is a contradiction in terms.

Alternatively Mr. Tucker argued that although there cannot be a loss unless there is a commercial loss, the reference to profit is not a reference to commercial profit, but to a profit taxable under Case VI. In considering, therefore, whether a particular transaction gives rise to a profit liable to be taxed under Case VI of Sch. D, you must apply the rules to be found in the Act of 1918 and the amending Acts in order to ascertain as regards any particular transaction whether there is such a profit. The fact that in some cases there may be a commercial profit and yet no assessment under Case VI is nihil ad rem.

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(9) [1940] 2 K. B. 465.

The Attorney-General also submitted that s. 27 could not apply because the taxpayer was taxed as regards rents partly under Sch. A and partly under Case VI. Both sources of income, said the Attorney-General, arose from the same transaction; therefore it was impossible to say that if there had been a profit the taxpayer would have been liable to be assessed in respect thereof under Case VI. The answer to this point, I think, is that if Parliament chooses, as it has done, to split the income arising from ownership of property into separate subjects of tax, the taxpayer who has made a loss is entitled to say that, although part of his income from the transaction is taxed under Sch. A, he would still be liable, if there had been a profit ascertained as directed by Parliament, to be taxed on that profit under Case VI, and it is immaterial that part of the commercial profit may have been taxable under Sch. A. On the whole, though not without hesitation, I have come to the conclusion that this argument is well founded, and that the taxpayer is entitled to succeed.

In view of an argument addressed to us by Mr. Hills, I would add that I agree with him that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability. None the less, I arrive at the conclusion I have reached all the more gladly because it is manifest that the Crown's argument, if successful, might involve that the taxpayer would have to pay income tax and possibly surtax on excess rents from one or more properties, although his income from properties as a whole and possibly from all sources was nil. As my brother Singleton put it in the course of the argument, the taxpayer would be worse off than he would have been if the Crown had won the *Salisbury House* case (10). The Crown's argument would also involve an unfortunate distinction between an owner of the unexpired portion of a lease for fifty years (a long lease to which s. 17 of the Act of 1940 applies) and the owner of the unexpired portion of a lease for forty-nine years (a short lease within s. 15), since it is common ground between the parties that in the case of excess rents under long leases the intermediate lessor by virtue of s. 17 gets the relief which the taxpayer seeks to have in this appeal.

In conclusion, I would add that it seems to me reasonable to suppose that Parliament, when it placed excess rents within Case VI of Sch. D, intended the taxpayer to be entitled to any relief attaching to that Case, including s. 27 of the Act of 1927. Such an intention would be in conformity with what the Attorney-General said was the reason for the original introduction of s. 27.

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(10) [1930] A. C. 432.

I would allow the appeal.

Singleton, L.J. The taxpayer is described in para. 4 of the case as a dealer in property. That, we were told, means that he is one who acquires leases of property and, thereafter, endeavours to let the properties comprised in the various leases on terms advantageous to himself. At all material times he held short leases of twenty-eight properties: the leases were short leases as defined in s. 13 of the Finance Act, 1940. The taxpayer is not assessable under Case I or under Case II of Sch. D of the Income Tax Act, 1918: that follows from the decision in the *Salisbury House* case (10). In that case it was sought to assess the company in respect of excess rents under Sch. D, though the property was already assessed under Sch. A, and it was held that the rents were profits arising from the ownership of land in respect of which the assessment under Sch. A was exhaustive, and that they could not be included in the assessment under Sch. D as trade receipts of the company.

If a company, or an individual, could be regarded as a trader, trade losses would be a proper and legitimate deduction, and, if the nature of the trade consisted of taking leases and re-letting, a loss on one would be set off against profits on others in order to arrive at the annual profits or gains from the trade or business.

Under s. 15 of the Act of 1940 excess rents of immediate lessors arising under certain short leases are made subject to tax. The immediate lessor is chargeable to tax under Case VI of Sch. D in respect of the excess. Leaving out any question of allowances, the excess is the amount by which the rent received exceeds the rent paid, or by which it exceeds the Sch. A assessment if that is greater than the rent paid. It is thus profit to the immediate lessor. The liability to tax is in respect of the excess, and to bring it within the framework of the Income Tax Act, 1918, it is put, and rightly put, under Sch. D and embraced under Case VI of that Schedule—tax in respect of any profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule. The section was dealing with excess rents:

(10) [1930] A. C. 432.

it was designed to enable tax to be collected in respect of profit rentals. Thus, from the passing of, or from the coming into force of, the Act of 1940, if profits arose from the transaction the taxpayer was liable to be assessed in respect of them, that is, in respect of the excess rents. He was brought in under Sch. D, which covers annual profits or gains, but he was brought under Case VI and not under Case I.

The claim of the Crown in this appeal is that the taxpayer is in a far worse position than he would be if he was to be regarded as a trader. They say that s. 15 of the Act of 1940 ought not to be regarded as undoing the effect of the *Salisbury House* case (10), that it goes much further, and that its effect in the case of short leases is that a man who engages in this business of taking short leases and re-letting must pay tax on each case in which he makes a profit, but can never deduct, or set off, a loss which he makes on another property. The position is shown by the figures given on document A attached to the case stated—on twenty-three properties the taxpayer receives excess rents amounting to 4,830*l*., whereas on five other properties he incurs a loss of 3,575*l*. The claim of the Crown is that he is chargeable to tax in respect of the 4,830*l*., and that he is not entitled to any deduction in respect of the other properties on which he lost 3,575*l*.—and this involves a considerable sum in income tax and surtax. It would strike one as surprising, if this should be the true position in regard to short leases, for it is agreed that in the case of excess rents under long leases the position is otherwise, and the immediate lessor by virtue of the provisions of s. 17 is given the relief which the taxpayer seeks to have in this appeal. And no one can suggest any reason why the taxpayer should be differently treated according to whether he held short leases or long leases. (A long lease might be approaching its end, whilst a short lease might have many years to run.)

I do not think that I have encountered anything more complicated than the Act of 1940. This court spent much time on *Tamplin & Son's Brewery (Brighton) Ld.* v. *Nash* (11) last year in considering the true meaning and effect of s. 17 (long leases), and we have now spent some days on s. 15 (short leases), and these are not the only troublesome sections. I cannot believe that it was the intention of the legislature to make the position of the taxpayer in this case worse than it would have been if the *Salisbury House* case (10) had been decided the other way, nor

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(10) [1930] A. C. 432.

(11) [1950] 2 All E. R. 93.

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can I see any reason why he should be better off if he held long leases than he would be if he held short leases.

The whole question depends on whether s. 27 of the Finance Act, 1927, applies to this case. I have come to the conclusion that it does apply. The Act of 1940 does not interfere with the incidence of Sch. A tax. If the excess rent is the difference between the rent received and the rent paid, it is profit to the taxpayer; if the excess rent is the difference between the rent received and the Sch. A assessment, it is part of the profit made by the taxpayer. In either case it is profit within the words " profits or gains not falling under any of the foregoing Cases ". They are profits in fact, and they are so treated for the purpose of the Income Tax Act, 1918: the taxpayer is chargeable to tax under Case VI of Sch. D in respect of the excess; that I read in the same way as " liable to be assessed in respect thereof under " Case VI of Sch. D " in s. 27 of the 1927 Act. Was there a " *transaction* " of such a nature that if any profits had arisen therefrom the taxpayer would have been liable to be assessed in respect thereof under Case VI of Sch. D? If so, the provisions of s. 27 of the Act of 1927 apply. Now the legislature has said by s. 15 of the Act of 1940 that in respect of excess rents therein mentioned the taxpayer shall be chargeable to tax under Case VI of Sch. D—which excess, as I have said, is profit to the taxpayer. How did the taxpayer become entitled to the excess rent? Surely the answer is—by the transaction of acquiring the lease, managing and sub-letting—that is the transaction. It was argued on behalf of the Crown that the original taking by the taxpayer was not a transaction within the section, even if it could be said that a letting by the taxpayer was, and, further, that it could not be said that the failure to let a property was a transaction which resulted in a loss. It is necessary to consider the taxpayer's activities. He acquired leases of properties for the purpose of obtaining profit in the way of increased rent. Each acquisition by him was for him a transaction out of which profit or loss might result, perhaps a profit in one year and a loss in another, or the following, year. In my view, the transaction ought to be regarded as being the acquisition of the lease, and if a loss occurs it matters not for the purposes of the section whether the loss results from letting at a smaller rent than that paid or from failure to let at all.

This, I believe, provides the right answer to the problem. Any other view would be placing too narrow a construction on the word " profits " in s. 27 of the Act of 1927, and would result

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in injustice and to a wholly unexplained distinction between the position of the taxpayer in regard to short leases as against long leases.

I am in favour of allowing the appeal.

JENKINS, L.J. This is an appeal from a judgment of Wynn-Parry, J., affirming a decision of the Special Commissioners in favour of the Crown on a question arising under s. 27 of the Finance Act, 1927, and s. 15 of the Finance Act, 1940, in the following circumstances.

The taxpayer, who is described in the stated case as a dealer in property, and appears to have made a practice of acquiring leasehold properties with a view to re-letting them at a profit, had on hand during the year ended April 5, 1943 (which has been taken as typical for the purpose of deciding the question of principle involved in the case), twenty-eight such properties. Of these twenty-three had been re-let by him at rents exceeding those at which he took them, and also exceeding the amounts of their respective assessments under Sch. A to the Income Tax Act, 1918, the aggregate excess of rents receivable over Sch. A assessments amounting in these twenty-three cases to 4,830*l*. Of the remaining five properties two had been let by him at rents lower than those for which he was himself liable and three had not been let at all, the aggregate deficiency of rents receivable as compared with rents payable in respect of these five properties amounting to 3,575*l*.

It will thus be seen that according to the ordinary acceptation of the expressions "profit" and "loss" the taxpayer had made a profit for the year on the twenty-three properties, represented by the excess of the rents he received over the rents he paid for them, but had made a loss for the year on the remaining five properties, represented by the excess of the rents he paid over the rents (if any) he received in those five cases.

His actual profit on the twenty-three properties would in fact be greater than the 4,830*l*. excess over the aggregate amount of their respective Sch. A assessments if, as would seem to have been the case, the rents he paid for them were below the amounts of those assessments; but as will be seen hereafter the excess of rent receivable over the Sch. A assessment, not the actual profit, is the relevant figure for the present purpose in any case in which the Sch. A assessment exceeds the rent payable. On the other hand, the deficiency of 3,575*l*. of rents receivable as compared with rents payable does represent his actual loss, in the ordinary or business sense of that expression, on the remaining five properties for the year in question.

In these circumstances the taxpayer admittedly became liable, by virtue of s. 15 of the Finance Act, 1940, to be assessed to income tax under Case VI of Sch. D on the 4,830*l*. representing the excess of the rents received for the twenty-three properties over the aggregate amount of their respective Sch. A assessments. But, while not contesting this liability, he claimed by virtue of s. 27 of the Finance Act, 1927, to be entitled to set off against or deduct from this excess of 4,830*l*. the loss of 3,575*l*. sustained on the remaining five properties. That claim was rejected by the Special Commissioners. Their decision was affirmed by Wynn-Parry, J., and the present appeal results.

As the law stood before s. 15 of the Finance Act, 1940, came into operation, the income tax liability in respect of the twenty-three houses would have been limited to tax at the standard rate on the amounts of their Sch. A assessments, notwithstanding that they had in fact been let at rents exceeding those amounts, so that in effect the taxpayer would have enjoyed tax-free so much of the profit rental received by him in respect of each property as represented an excess over and above the amount of its Sch. A assessment. I will assume by way of illustration that in a year when the standard rate of tax was 10*s*. in the *l*. the taxpayer held at a rent of 100*l*. a property with a Sch. A assessment of 300*l*. and had re-let it to an occupying tenant at a rent of 400*l*. In such a case the occupier would in the first instance have paid tax at the standard rate of 10*s*. in the *l*. on the Sch. A assessment of 300*l*. = 150*l*. Having so paid, the occupier would have been entitled to deduct the 150*l*. tax from the rent of 400*l*. payable by him to the taxpayer, who would thus have received 400*l*. less 150*l*. = 250*l*. The taxpayer, in his turn, on paying the rent of 100*l*. to his superior landlord, would have been entitled to deduct the tax thus suffered by him up to 10*s*. in the *l*. on the amount of rent payable by the taxpayer, the superior landlord thus receiving 100*l*. less 50*l*. = 50*l*. In the result, therefore, the taxpayer would have borne tax on the rent of 400*l*. received by him only to the extent of 100*l*. (that is, 150*l*. less 50*l*. recovered by deduction from the superior landlord), or, in other words, tax at the standard rate of 10*s*. in the *l*. on so much only of his profit rental as represented the difference (that is, 200*l*.) between the rent payable by him (that is, 100*l*.) and the Sch. A assessment (that is, 300*l*.), and would thus in effect have enjoyed tax-free the remaining 100*l*. of his profit rental, representing the excess of the rent receivable by him over the Sch. A assessment.

On the other hand, if with rents payable and receivable of 100*l*. and 400*l*. respectively as above the Sch. A assessment had been 400*l*. instead of 300*l*., the occupying tenant would have paid and deducted from the rent payable to the taxpayer 200*l*., and the taxpayer would have deducted as before 50*l*. from the rent payable by him, and would thus have been left to bear himself tax amounting to 150*l*., or, in other words, tax at the full standard rate of 10*s*. in the *l*. on the whole of the profit represented by the 300*l*. by which the rent he received exceeded the rent he paid. Moreover, although charged with tax at the full standard rate on the whole of the surplus of 300*l*. realized by him in this imaginary example, there would have been no question of his setting off against that figure any amount he might have been out of pocket over some other property which he had only been able to re-let at a lower rent than the rent he had himself to pay for it, or had been unable to re-let at all.

To summarize the position as it stood before s. 15 of the Finance Act, 1940, came into operation:—(i) The charge of tax at the standard rate on the amount of the assessment made under Sch. A by reference to the annual value of a property ascertained in accordance with the provisions of that schedule exhausted the liability to tax of the income derived from the letting of that property even though the rent actually derived from it might exceed the amount of the Sch. A assessment: see *Fry* v. *Salisbury House Estate Ld.* (13).

(ii) Schedule A was not concerned with profit and loss in the sense of excess or deficiency of receipts as compared with outgoings, but simply with the annual value ascertained in accordance with its terms, which was presumed for tax purposes to represent the income derived from the property and served as the statutory measure of such income: see *Coman* v. *The Rotunda Hospital, Dublin* (*Governors*) (14), *per* Lord Atkinson.

The group of sections in which s. 15 of the Finance Act, 1940, appears (comprising ss. 13 to 18 of that Act) has undoubtedly displaced the first of these propositions. The question in this case is, in effect, how far, if at all, these sections in conjunction with s. 27 of the Finance Act, 1927, have displaced the second.

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(13) [1930] A. C. 432.

(14) [1921] 1 A. C. 1, 25, 26.

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There is no doubt that the primary object of this group of sections in the Finance Act, 1940, was designed to bring into effective charge to tax the amounts by which rents received for properties assessable to tax under Sch. A exceed the amount of their Sch. A assessments, or, to be strictly accurate, to subject rents received for properties to the same amount of tax as they would have attracted if the Sch. A assessment had been made in each case by reference to the rent actually received for the property during the relevant period.

Section 13 of the Finance Act, 1940, contains a number of definitions: " 'immediate lessor' means in relation to any " premises—(*a*) if different parts of the premises are the subject " of separate tenancies or separate occupations, a lessor of the " whole or any part of the premises whose estate or interest " extends to the entirety of the premises and is not subject, im" mediately or mediately, to a lease of the entirety thereof; and " (*b*) in any other case, a lessor whose immediate tenant is " occupying or entitled to occupy the entirety of the premises: " Provided that if, in any case to which para. (*a*) of this definition " applies, there is more than one lessor satisfying the conditions " set out in that paragraph, that one of those lessors shall be " deemed to be the immediate lessor whose estate or interest is " not reversionary on the estate or interest of any of the others ".

" 'long lease' means a lease granted for a term exceeding fifty " years, other than a lease which is or takes effect as a lease for " a term of years determinable after the death or marriage of " any person;

" 'short lease' means a lease which is not a long lease;

" 'unit of assessment' means any land which forms a unit " of assessment for the purposes of Schedule A ".

The leases with which this appeal is concerned are all short leases, and the taxpayer is in each case the immediate lessor. The section directly applicable is, therefore, s. 15. [His Lordship read sub-s. 1.] By sub-s. 3 of s. 15: " Where for any year " an assessment has been made on an immediate lessor by " virtue of this section, the amount of any relief which may be " claimed by him under rule 8 of No. V of Schedule A shall be " such amount as could have been claimed by him if the annual " value of the unit had been determined in the manner described " in sub-s. 1 of this section ".

By sub-s. 4: " A lease shall be deemed to be a lease to which " this section applies if, and only if, the following conditions are "fulfilled with respect to it—(*a*) that it is a short lease; (*b*) that "the land comprised in it is or forms part of a single unit of "assessment; (*c*) that the rent under it is payable to the immediate lessor of that unit; (*d*) that the estate or interest of "the immediate lessor of that unit is not, as respects any part "of that unit, subject to any short lease which comprises also "land not wholly within that unit, being a lease the rent under "which is payable to that immediate lessor".

It will be seen that the method of charging tax on rents in excess of actual Sch. A assessments prescribed in cases to which s. 15 applies is to make the "excess" ascertained, as therein provided, chargeable to tax under Case VI of Sch. D.

For the taxpayer it is, in effect, contended that this is a new departure in the method of taxing rents which, while making him liable to tax on the excess admittedly realized as regards the twenty-three properties, does so not by treating the excess as rent to be brought into effective charge to tax by means of an upward revision of the Sch. A assessments, but by treating it as a profit taxable under a different schedule, namely, Sch. D, Case VI; and that as he is thus made liable to assessment under Case VI on the footing that the excess is a profit arising from his lettings of the twenty-three properties, it follows that he must be entitled by virtue of s. 27 of the Finance Act, 1927, to deduct from or set off against such profit the loss he has sustained with respect to the five properties which he has either let at rents lower than those he had to pay or failed to let at all.

Sub-s. 1 of s. 27 of the Finance Act, 1927, is in these terms: [His Lordship read the sub-section]. There was some argument on the meaning of the word "transaction" in s. 27, and it was suggested on the part of the Crown that while the taking on lease and re-letting of premises might be a "transaction", a mere failure to let leasehold premises could hardly be so described. Examples were given, such as the case of a legatee of a leasehold house who fails to find a tenant for it, or the case of the owner of a leasehold house acquired as his own residence who goes to live elsewhere and makes abortive attempts to sublet. It was asked whether it could be said that in cases such as these there was a "transaction" from which a loss arose in the shape of the rent which had to be paid without any return from the property. The answer, I think, is that the facts supposed in the hypothetical cases put are far removed from those of the present case. As I have said above, the taxpayer here appears to have made a practice of acquiring leasehold properties with a view to making a profit by re-letting them. That being so, I think each acquisition by him of a leasehold property with this object in view, being in the nature of a business venture or investment, is on the whole rightly to be regarded as a transaction giving rise to a profit in any year in which income derived from re-letting exceeds outgoings under the superior lease and wherein he sustains a loss in any year in which the reverse is the case, whether through re-letting at an inadequate rent or through failure to re-let at all. I am at all events prepared to assume this much in the taxpayer's favour for the purposes of the present case.

The main argument centred upon the question whether, given a "transaction" within the meaning of s. 27 with respect to each of the five properties in respect of which the taxpayer within the meaning of the section sustained a loss in the relevant year through failing to re-let at all or failing to re-let at an adequate rent, the transaction was within the meaning of the section "of "such a nature that if any profits had arisen therefrom" the taxpayer "would have been liable to be assessed in respect thereof "under Case VI of Sch. D".

The answer to this question depends largely on the meaning to be given to the words "loss" and "profits" in s. 27, sub-s. 1, of the Act of 1927 when considered in relation to the "excess" which s. 15 of the Act of 1940 makes chargeable to tax under Sch. D, Case VI. It is to be observed that what s. 15 of the Act of 1940 makes chargeable to tax under Case VI of Sch. D is not the profit made by the immediate lessor in the shape of the excess of the rent he receives over the rent he pays (in other words, his "profit" on the property for the year in the ordinary or business sense of that expression), but the excess of a notional Schedule A assessment, based on the rent actually received by him over whichever is the greater of two amounts, namely (a) the actual Sch. A assessment of the property, and (b) the amount of the rent paid under any short lease by the immediate lessor.

We were provided by the Crown in the course of the argument with a number of examples to show, as is indeed manifestly the case, that the "excess" charged with tax under the formula prescribed by s. 15, sub-s. 1, bears no necessary relation to the immediate lessor's profit for the year in the ordinary or business sense (which may conveniently be termed "the commercial "profit"). If the three elements in the formula are in the following ascending order of magnitude, namely:—(1.) rent paid by the immediate lessor under a "short" lease; (2.) notional Sch. A assessment based on rent received; (3.) actual Sch. A assessment; the commercial profit is represented substantially by the excess of (2.) over (1.), yet there is no "excess" for the purposes of s. 15, the reason why the formula is framed so as to exclude any statutory "excess" in such a case presumably being that where the rent received, while exceeding the rent paid, is less than the actual amount of the Sch. A assessment, the assessment under Sch. A effectively brings into charge to tax at the standard rate the whole of the rent actually received.

Again, if the items in the ascending order of magnitude are:—(1.) Rent paid by the immediate lessor under a "short" lease; (2.) Actual Sch. A assessment; (3.) Notional Sch. A assessment; the commercial profit is represented substantially by the excess of (3.) over (1.), but the statutory excess is limited to the excess of (3.) over (2.), the reason for so limiting the statutory excess presumably being that in such a case the excess of rent received over rent paid up to the actual Sch. A assessment is effectively brought into charge to tax at the standard rate by means of the actual Sch. A assessment.

Finally, the ascending order of magnitude might be:—(1.) Actual Sch. A assessment; (2.) Rent paid by the immediate lessor under a "short" lease; (3.) Notional Sch. A assessment. In such a case the statutory excess does no doubt approximate to the commercial profit, though it does not exactly coincide with such profit on account of the adjustments, and in particular the conventional allowance for repairs, involved in the notional assessment made in accordance with the rules applicable to Sch. A on the basis of an annual value determined in accordance with the provisions of that schedule by reference to the rent actually received by the immediate lessor. It may be noted that in this instance the difference between the rent paid by the immediate lessor and the actual amount of the Sch. A assessment would under s. 16 be brought into account against the superior landlord for the purpose of determining the excess which that section makes chargeable to tax in his hands under Case VI of Sch. D.

As was pointed out in the course of the argument, it is for practical purposes true to say that where the lease under which the immediate lessor holds is a "short" lease the s. 15 formula at all events produces no "excess", unless there is in fact a commercial profit, that is, unless the rent received exceeds the rent paid. But in any case in which the rent paid exceeds the rent received the whole of the rent paid, if less than the actual Sch. A assessment, is fully charged to tax at the standard rate under Sch. A, while if it exceeds the actual Sch. A assessment such excess is brought into account for the purpose of determining the " excess " in respect of which the superior landlord is himself made chargeable to tax under Case VI of Sch. D by virtue of the provisions of s. 16.

Moreover, it should be noted that rent payable by an immediate lessor under a long lease is ignored for the purposes of the s. 15 calculation. This I take to be because any rent payable by the immediate lessor under a long lease would be payable under deduction of tax at the standard rate by virtue of the provisions of s. 17. It appears to follow that if an immediate lessor holding under a long lease at a rent of 300*l*. per annum let the property on short lease at a rent giving a notional Sch. A assessment of 200*l*. per annum and the actual Sch. A assessment of the property was 100*l*., there would be an " excess " under s. 15 of 100*l*., although in fact the immediate lessor had sustained a commercial loss of 100*l*. The immediate lessor in such a case would, I take it, be entitled under s. 17 to deduct tax at the standard rate on the 200*l*. rent payable by him and to retain the tax on 100*l*. of it, and would thus in fact be recouped the tax with which he was charged on the s. 15 excess. But this example, if it be right, affords yet another illustration of the absence of any necessary relation between the s. 15 excess and the commercial profit realized by the immediate lessor.

Bearing in mind these considerations as to the character of the " excess " which s. 15 of the Act of 1940 makes chargeable to tax under Case VI of Sch. D, I return to s. 27, sub-s. 1, of the Act of 1927. Does s. 15 have the effect of making the transaction of acquiring a leasehold property and re-letting it at a lower rent or failing to re-let it at all, and thereby sustaining a loss on income account, a transaction which is within the meaning of s. 27, sub-s. 1, a transaction of such a nature that if a profit had arisen therefrom the person concerned would have been liable to be assessed in respect thereof under Case VI of Sch. D?

In the submission of the Crown, which has so far prevailed, s. 15 has no such effect. The word " loss " in s. 27, sub-s. 1, must, it is argued, obviously mean " loss " in the ordinary commercial sense, and the word " profits " used as it is in contradistinction to " loss " must likewise mean " profits " in the ordinary commercial sense. As has been seen above, the s. 15

"excess" bears no necessary relation to commercial profit. There may be a commercial profit without any "excess", or again the "excess", if any, may be only a fraction of the commercial profit. The nature of a transaction of the kind here in question is not such as to attract tax under Case VI of Sch. D on any profits arising therefrom. Its nature is such that by virtue of s. 15 of the Act of 1940 it attracts tax, under Case VI of Sch. D, if, and only if (irrespective of any profit in the commercial sense), the amount of a notional Sch. A assessment based on the actual rent received exceeds both the actual amount of the Sch. A assessment and the amount of the rent paid by the immediate lessor under any short lease, and in such case the subject of tax is not the amount of any commercial profit, but simply the excess of the amount of the notional Sch. A assessment over whichever is the greater of the other two factors in the calculation prescribed by s. 15. Moreover, it is argued, the "excess", if any, cannot be said to "arise" from the transaction in the sense of being the product of the transaction like the simple commercial profit represented by the excess of rent received over rent paid. It arises by virtue of the application of the statutory formula, and is the product not of the transaction but of the calculation which s. 15 enjoins.

Mr. Millard Tucker, for the taxpayer, argued that the word "profits" in s. 27, sub-s. 1, means profits in the income tax sense, that is, taxable income of any amount which under the income tax legislation is treated as taxable income, and he referred us to a number of passages in the Acts in which the expressions "profits", "gains" and "income" are used in this sense. He invited us, therefore, to hold that inasmuch as the "excess" ascertained in accordance with s. 15 had been made by that section chargeable to tax under Case VI of Sch. D, it followed that, no matter how ascertained, it became "profits" for all income tax purposes, and in particular "profits" within the meaning of s. 27, sub-s. 1. He supported this contention by reference to the scope of Case VI of Sch. D itself, which is expressed to extend to "tax in respect of any annual profits or "gains not falling under any of the foregoing cases and not "charged by virtue of any other schedule". This reasoning enabled him in effect to substitute "excess" for "profits" in s. 27, sub-s. 1, and to claim that the taxpayer was entitled to the benefit of that section with respect to the five transactions in which he had sustained "losses". He agreed, as I understood

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long and short leases. A man who acquired a "short" leasehold and re-let it at a profit would be entitled to set off against that profit losses sustained in other similar transactions, if a notional Sch. A assessment based on the rent he received exceeded the actual amount of the Sch. A assessment, but he would have no such right if such notional Sch. A assessment was less than the actual amount of the Sch. A assessment, although the commercial profit represented by the excess of rent received over rent paid might in either case be precisely the same.

For the reasons I have stated, being in substance the same as those which commended themselves to the Special Commissioners and the judge, I would for my part dismiss this appeal.

Appeal allowed.

Solicitors: *Tobin & Co.; Solicitor of Inland Revenue.*

C. G. M.

DANCKWERTS, J.

1951
July 6.

STEYNING AND LITTLEHAMPTON BUILDING SOCIETY *v.* WILSON.

[1950 S. 5120.]

Mortgage—Attornment clause—Relation of landlord and tenant—Agricultural holding—Mortgagee's claim for possession—Whether mortgagor within protection of Agricultural Holdings Acts—Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48)—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 23.

A mortgagee began an action against a mortgagor to obtain an order that the mortgagor, who had attorned tenant under an attornment clause in the mortgage deed, should deliver up possession of the mortgaged property.

The master made an order for possession, subject to decision by the judge of the question of law whether a letter from the mortgagee purporting to determine the tenancy created by the attornment clause was ineffective by reason of the Agricultural Holdings Act, 1948.

Held, that the Agricultural Holdings Acts could not have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings; that those statutes did not apply to the present mortgage; and that the question of law must therefore be decided against the mortgagor.

Portman Building Society v. *Young* [1950] W. N. 372; [1951] W. N. 10; [1950] 2 All E. R. 443; [1951] 1 All E. R. 191, considered and distinguished.

POINT OF LAW set down for determination under R. S. C., Ord. 55, r. 5A.

An action was begun by the Steyning and Littlehampton Building Society against a mortgagor to enforce a mortgage, dated June 8, 1948, by an order for delivery up of the mortgaged property. The plaintiff obtained an order for possession from the master, subject to determination by the court of the question of law stated below, and the case was adjourned into court for that purpose.

The property was of an agricultural nature, consisting of a market garden and nursery grounds. The tenant was the mortgagor of the whole of the property, and had attorned tenant under cl. 8 of the mortgage, which was as follows: "The borrower "hereby attorns tenant to the society of the property at the yearly "rent of sixpence if demanded provided that the society may at "any time after the last Thursday in July next by giving to the "borrower or leaving upon the property at least three days' "notice in writing of the intention of the society so to do "determine the tenancy hereby created and enter upon the "property but so that the said tenancy shall not render the "society liable to account to any person as mortgagees in "possession".

The question of law arose on the contention by the mortgagor that an attempt which had been made by the society by a letter dated October 26, 1950, to determine on October 31, 1950, the tenancy created by cl. 8 of the mortgage was ineffective by reason of s. 23 of the Agricultural Holdings Act, 1948 (1).

J. L. Arnold for the defendant mortgagor. This property is clearly an agricultural holding: see s. 1, sub-s. 2, of the Agricultural Holdings Act, 1948; and it comes within the definition of agriculture set out in s. 94, which is the definition section. The Act applies only to a letting from year to year (see s. 2), and a letting for an interest less than a tenancy from year to year is to long and short leases. A man who acquired a "short" leasehold and re-let it at a profit would be entitled to set off against that profit losses sustained in other similar transactions, if a notional Sch. A assessment based on the rent he received exceeded the actual amount of the Sch. A assessment, but he would have no such right if such notional Sch. A assessment was less than the actual amount of the Sch. A assessment, although the commercial profit represented by the excess of rent received over rent paid might in either case be precisely the same.

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(1) Agricultural Holdings Act, 1948, s. 23, sub-s. 1: "A notice to "quit an agricultural holding or part "of an agricultural holding shall "(notwithstanding any provision to "the contrary in the contract of "tenancy of the holding) be invalid "if it purports to terminate the "tenancy before the expiration of "twelve months from the end of the "then current year of tenancy . . .".

For the reasons I have stated, being in substance the same as those which commended themselves to the Special Commissioners and the judge, I would for my part dismiss this appeal.

Appeal allowed.

Solicitors: *Tobin & Co.; Solicitor of Inland Revenue.*

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Held, that the Agricultural Holdings Acts could not have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings; that those statutes did not apply to the present mortgage; and that the question of law must therefore be decided against the mortgagor.

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The question of law arose on the contention by the mortgagor that an attempt which had been made by the society by a letter dated October 26, 1950, to determine on October 31, 1950, the tenancy created by cl. 8 of the mortgage was ineffective by reason of s. 23 of the Agricultural Holdings Act, 1948 (1).

J. L. Arnold for the defendant mortgagor. This property is clearly an agricultural holding: see s. 1, sub-s. 2, of the Agricultural Holdings Act, 1948; and it comes within the definition of agriculture set out in s. 94, which is the definition section. The Act applies only to a letting from year to year (see s. 2), and a letting for an interest less than a tenancy from year to year is to be deemed a tenancy from year to year. The provisions of ss. 23 and 24 fetter the determination of the tenancy and restrict the giving of notice to quit. The notice to determine the tenancy is ineffective, and the tenancy continues. The case is not covered by authority. See, however, *Portman Building Society* v. *Young* (2).

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(1) Agricultural Holdings Act, 1948, s. 23, sub-s. 1: "A notice to "quit an agricultural holding or part "of an agricultural holding shall "(notwithstanding any provision to "the contrary in the contract of "tenancy of the holding) be invalid "if it purports to terminate the "tenancy before the expiration of "twelve months from the end of the "then current year of tenancy . . .".

G. C. D. S. Dunbar for the plaintiff society (the mortgagees). The attornment clause does not create an effectual tenancy within the scope of the Agricultural Acts. It appears that the provisions of those Acts are inapplicable to the relation of mortgagor and mortgagee. Sections 13, 14, 18 and 19 of the Act of 1948, for example, show that the Act was intended to be applicable between landlords and tenants and not between mortgagors and mortgagees: see, also, s. 6 of the Act of 1948 and the provisions as to repairs. From Jackson's Agricultural Holdings (10th ed.), it will be seen that an elaborate code has come into existence with regard to repairs, none of which is applicable to attornment. It would be extraordinary if a mortgagee suddenly became a landlord with an active interest in the estate. *Portman Building Society* v. *Young* (2) is not precisely applicable.

An attornment clause does not come within the scope of an Act of this kind, which imposes on landlords matters concerned with agriculture and machinery. The Acts have nothing to do with mortgagors and mortgagees and are not ancillary to the relation of mortgagor and mortgagee.

Arnold in reply. This was from the start an agricultural tenancy. [Counsel referred to *Ex parte Isherwood* (3).]

DANCKWERTS, J. This is a case, which again illustrates the undesirability of retaining in mortgages an attornment clause, which is entirely obsolete and at the present time performs no useful purpose. [After stating the facts, his Lordship continued:] The society have obtained from the master an order for possession in exercise of his discretion, subject only to the point of law in respect of which the case has been adjourned to me. That question is this: Mr. Arnold, who appears for the borrower, says that the attempt which was made by the society by a letter dated October 26, 1950, to determine on October 31, 1950, the tenancy created by cl. 8 of the mortgage, was ineffective by reason of s. 23 of the Agricultural Holdings Act, 1948. [His Lordship read it.] Mr. Arnold applies that provision, which at first sight does not seem to apply to a tenancy at will, in this way: Section 2 of the same Act provides: " Subject to the provisions of this " section, where under an agreement made on or after the first " day of March, 1948 "—which, of course, is the case in the present mortgage—" any land is let to a person for use as agricul- " tural land for an interest less than a tenancy from year to year, " or a person is granted a licence to occupy land for use as " agricultural land, and the circumstances are such that if his " interest were a tenancy from year to year he would in respect " of that land be the tenant of an agricultural holding, then, " unless the letting or grant was approved by the Minister before " the agreement was entered into, the agreement shall take effect, " with the necessary modifications, as if it were an agreement for " the letting of the land for a tenancy from year to year . . .".

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(2) [1950] 2 All E. R. 443; [1951] 1 All E. R. 191.

(3) (1882) 22 Ch. D. 384.

It is said that a tenancy at will is less than a tenancy from year to year and so, by virtue of this provision, assuming that the provisions of the Act otherwise apply, the tenancy shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year, and accordingly, therefore, s. 23 applies and restricts the giving of notice to quit.

There are other provisions of the Act to which I should refer. Section 1 defines " agricultural holding ", and it provides: " In " this Act the expression ' agricultural holding ' means the aggre- " gate of the agricultural land comprised in a contract of tenancy, " not being a contract under which the said land is let to a tenant " during his continuance in any office, appointment or employ- " ment held under the landlord. (2.) For the purposes of this " and the next following section, the expression ' agricultural " ' land ' means land used for agriculture which is so used for the " purposes of a trade or business and includes any other land " which, by virtue of a designation of the Minister of Agriculture " and Fisheries (hereafter in this Act referred to as ' the " ' Minister ') under sub-s. 1 of s. 109 of the Agriculture Act, " 1947, is agricultural land within the meaning of that Act ".

Section 94, the definition section of the Act, provides that: " ' agricultural holding ' has the meaning assigned to it by s. 1 " of this Act and ' agriculture ' includes horticulture, fruit " growing, seed growing, dairy farming and livestock breeding and "keeping, the use of land as grazing land, meadow land, osier "land, market gardens and nursery grounds" which, of course, is the use made of the land in the present case. "Landlord" is defined as meaning "any person for the time being entitled to "receive the rents and profits of any land", and "tenant" means "the holder of land under a contract of tenancy", and includes the executors and persons deriving title from him.

That is the argument, and, of course, if it applies, the proposition is that the notice given to determine the contract of tenancy on October 31, 1950, was ineffective and so the tenancy still continues and the tenant is entitled, presumably, to remain in possession.

A somewhat similar point was considered by me in *Portman Building Society* v. *Young* (4), where I held that, in the case of an attornment clause in another building society's mortgage, the relation of landlord and tenant was created so that the rights of the landlord to obtain possession, even though the tenancy had been determined, were subject to the provisions of the Rent Restriction Acts. The attornment clause in that case differed in certain respects from the present. It was in these terms: "The mortgagor hereby attorns tenant to the society of such "parts of the property as may at any time be in the occupation "of the mortgagor at the monthly rent of 9*l*. 16*s*. 0*d*. to be paid "on the days hereinbefore appointed for payment of monthly "instalments and such rent is to be applied in or towards satis"faction of such instalments. Provided always that the society "may at any time without giving previous notice in that behalf "determine the tenancy created by such attornment". It appears that no notice had in fact been given, and it was the issue of the summons by the building society in that case which determined the tenancy before the date when the matter came before me.

Portman Building Society v. *Young* (4) came before the Court of Appeal, which took the view that the protection of the Rent Restriction Acts, which I thought applied notwithstanding the argument that they had nothing whatever to do with mortgage transactions, did not apply because the relation created by the attornment had come to an end. Evershed, M.R., said (4): "Once the contractual situation created by the attornment clause "is gone, it is impossible with any sense of the meaning of words

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(4) [1950] 2 All E. R. 443; [1951] 1 All E. R. 191, 194.

"to refer to their relationship as that of landlord and tenant", and on that ground they decided that there was no relation of landlord and tenant and the Rent Restriction Acts had no application.

I am somewhat puzzled by the situation, because one cannot help noticing that in many cases in which the Rent Restriction Acts are applied the contractual relationship of landlord and tenant has gone either by the expiration of the term of the tenancy, or by the giving of notice to quit, and the tenant is protected by the provisions of those Acts, which create what is sometimes called a statutory tenancy. However that may be, I am not concerned with that in the present case.

It is clear that the decision of the Court of Appeal was based entirely on the view that there was no longer any relation of landlord and tenant in existence. The present case is not one where any protection would be given by the relevant Act to a person who ceased to be a tenant; but is one in which it is argued that the provisions of the Agricultural Holdings Act, 1948, impose certain restrictions on the giving of notices to determine tenancies, so that, if those restrictions are not complied with, the notice to quit and the attempt to determine the tenancy is ineffective.

The argument for the society is similar to the argument which was advanced by the building society in *Portman Building Society* v. *Young* (4); that is to say, that the situation was one between mortgagor and mortgagee, borrower and lender, and not such as was contemplated by the legislation, which was alleged to restrict the mortgagee's right to possession. That argument was noticed by the Master of the Rolls (5), but the court expressed no opinion on it, and I am left still to consider, therefore, without any real assistance from that decision, whether it was effective in the present case.

After referring to the argument that the Rent Restriction Acts applied, Evershed, M.R., said (6): "I confess that at first sight "it seemed a strange case for the invocation of the Acts. It did "not look as though it was the sort of case Parliament desired "to protect in this way. Still, the mortgagees, for their own "purposes, and to give themselves certain procedural advantages, "had thought fit to insert this attornment clause, and it might "be said that they must take the rough with the smooth and "must prove what was necessary to bring their case within the "class in which an order for possession under the Acts can be

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(4) [1950] 2 All E. R. 443; [1951] 1 All E. R. 191.

(5) [1951] 1 All E. R. 191, 193.

(6) Ibid. 192, 193.

"made, though, being mortgagees, they would almost inevitably "have to sue in the High Court where they would be deprived "of costs.

"The question whether or not an attornment clause in general "does create what Jessel, M.R., called a real tenancy between a "real landlord and a real tenant is one which might be perceptible "of a good deal of argument. In the days when *Ex parte Isherwood* (7) came before this court, a mortgage commonly took "the form of a conveyance of the fee simple so that at law the "mortgagee was the owner of the property and the mortgagor his "tenant at will. The position in equity was superimposed, and, "in fact, controlled the relationship, but, as I have said, in those "days the mortgagee became the owner at law, and, that being "so, it was, perhaps, somewhat easier to say that in reality a "position of landlord and tenant was created by putting the "attornment clause in the mortgage deed. Under modern conveyancing practice, the mortgagee does not become the legal "owner. He becomes a chargee. He may become a lessee "under a term of years, but he does not become the owner. "The mortgagor remains at law, as well as in equity, the owner "subject to the charge and otherwise to the provisions of the "mortgage deed. I do not think it necessary to pursue that "aspect of the case further, nor do I think it necessary (and, "indeed, on this we have heard no argument) to decide whether, "having regard to the terms of the attornment clause and the "uncertainty which, it is said, surrounds the description of the "parcels, it would be right to say that no tenancy in the true "sense of the term ever came into existence".

I think that the reference to uncertainty in that case is a reference to the fact that the attornment in the *Portman Building Society* case (8) was of such parts of the property as might at any time be in the occupation of the mortgagor. In the present case there is no doubt that the attornment refers to the whole of the property and, consequently, the question of uncertainty does not arise.

There remains the argument that, however ingeniously Mr. Arnold may have followed up and applied the provisions of the Agricultural Holdings Act, 1948, to the situation created by this attornment clause, the matter is not really a true contract of tenancy at all, but is purely a lending and borrowing transaction and not within the intention of the Agricultural Holdings Act,

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(7) 22 Ch. D. 384.

(8) [1950] 2 All E. R. 443; [1951] 1 All E. R. 191.

1948, or the Agriculture Act, 1947, which contain elaborate provisions for securing good management on the part of the landowners and good husbandry by the tenants of agricultural land.

Actually it seems to me that *Ex parte Isherwood* (9) does not really assist the argument of the society, and in a sense does assist the argument of Mr. Arnold, because, although Jessel, M.R., there said a good deal about there not being a real tenancy, and there really being the relation of mortgagor and mortgagee, he was really invoking that for the purpose of the exercise of a discretion by the court under the Bankruptcy Act, 1869, and rules as regards the terms to be imposed on a trustee to disclaim a leasehold interest of a bankrupt, and was not, as it seems, saying that, by reason of its not being a true landlord and tenant case at all, the disclaimer provisions in the statutory provisions relating to bankruptcy had no application to that. So to that extent it may be said that the case does support the argument that Mr. Arnold seeks to apply in the present case.

As against that, it seems to me that if an attornment clause of this kind is to invoke the provisions of the Agricultural Holdings Act, 1948, and the Agriculture Act, 1947, and if those provisions are to be applied again to the artificial term of years created either expressly in the mortgage, or by implication owing to s. 85 of the Law of Property Act, 1925, extremely odd results will occur, and the situation requiring the application of elaborate provisions in those Acts will be an extraordinarily unreal one. It seems to me that those Acts cannot have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings. The tenancies created for the purpose of farming the land are the subject of tenancy agreements and are not intended to be artificial tenancies created either under the statute or by an attornment clause in the mortgage deed for the purpose of providing a security to a lender.

In the present case I am supported in that conclusion by the form of the attornment clause. I took a different view in *Portman Building Society* v. *Young* (10), but in that case there was a rent in the attornment clause of a real money value, and it was because it was of a real money value that the case came within and was not excluded from the Rent Restriction Acts. In the present case the tenancy, such as it is, created by the attornment clause in cl. 8 of the mortgage, is at a yearly rent of sixpence, if

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(9) 22 Ch. D. 384.

(10) [1950] 2 All E. R. 443; [1951] 1 All E. R. 191.

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demanded. It seems to me that it would be disregarding the true nature of the transaction, and applying the provisions of a statute passed for a very different purpose in a highly artificial manner, if I were to hold that that attornment clause had the effect of creating an agricultural tenancy for the purpose of the Agricultural Holdings Act, 1948, which could only be terminated on notice in accordance with the very restrictive provisions contained in that statute for the purpose of the farming community.

Accordingly, I hold that the Agricultural Holdings Act, 1948, does not apply to the present mortgage, and cl. 8 in particular; and I decide the question reserved to me against the borrower.

Declaration accordingly.

Solicitors: *Montagu's and Cox & Cardale; Lewis, Holman & Lawrence, for Raper & Co., Chichester.*

J. L. D.

C. A.

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June 26, 27, 28, 29.

Evershed, M.R., Jenkins and Birkett, L.JJ.

NOVELLO & CO. LD. *v.* HINRICHSEN EDITION LD.

[1949 N. No. 570.]

Copyright—Emergency legislation—Ownership in enemy alien—Non-exclusive statutory licence granted by Comptroller of Patents to publish musical work—Vesting of copyright in British subject on death of owner—British subject entitled to grant non-exclusive licence to publish musical work—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 107), *s.* 2, *sub-s.* 1.

In 1939 the copyright in two musical works was owned by a father and son who were enemy nationals. The son died in 1940 and the father in 1942. The Comptroller-General of Patents, Designs and Trade Marks in 1940 made an order under the powers conferred by the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, granting to the plaintiffs a non-exclusive right to publish one of the works, and in 1948 he made a similar order in respect of the other musical work. In 1949 the second defendant, who at all material times was a British subject by naturalization, obtained a grant of administration with the will annexed to the father's estate. That grant related back to the father's death, and accordingly it was agreed that since the father's death the second defendant had been the owner of the English copyright in the two works in question. By the present proceedings the plaintiffs sought an injunction to restrain the first defendants and the second defendant from infringing their copyright in these musical works by selling them or offering them for sale. By their defence the first defendants alleged that the second defendant, who at all material times was the owner of the copyright, had granted them a licence to publish the two works, and that accordingly there had been no infringement of the plaintiff's copyright.

Wynn-Parry, J., dismissed the action, holding, first, that the second defendant's right to deal with his own copyright had not been taken away by the Act of 1939; and, secondly, that after the copyright had ceased to be enemy-owned, the comptroller had no jurisdiction to make any order under the Act of 1939. On appeal:—

Held, that the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, left the owners of copyrights to which the Act applied free to deal with their copyrights unless and until some licence were granted by the comptroller affecting those copyrights. Such a licence, when granted, ousted any exercise of the owners' rights which were inconsistent with the terms of that licence, and to a like extent overrode any licences previously granted by the owner. Where a non-exclusive licence had been granted by the comptroller, there was nothing to prevent the owner of the copyright, if not disqualified by the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it. Accordingly, the plaintiffs were not entitled to the injunction which they sought.

Decision of Wynn-Parry, J., on the first point affirmed.

Quære, whether the comptroller could exercise the powers conferred by the Act of 1939, if at any time the copyright had been owned by an enemy and notwithstanding the fact that the copyright was no longer enemy-owned.

Semble, having regard to the observations of Morton, J., in *In re I. G. Farbenindustrie Aktiengesellschaft and Bayer Products Ld.'s Agreement* [1941] Ch. 147; 58 R. P. C. 31, at pp. 38, 55, the view taken by Wynn-Parry, J., on the second point was open to question, and, if the matter came before the court again, the judge of first instance should not feel himself bound by the views of either Wynn-Parry, J., or Morton, J., on that point.

Decision of Wynn-Parry, J., ante 595, affirmed.

APPEAL from Wynn-Parry, J. (1).

In 1939 Henry Hinrichsen and Hans Hinrichsen, one of his sons, as partners in the firm known as C. & F. Peters, of Leipzig, owned the copyright of a number of musical works including "Rustle of Spring" by Sinding and a Sonatina by Clementi.

The Hinrichsen family were Jews, and in 1939, under the German anti-Jewish legislation, they were compelled to transfer the business and assets of the firm to two Germans. The father and Hans left Germany in 1940. Hans died in that year and the father died in 1942 in Belgium. In 1949, Max Hinrichsen, the second defendant, another son of the father, took out letters of

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administration with the will annexed to his father's estate. That grant related back to the death of the father. It was accordingly agreed that since the father's death Max had been the owner of the English copyright and that he was at all material times a British subject by naturalization.

By an order dated February 19, 1940, the Comptroller-General of Patents, Designs and Trade Marks, under the powers conferred on him by the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, made an order granting a non-exclusive licence to publish " Rustle of Spring " to the plaintiffs, Novello & Co. Ld., and by an order dated June 1, 1948, he granted to them a non-exclusive licence to publish the Sonatina. In this action the plaintiffs sought an injunction to restrain the defendants, Hinrichsen Editions Ld. and Max, from infringing the copyright of these two musical works by reproducing them or offering them for sale, an inquiry as to damages, and a delivery up of the infringing material. The defendant company alleged in their defence that the second defendant Max, as the owner of the copyright in these two musical works, had granted to the defendant company a licence to publish and that accordingly there had been no infringement by either of the defendants of the plaintiffs' copyright.

Wynn-Parry, J., dismissed the action. He held that the transfer of C. & F. Peters' business under the anti-Jewish legislation was a transfer to which the English courts would pay no attention whatever. That finding was not challenged. He further held that the claim of Max to have succeeded to the copyright formerly vested in his father was well-founded and that Max could grant licences to publish.

The learned judge further held that the comptroller had no jurisdiction in 1948 to make an order granting a licence to publish the Sonatina by Clementi.

The plaintiffs appealed.

Sir Andrew Clark, K.C., and *Guy Aldous* for the plaintiffs. The plaintiffs do not dispute that the legal title in the copyright in these musical works is in Max and that that title is not vested in the comptroller. The question is whether the effect of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2), was to sterilize the copyright in the hands of the legal owners, so that the copyright can only be operated by licences granted by the comptroller. It is submitted that the copyright is so sterilized. The comptroller can, under s. 2, sub-s. 1, of the Act of 1939, grant an exclusive licence in respect of the whole residue of the term of the copyright. The legal title remains in the owner subject to its being divested by an order under the Trading with the Enemy Act, 1939, and to the power of the comptroller to grant licences. Section 1, sub-s. 1, of the Act of 1939 preserves the rights under licences granted before September 3, 1939, but the comptroller has absolute control over such licences once the copyright has passed into enemy hands. Section 2, sub-s. 1 (*a*), gives the comptroller power to grant new licences. The fact that the comptroller is authorized to grant exclusive licences means that he has the exclusive power to grant licences. The plaintiffs rely on s. 2, sub-s. 2, and contend that, once the owner of a copyright becomes an enemy, the comptroller alone has power to grant licences in respect of it.

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(2) The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2, sub-s. 1: " Where— " (*a*) an enemy or an enemy subject " is, or has at any time since the " beginning of September 3, 1939,

Pascoe Hayward, K.C., and *F. E. Skone James* for the defendants. The plaintiffs' contention is not borne out by the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. It is submitted, first, that the Act is designed to preserve the rights of the owner of the copyright. This appears from s. 5, sub-ss. 1 and 2. Secondly, that its object is to prevent the sterilization of the copyright during the emergency period. The Act does not touch the rights of the copyright owner: it merely gives to the comptroller power to grant licences. [They referred to *Novello & Co. Ld.* v. *Ernst Eulenburg Ld.* (3).]

This Act is similar to the Patent Acts which confer power to grant compulsory licences. When Parliament intends to abrogate rights it does so in express terms. The Act of 1939 does not invade the rights of the copyright owner. It is necessary to look at the status of the owner when an application is made for a licence.

F. E. Skone James, following. The plaintiffs contend that, once a copyright has become tainted by enemy ownership, it is

"been . . . the owner of a copyright "... and (*b*) the comptroller is satis- "fied that it is in the interests of all "or any of His Majesty's subjects "that . . . the copyright [should be] "exercised . . . and that a person "... desires to . . . exercise the said "copyright . . . the comptroller may "... make an order . . . granting "an interest in the copyright . . . "either for the whole of the residue "of the term of the . . . copyright, "or for such less period as the comp- "troller thinks fit".

(3) [1950] W. N. 4.

completely sterilized. That construction would be a breach of the international conventions governing copyrights.

The defendants contend that the powers conferred by s. 2, sub-s. 1 (*a*), are limited to the period during which the copyright owner is an enemy. The comptroller must ask himself, not whether the owner has been an enemy, but whether he is in fact an enemy. He has no power to grant a licence except when the owner is an enemy at the time of the order. Parliament cannot have intended that, if the owner were an enemy for any period, however short, he would lose his rights to deal with the copyright for ever.

Sir Andrew Clark, K.C., in reply.

P. Stuart Bevan, appearing for the Comptroller-General, at the request of the court, said that the comptroller, if he were satisfied that at some period during the war the copyright was owned by an enemy, considered that he had power to grant licences under the Act.

Evershed, M.R. [after stating the facts]: In 1940, when the first of the licences was granted, there is no doubt that the copyrights were enemy-owned within the meaning of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. On June 1, 1948, if the question had then been asked, a very natural answer would have been that they were probably still enemy-owned. But, on the granting of letters of administration to Max dating back to 1942, we can now say, on the basis of Wynn-Parry, J.'s judgment (which nobody has contradicted), that on June 1, 1948, the copyrights must be taken to have been owned by Max, a British subject. Both licences were non-exclusive, and I use that phrase to mean that they did not grant the rights which they covered exclusively to the grantees; and they were also for limited periods. The grant not being exclusive, prima facie it clearly follows that the exercise by the first defendants of the right to publish these works as a result of another licence, also non-exclusive, by Max, would be no infringement, if there were a right to grant such licences on the part of Max. That rests on the simple proposition that one non-exclusive licensee cannot complain that another non-exclusive licensee is infringing the first non-exclusive licensee's grant.

There are therefore two questions under the statute: The first is whether Max, admittedly now the owner of the copyrights, can grant to anybody a non-exclusive licence, or whether, as Sir Andrew Clark has claimed, the effect of the Act is to take away altogether, and for the whole term of the copyright until such time as this Act is repealed, all the rights of the copyright owner to deal with his own copyright.

The second question is whether, since the date when the second licence was granted (for reasons I have indicated the copyrights must be taken to have then been non-enemy owned), there was any jurisdiction in the comptroller to make the order he did; and, if there was not, then the order is ineffective and produces no rights at all. The judge decided both those points in favour of the defendants. I take clearly the view on the first point that the making of the order and the Act did not, either of them, or together, take away the right of Max to grant a licence, subject only to the terms of s. 2, sub-s. 4, of the Act, and that there was therefore no infringement by either of the defendants of the non-exclusive licence granted by the comptroller.

As I take that view, it is unnecessary to express a concluded opinion on the other question of construction, namely, whether it is sufficient to vest in the comptroller the powers of the Act that at some time, however remote in the past, the copyrights have been owned by an enemy or an enemy subject. Taking the view that I do, I need not spend much time on the point, but I ought to make it clear how the point arises.

It emerges from the opening words of s. 2, sub-s. 1 (*a*), which states the conditions on which the powers of the comptroller to make orders arise. The words are: " Where an enemy or an " enemy subject is, or has at any time since the beginning of " September 3, 1939, been, whether alone or jointly with any " other person, . . . the owner of a copyright ", etc. The judge took the view that, on the true construction of those words, it was necessary that, at the time when the application was made to the comptroller for an order, either the owner must then still be an enemy, or (I think he also so put it), the owner having been an enemy who had parted with the copyright to a non-enemy, that original enemy owner was still alive and was still an enemy.

On the other hand, it is said that, according to the ordinary meaning of the words used, the condition is satisfied if at any time since September 3, 1939, and for however short a time, the copyright has been owned by an enemy or enemy subject; and that then the jurisdiction arises whatever has since happened either to the original enemy-owner, or the former enemy-owner, or anybody else, and whether or not at the time of the application the owner is or is not an enemy.

The second view (that for which Sir Andrew Clark contended) does seem startling. This Act, unlike many others passed about the same time, which have recently been considered in another court, is not limited in its duration by reference to "the "emergency". True it is an Act which was passed, as the long title states, "to meet any emergency which may arise", but it is an Act which has no automatic termination and no means whereby it could be terminated otherwise than by repeal; and it will therefore remain on the statute book until repealed. And it is to be noted that, just as the Trading with the Enemy Act, 1914, remained unrepealed for twenty-five years until it was replaced by the Trading with the Enemy Act, 1939, so it may be that this Act will remain on the statute book for a long time. As one looks ahead into the future, it does indeed seem startling that this right in the comptroller to grant licences will persist for years and years simply because for some time, however short, the copyright owner or his predecessor in title had been in, say, occupied France. There is, therefore, a strong ground, at any rate, for supposing that such a construction goes beyond the purpose of the Act. On the other hand, the language of the section, according to the ordinary sense of it, seems to imply the meaning given to it by Sir Andrew Clark, and sub-s. 5 of s. 2 seems clearly to contemplate that at the date of the grant of the licence the copyright owner would not be an enemy.

It is right to say that this point was not raised, except formally on the pleadings. It was not a point which the defendants had actually taken in argument. It was raised by the judge and debated between him and Mr. Shelley (who then appeared for the plaintiffs) in the course of Mr. Shelley's final speech; and, perhaps because it so arose, the attention of the judge was not directed to *In re I. G. Farbenindustrie A/G. and Bayer Products Ld.'s Agreement* (4) relating to a letters patent in the name of Bayer Products Ld., in which, as Mr. Aldous pointed out, Morton, J., in the course of his judgment (5), seems to have taken a view contrary to that which appealed to Wynn-Parry, J., namely, the view contended for by Sir Andrew Clark.

This point is no longer essential to the result. If we were to express a concluded opinion upon it adverse to the defendants, we should leave them in the difficult position that they could not appeal against it. On the other hand, I think, having regard

(4) [1941] Ch. 147; 58 R. P. C. 31.

(5) 58 R. P. C. 38, 55.

to the argument and particularly to the view expressed by Morton, J., it is right to say at least that I am not myself satisfied that the view taken by Wynn-Parry, J., is well-founded. I say no more upon it, because I think that it should be left open, if and when this matter comes again before the courts, for the judge of first instance to take his own independent view and not to feel himself bound by Wynn-Parry, J.'s view any more than by that of Morton, J. It may well be that the actual significance of the point will not be great and will as time goes on recede altogether.

I now turn to the other point. Sir Andrew Clark's argument has, I think, upon analysis, come to this: he fully accepts that if the result of this Act is wholly to suspend for the entire term of the copyright all the rights of the copyright owner should he or his predecessor in title have been an enemy within the meaning of the Act, for however short a time, he must show that the result follows, either expressly or by necessary implication, from the proper reading of the words. As a matter of general principle, such a taking away (for suspension is a taking away, in spite of the distinction Sir Andrew Clark sought to draw) of the rights of the owner must be clearly expressed in the Act, and however beneficent the comptroller may be, and, indeed, though he may be infallible in his administration, an owner of copyright would, I think, not feel those considerations to be an entirely satisfactory compensation for the deprivation of his own right to deal with his own property.

Sir Andrew Clark starts by saying that the purpose of this Act was to sterilize copyrights of the character named. I will not refer to patents and designs, for this case is concerned only with copyrights. Sir Andrew Clark suggests that the object is to sterilize the copyrights and to put them into the beneficent hands of the comptroller, so that (as I understand him) for this long period of time the profits of the copyright should always be available for the Custodian of Enemy Property for purposes connected with or arising out of the war. I do not accept that first premise. I think that, so far from the purpose of the Act being to sterilize the rights of the parties, it was to prevent their sterilization; and that what the Act was designed to do (again I confine myself to copyrights, though the force of this may be even stronger with regard to patents) was to put into the comptroller's hands a power to see that these copyrights could be used in the public interest, although the person who alone could give the right to use them was prevented from doing so by his enemy status. I therefore approach this Act with that in mind. Although it is an Act which is not temporary in the same sense as some of the Acts passed at about this time were temporary, it is an Act which, according to its long title was designed to meet emergencies arising out of the war; and we should therefore not give it a construction, unless forced so to do, which would appear to extend its operation far beyond the mischief which, according to its own expression, it was designed to remedy.

I think that Sir Andrew Clark fairly admitted that his case really rested on this (for he could find no words which in terms suspended all the rights of the owner), that, since the comptroller was given the right, by order, to grant exclusive licences, therefore he must exclusively have the right to grant any licences. Verbally that proposition sounds attractive, but logically it is, I think, unsound. It is to be borne in mind that an exclusive licence by no means comprehends only a licence covering the whole of the rights of the copyright for the whole of the term of the copyright, though the right to grant an exclusive licence would, no doubt, comprehend that particular transaction, however unlikely in practice it may be. The proposition itself is, I think, unsound, and when you look at sub-ss. 2, 3 and 4, and also, indeed, at the other sections and sub-sections to which we have been referred, all the indications are the other way.

As we are concerned with musical copyrights, it is, perhaps, not inappropriate to say that reading sub-ss. 2, 3 and 4 the indications appear in a crescendo. In sub-s. 2 (*b*) power is given to make an order "notwithstanding that a licence, whether "exclusive or otherwise (not being an exclusive licence granted "by virtue of the powers conferred by this section) is in force in "relation thereto". That is at least consistent with the view, contrary to that which Sir Andrew Clark has advanced, namely, that licences are contemplated after the impact of the Act, being licences granted by the owner, as well, indeed, as by the comptroller himself, the exception being only of exclusive licences granted by the comptroller. The matter is more forcible when one comes to sub-s. 3, which provides that, where the comptroller makes an order granting a licence in relation to a copyright in relation to which any other licence has been granted otherwise than by an order, then he is given the power to vary those other licences, a power similar to the power conferred on him by sub-s. 1, but limited in that case to "pre-taint" licences, as they have been called, namely, licences granted before the impact of the Act. Sub-section 3 is not entirely conclusive, because it may be that there is substance in the distinction which Sir Andrew Clark drew between the circumstances in which the comptroller could make a variation under s. 1 and those in which he could make one under s. 2—though I think that at this stage counsel has reached very thin ice. But when we come to sub-s. 4 of s. 2 and read what I have ventured in anticipation to call the forte, I think the ice gives way under Sir Andrew Clark altogether. Sub-section 4 states that " an order granting a licence under this " section shall, without prejudice to any other method of enforce-" ment, operate as if it were embodied in a deed granting the " licence which . . . the owner of the copyright . . . had executed " with full capacity so to do, and the order shall accordingly " operate to take away from any such party any right in relation " thereto the exercise whereof would be inconsistent with the " exercise of the licence in accordance with and subject to the " terms on which it is granted ".

Sir Andrew Clark has sought to escape from that very formidable difficulty by saying that the sub-section is purely procedural; that it is intended to give a right of action to the compulsory licensee against the copyright owner; and that, although it says " the order shall take away the owner's rights so far as is neces-" sary ", that is in no way in conflict with the proposition that the Act has already suspended all the rights. He draws distinction between " taking away the rights " and their total suspension by saying that, although a man's rights are totally suspended, he has only to go to the comptroller and obtain his licence and then he can himself exercise them. That argument wholly fails to satisfy me. I think that sub-s. 4, and the final words which I have emphasized, make it plain that what the licence granted under the order does is what this sub-section says it does, that is, pro tanto to take away the rights of the owner as though he had made a grant in the terms of the order. I think that were it otherwise it would be a little shocking. The suggestion that the existence of this control would have the effect, on the whole term of the copyright, of taking from the owner's hands altogether all his rights of dealing with his own property is one which no court could accept unless the words used were absolutely compelling. I certainly have failed to find any such compulsion in this sub-section.

I need not travel through the other parts of the Act which have been mentioned. Suffice it to say that there is nothing anywhere which I can find capable of being the smallest comfort to Sir Andrew Clark's argument. It was suggested by him and Mr.

Aldous, with apparent equanimity, that this Act contemplates that perhaps half a century hence an owner could come with his hat in his hand and obtain from the comptroller, out of the goodness of his heart, the right to operate his own copyright; and then it was suggested that that privilege which the copyright owner might, if he were lucky, obtain would be qualified by this, that he would have to pay royalties to the Custodian of Enemy Property in respect of the exercise of the rights relating to his own copyright. I am not surprised that Wynn-Parry, J., rejected this argument with some vigour, and I hope I shall in no measure be lacking in vigour in refuting it likewise. I think it is a bad argument, and I reject it. I think that the appeal ought to be dismissed.

JENKINS, L.J. I entirely agree, and have very little to add. So far as these proceedings are concerned, the only interest which the plaintiffs have in the two copyrights is the interest of statutory licensees under the two orders made by the comptroller under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. By sub-s. 5 of s. 2 of the Act, which I will call for brevity the Copyright Act, 1939, the plaintiffs, as statutory licensees, are empowered to sue for infringement in their own name as though they were the owners of the copyright, subject to provisions as to the joinder of the actual owner to which I need not refer in detail. Nevertheless, it is incumbent on them, in order to succeed, to establish that there has, in fact, been an infringement. On the facts, which have been fully stated by my Lord, they clearly cannot do that, unless they can show that the authority given by Max to the defendant company to use these copyrights was not a valid authority. On the facts which my Lord has stated, it is clear that Max, as personal representative of his father, was able to give the authority which he gave, and that there is no reason in law why it should be held invalid, unless such reason is to be found in the Copyright Act, 1939, itself.

As my Lord has said, this Act, in so far as it operates to take away rights in property, must be strictly construed and must not be taken to interfere with proprietary rights further or otherwise than it is either expressly or by necessary implication found to do when its provisions are examined. The relevant provisions have been fully discussed by my Lord, and I need not go into them again at length. Section 1 enables the comptroller, in certain cases, to revoke or vary licences granting interests in copyrights. That section, it is agreed, is directed, or, at all events, primarily directed, to cases in which copyrights were subject to licences before any question of enemy ownership entered into the case. Speaking for myself, I am not entirely satisfied that what I may describe as a post-beginning-of-hostilities licence might not, in some circumstances, come within the purview of s. 1, but, at all events, its primary intention is as I have mentioned. Be that as it may, there is clearly nothing whatever in s. 1 to indicate that subject to the restrictions imposed by the Trading with the Enemy Act, 1939, it is not possible for a licence to be granted otherwise than by the comptroller in respect of a copyright owned or formerly owned by an enemy. Section 2, sub-s. 1, empowers the comptroller to grant licences in respect of copyrights in the circumstances in which the section is applicable, that is to say, the circumstances of ownership or interest on the part of an enemy or an enemy subject, to which my Lord has referred. There is nothing whatever in this sub-section to prohibit the granting of licences by other persons if they are otherwise lawfully entitled to do so.

Section 2, sub-s. 2, empowers the comptroller to grant an exclusive licence; enables him to make an order granting a licence notwithstanding that a licence, whether exclusive or otherwise, not being an exclusive licence granted by virtue of the power conferred by the section, is in force in relation to the same subject-matter, and to make an order granting a licence on any terms that he may think expedient. This sub-section is in the nature of a further definition of the extent of the power to grant licences conferred on the comptroller. Again, there is nothing in it to show that no other person can, in any circumstances, grant a licence, as Sir Andrew Clark for the plaintiffs invites us to hold.

As my Lord has said, sub-para. (*b*) of s. 2, sub-s. 2, contains some indication to the contrary, in that it enables the comptroller to make his grant notwithstanding that a licence, whether exclusive or non-exclusive, not being an exclusive licence granted by virtue of the powers conferred by the section, is in force in relation to the same subject-matter. Sub-section 3, as my Lord has pointed out, again contains indications contrary to Sir Andrew Clark's contention. Sub-section 4 is, to my mind, well-nigh conclusive against it.

Taking all these indications together, it seems to me that, not only can it not be said that the powers conferred on the comptroller by the Copyright Act, 1939, are such that the Act itself by necessary implication ousts all the rights of the actual owner of a copyright, but there are, on the contrary, strong

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indications the other way. In my judgment, on the true construction of the Copyright Act, 1939, its effect is that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, owners of copyrights to which the Copyright Act, 1939, applies are still free to exercise their rights, unless and until some licence affecting them is granted by the comptroller. Such a licence, when granted, ousts any exercise of the owners' rights, which would be inconsistent with the terms of that licence, and to a like extent, overrides any licence previously granted by the owner. But unless and until the comptroller has moved in the matter and has granted a licence, in my judgment, the owners' rights remain as they were. When a licence has been granted, its terms must be looked at to see how far the owners' rights are restricted. Where, as in the present case, a mere non-exclusive licence has been granted, then there is nothing in the Act to prevent the owner, if not disqualified by some provision of the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it. Accordingly, I agree that the appeal fails and should be dismissed.

Birkett, L.J. I agree with the two judgments which have just been delivered.

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Nicholsons; Kaufman & Seigal.*

B. A. B.

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June 11, 12, 13, 14;
July 16.

Evershed, M.R., Jenkins and Birkett, L.JJ.

In re D'AVIGDOR-GOLDSMID; D'AVIGDOR-GOLDSMID *v.* INLAND REVENUE COMMISSIONERS.

[1949 D. 1606]

Revenue—Estate duty—Property passing on death—Policy of life insurance—Claim for estate duty on value of policy—Whether an interest provided by deceased—Whether any beneficial interest arose on death of deceased—Scottish decision on similar point—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*), (*d*)—"*Donee*"—*Meaning of—Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11, *sub-s.* 1.

By a marriage settlement, made in 1907, a settlor settled a policy on his life for 30,000*l.* with profits, dated May 3, 1904. On

June 10, 1930, a resettlement of the policy was made by the settlor and his eldest son under joint powers of appointment.

On November 10, 1934, the settlor and the son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property, known as No. 27 Wood Street, London, to the son absolutely. From the date of that appointment the premiums previously paid by the deceased were paid by the son, but to the extent of the income from No. 27 Wood Street, premiums so paid were by s. 30 of the Finance Act, 1939, attributed to the deceased.

The settlor died in 1940, and the son received under the policy the sum of 48,765*l*.

The Estate Duty Office claimed to be entitled to charge duty, alternatively, under paras. (*c*) and (*d*) of s. 2, sub-s. 1, of the Finance Act, 1894, and a summons was taken out by the son to have determined whether estate duty was payable as claimed by the Inland Revenue Commissioners.

Held (affirming Vaisey, J., with regard to the claim under para. (*c*)), that para. (*c*) did not apply to the plaintiff, who, having derived his title from his father's marriage settlement of 1907, was within the marriage consideration, and could not aptly be described as a "donee" within the meaning of the paragraph.

Held (reversing Vaisey, J., with regard to the claim under para. (*d*)), that the immediate right to receive the policy moneys on the death of the settlor was a "beneficial interest arising on "the death of the deceased" within the meaning of that expression in para. (*d*), and that so far as the claim under that paragraph was concerned, the appeal must be allowed.

Attorney-General v. *Dobree* [1900] 1 Q. B. 442 and *Attorney-General* v. *Robinson* [1901] 2 I. R. 67 followed.

Lord Advocate v. *Hamilton's Trustees,* 1942 S. C. 426 not followed.

APPEAL from Vaisey, J. (1).

Sir Osmond Elim D'Avigdor-Goldsmid (hereinafter called "the deceased") took out a life policy, dated May 3, 1904, for 30,000*l*., with profits, under the annual premium of 695*l*. The first annual premium was payable on January 20, 1905, and premiums were payable on each succeeding anniversary of that date during the life of the deceased. On the issue of the policy a first premium of 510*l*. 6*s*. 0*d*. was paid in respect of the initial period of "cover", namely, 268 days from April 27, 1904, to January 20, 1905. The deceased was married on October 23, 1907, and his eldest son, the plaintiff, was born on June 10, 1909.

On his marriage, the deceased made a settlement dated October 22, 1907, of certain freehold estates and investments, and the policy. The interests which the deceased took under the settlement were, first, a protected life interest in the settled freeholds, out of which, after his death, a jointure rentcharge was limited to his wife with power for him to apportion it among the various settled properties and, subject as aforesaid, as to the estates specified in the first and second parts of the first schedule to the settlement, there was a limitation to the first and other sons of the marriage in tail male. The policy with all bonuses and additions was assigned to the trustees on trust to receive the moneys to become payable thereunder at maturity and to invest the same in the purchase of freehold hereditaments to be settled on and subject to the uses, trusts, powers and provisions therein declared and contained concerning the before-mentioned freeholds or such of them as should be subsisting or capable of taking effect and in the meantime to invest or apply it in any other mode in which capital moneys under the Settled Land Acts, 1882 to 1890, were authorized to be invested or applied. The deceased covenanted to pay the premiums on the policy, and he was given an option (which he never exercised) to apply bonuses in reduction of premiums.

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(1) Ante, 321.

A private Act of Parliament entitled the Goldsmid Estate Act, 1928 (18 & 19 Geo. 5, c. 1), was passed on August 3, 1928, and by s. 3, sub-s. 1, of that Act the deceased was empowered by deed effectually to assure his life interest in all or any parts of the settled property to the person who at the date of the assurance was next entitled in remainder or reversion expectant on his death to the property to which the assurance related; and in particular it was provided that that section should extend to a disentailing deed affecting the property or any part of it whereby the property was assured to a grantee on trusts conferring a general power of appointment having priority over the life interest; and it was provided by s. 3, sub-s. 2, of the Act that any assurance thereby authorized should operate as if the settlement had not contained any provision to determine the deceased's life interest and as if, in place thereof, an absolute life interest had been limited to him, and any such assurance of part of the settled property should not operate to effect a determination of the said life interest as respects any other part of the settled property.

By a deed of appointment dated June 10, 1930, the deceased, acting under a power of appointment conferred on him by the settlement over certain properties and funds thereby settled for the benefit of his younger children, appointed that the same should be held in trust for the plaintiff in tail male, subject to the prior limitations and powers in the appointment referred to; and by cl. 1 of a disentailing deed of the same date the plaintiff, with the consent of the deceased as protector of the settlement, assured, and the deceased, in exercise of the powers conferred on him by the Act as to his life interest in the property (but not so as to transfer any legal estate), assured, released and confirmed, to the trustees all the hereditaments of which the plaintiff was then tenant in tail under the settlement or the said appointment, to hold the same in fee simple or absolutely freed from the life estate or interest of the deceased and from the plaintiff's interests in tail male and all subsequent estates or interests on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint and in default of and until and subject to any such appointment on the precedent subsisting trusts and so as to restore the same, and by cl. 2 of the disentailing deed a similar assurance was made of, inter alia, the said life policy on and subject to similar trusts and powers.

After the two last-mentioned deeds, a resettlement was also, on June 10, 1930, made by the deceased and the plaintiff under their joint powers of appointment of property including the policy.

By cl. 3 of the resettlement some of the family real estate was settled on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint, provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly and in default of and until and subject to any appointment on trusts under which during the life of the plaintiff there was a discretionary trust of which the plaintiff was the principal object. By cl. 4 of the resettlement other parts of the family real estate were settled on trusts under which the deceased and the plaintiff had a joint power of appointment corresponding to the power conferred on them by cl. 3 of the deed and, subject thereto and to certain charges, the deceased took a determinable protected life interest in restoration of his interest in those parts of the real estate under the settlement with remainder on the trusts and subject to the powers and provisions affecting the estates comprised in cl. 3 of the resettlement.

By cl. 10, sub-cl. 1, of the resettlement the deceased, so long as the policy should remain subject to the trusts thereof, covenanted with the trustees that he would duly pay all money payable and do all things necessary for keeping it on foot.

By cl. 22 of the resettlement, in exercise of the said power conferred by the disentailing deed, the deceased and the plaintiff appointed inter alia the policy to be held on trust to get in all moneys to become payable thereunder and to stand possessed of the net money received on the trusts and subject to the powers and provisions on and subject to which capital money arising under the Settled Land Act, 1925, from the estates settled by cl. 4 of the resettlement or investments representing the same would be held, and as to the said money and investments mentioned in the said second schedule on the trusts and subject to the powers and provisions subject to which capital money arising under the said Act from the estate settled by cl. 3 of the resettlement would be held.

Before the appointment hereinafter referred to, the freehold property known as No. 27 Wood Street, in the City of London, was acquired out of capital moneys representing part of the estates settled by cl. 4 of the resettlement.

By a deed of appointment dated November 10, 1934, under the hands and seals of the deceased and the plaintiff they, in exercise of their said joint powers of appointment conferred by the resettlement, appointed that, first, the policy and, secondly, the premises, No. 27 Wood Street, should be thenceforth held by the trustees and the deceased respectively in trust for the plaintiff absolutely and in fee simple for the plaintiff's own use and benefit discharged from the trusts, powers and provisions declared by the resettlement, and the plaintiff thereby released and discharged the deceased from all his covenants contained in the resettlement for the payment of premiums on and otherwise relating to the policy and that a term of ninety-nine years limited by the resettlement should, as regards the premises affected by such appointment, cease and be extinguished.

From the date of the appointment the plaintiff paid the premiums out of his own moneys. The settlor had paid all the premiums due before that date, but, to the extent of the income from No. 27 Wood Street, premiums so paid were, by virtue of s. 30 of the Finance Act, 1939, attributed to the deceased.

The deceased having died on April 14, 1940, the policy matured, and the plaintiff received under the policy the sum of 48,765*l*.

The Estate Duty Office put forward a claim under s. 2, sub-s. 1, para. (*c*), and, alternatively, under para. (*d*), of the

Finance Act, 1894 (2), to duty on the policy moneys; and a summons was taken out by the son to have determined whether estate duty became payable, as claimed by the defendants, the Inland Revenue Commissioners, on the death of the deceased,

(2) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death "of the deceased shall be deemed to "include the property following, that "is to say: . . . (*c*) Property which "would be required on the death of "the deceased to be included in an "account under s. 38 of the Customs "and Inland Revenue Act, 1881, as "amended by s. 11 of the Customs "and Inland Revenue Act, 1889, if "those sections were herein enacted "and extended to real property as "well as personal property, and the "words 'voluntary' and 'voluntarily' "and a reference to 'volunteer' were "omitted therefrom; and (*d*) Any annuity or other interest purchased or "provided by the deceased, either by "himself alone or in concert or by "arrangement with any other person, "to the extent of the beneficial interest "accruing or arising by survivorship "or otherwise on the death of the "deceased".

Customs and Inland Revenue Act, 1881, s. 38: "(1) Stamp duties at the "like rates as are by this Act charged "on affidavits and inventories shall "be charged and paid on accounts "delivered of the personal or moveable property to be included therein "according to the value thereof. (2) "The personal or moveable property "to be included in an account shall "be property of the following descriptions, viz.:—(*a*) Any property taken "as a donatio mortis causa made by "any person dying on or after June 1, "1881, or taken under a voluntary "disposition, made by any person so "dying, purporting to operate as an "immediate gift inter vivos whether "by way of transfer, delivery, declaration of trust or otherwise, which "shall not have been bona fide made "three months before the death of the "deceased. (*b*) Any property which "a person dying on or after such "day having been absolutely entitled "thereto, has voluntarily caused or "may voluntarily cause to be transferred to or vested in himself and "any other person jointly whether by "disposition or otherwise, so that the "beneficial interest therein or in some "part thereof passes or accrues by "survivorship on his death to such "other person. (*c*) Any property "passing under any past or future "voluntary settlement made by any "person dying on or after such day "by deed or any other instrument not "taking effect as a will, whereby an "interest in such property for life or "any other period determinable by "reference to death is reserved either "expressly or by implication to the "settlor, or whereby the settlor may "have reserved to himself the right, "by the exercise of any power, to "restore to himself, or to reclaim the "absolute interest in such property".

Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1: "Sub-section 2 "of s. 38 of the Customs and Inland "Revenue Act, 1881, is hereby "amended, as follows:—The description of property marked (*a*) shall be "read as if the word 'twelve' were "substituted for the word 'three' "therein, and the said description of "property shall include property taken "under any gift, whenever made, of "which property bona fide possession "and enjoyment shall not have been "assumed by the donee immediately "upon the gift and thenceforward "retained, to the entire exclusion of "the donor, or of any benefit to him "by contract or otherwise. . . . The "charge under the said section shall "extend to money received under a "policy of assurance effected by any "person dying on or after June 1, "1889, on his life, where the policy "is wholly kept up by him for the "benefit of a donee, whether nominee "or assignee, or a part of such money "in proportion to the premiums paid "by him, where the policy is partially "kept up by him for such benefit".

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in respect of the policy or the sum of 48,765*l.*, which became payable under it.

Vaisey, J., held that the claim of the Crown under both para. (*c*) and para. (*d*) failed, and decided that no estate duty was payable at the death of the deceased settlor on the policy, or on the value of it or on any part of that value, or on the sum of 48,765*l.*, which became payable under the policy or on any part of such sum. The commissioners appealed.

Upjohn, K.C., and *J. H. Stamp* for the appellant commissioners. The Crown is, in the first place, entitled to estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The settlor made a gift of the policy in 1907 and it was kept up until 1934 for the benefit of the donee. Section 2, sub-s. 1 (*c*), comes into operation as soon as that gift is made. The number of premiums paid by the deceased settlor must be compared to the total number of premiums paid, and duty is payable on the proportion of the policy moneys attributable to the premiums paid by the deceased. As he paid twenty-seven premiums out of thirty-three, duty is payable on 27/33rds of the policy moneys. In s. 11 of the Customs and Inland Revenue Act, 1889, the words "where a policy is wholly kept up for the benefit of a "donee" include a series of donees entitled successively to policy moneys under a settlement.

The use of the word "donee" in s. 11 of the Act of 1889 is significant. The "donee" is plainly the aggregate of persons taking under the assignment which constituted the gift. The person who took the policy on the death of the settlor had no beneficial interest until that death, but the trustee had had a bona fide interest from the start. Applying that to policies, the same result is reached. The "donee" is the body of persons entitled under the disposition. It is the history of the policy, not the person who takes, that determines whether there is or is not to be a charge on the policy. Writing "donee" at large, the present case is completely covered and the policy is liable to duty.

From the date of the settlement in 1907 onwards the deceased was bound to keep up the policy for the persons who ultimately became entitled to it under that settlement. It may be that s. 11 does not apply to a single premium policy. Where, however, the person making the gift goes on paying the premiums, the policy is caught by s. 11 to the extent of the premiums, which the donor pays. The fact that the ultimate donee may

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change is not material. It would be strange if, in the case of an absolute gift of a policy, para. (*c*) applied, but not where the policy was settled.

All that was decided in *Lord Advocate* v. *Fleming* (3) was that, where a policyholder pays premiums on his own policy for his own benefit, he is not keeping the policy up for the benefit of the donee, if he subsequently makes a gift of the policy. Here the policy was kept up for the benefit of the donee from 1907 onwards and duty is in any event payable to the extent of the number of the premiums thereafter paid by the settlor. [Counsel referred to *Lord Advocate* v. *Inzievar Estates* (4).] *Attorney-General* v. *Barclay's Bank Ld.* (5) is the nearest reported case to the present case and shows that it is immaterial whether there is one donee or several.

The only gift made by the settlor is the gift when he transferred the policy and put it into the names of the nominees on certain trusts. It would be fantastic to say that this section was dealing only with an absolute assignment to a named person. It would be extraordinary if, in the case of a life policy being taken out in the name of a person and the premiums being kept up on it by the person who took out the policy, duty was payable, but in the case of a life policy being assigned to trustees and the premiums being paid by the person who took out the policy, duty was not payable.

With regard to the alternative claim under s. 2, sub-s. 1 (*d*), on the ground that this is an interest provided by the deceased and duty is payable to the extent of the beneficial interest accruing or arising, the " beneficial interest arising " is the right to sue for the policy moneys.

Attorney-General v. *Dobree* (6) and *Attorney-General* v. *Robinson* (7) are both directly in point and in favour of the Crown's contention. In *Attorney-General* v. *Murray* (8) approval was given to *Attorney-General* v. *Dobree* (6). [Counsel referred to *Lethbridge* v. *Attorney-General* (9); *Tennant* v. *Lord Advocate* (10); *Westminster Bank Ld.* v. *Attorney-General* (11); and *Lord Advocate* v. *Hamilton* (12).]

It is doubtful if the decision in *Lord Advocate* v. *Hamilton* (12), which is in conflict with *Attorney-General* v. *Dobree* (6)

(3) [1897] A. C. 145.
(4) [1938] A. C. 402.
(5) [1943] 1 All E. R. 181.
(6) [1900] 1 Q. B. 442.
(7) [1901] 2 I. R. 67.
(8) [1904] 1 K. B. 165.
(9) [1907] A. C. 19.
(10) [1939] A. C. 207.
(11) [1939] Ch. 610.
(12) 1942 S. C. 426.

and *Attorney-General* v. *Robinson* (7), would have been the same if the policies had not been fully paid.

The court is asked to make an order for the payment of the duty, either under para. (*c*) or para. (*d*).

[Counsel also referred to Green's Death Duties (2nd ed.), p. 772; and to *In re Albert Life Assurance Co.* (13); and *In re Anchor Assurance Co.* (14).]

J. Millard Tucker, K.C., *Cyril King, K.C.*, and *Wilfrid M. Hunt* for the plaintiff. There is one point which was not taken on behalf of the plaintiff in the court below, namely, that, if the word " donee " is taken as referring to the whole group of beneficiaries under the settlement, then not one of them is a " donee ", because they are all objects of a marriage settlement, and these are not " donees ".

From 1894 onwards, where a settlor settled policies on his own marriage, the commissioners never claimed duty under s. 2, sub-s. 1 (*c*). Then came the question of property settled, e.g., by a father on the marriage of his son or daughter. These gifts were expressly exempted from s. 2, sub-s. 1 (*c*), by s. 59 of the Finance Act, 1910: see Green's Death Duties (2nd ed.), p. 815. A gift in consideration of marriage is therefore not caught under s. 2, sub-s. 1 (*c*): see also Dymond's Death Duties (11th ed.), p. 371. [Counsel also referred to *Attorney-General for Ontario* v. *Perry* (15); *Attorney-General* v. *Jacobs Smith* (16); *In re Earl Fitzwilliam's Agreement* (17); and *Attorney-General* v. *Pearson* (18).]

Here there was one continuous settlement. The plaintiff was never a " donee ". When considering whether s. 11 of the Act of 1889 applies, it is necessary to look at the time when the alleged gift was made, and ask if there was then a donee in existence. In 1907 there was no donee in existence. Section 11 assumes that there is a donee at the date of the death. It is then necessary to see that there is a donee at the date of the death. It is clear from *Attorney-General* v. *Fleming* (19) that payments made before there is any donee in existence are not to be taken into account. If the policy is taken out for the benefit of more than one donee, they must all be living at the donor's death.

These policy moneys are not caught by para. (*d*). In any event, the policy was assigned more than five years before the death of the settlor and therefore falls outside para. (*d*). After the policy had been transferred it could have been surrendered or sold. The money paid under the policy was not provided by the deceased settlor. He did not provide any property which could exist after his death; he merely provided the right to sue on a contingency. [Counsel referred to *Westminster Bank Ld.* v. *Attorney-General* (20) and *Tennant* v. *Lord Advocate* (21).]

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(7) [1901] 2 I. R. 67.
(13) (1870) L. R. 9 Eq. 703.
(14) (1870) L. R. 5 Ch. 632.
(15) [1934] A. C. 477.
(16) [1895] 2 Q. B. 341, 353.
(17) [1950] Ch. 448.
(18) [1924] 2 K. B. 375.
(19) [1897] A. C. 145.

As to the question whether there is a conflict between *Lord Advocate* v. *Hamilton* (22) and *Attorney-General* v. *Dobree* (23); *Attorney-General* v. *Murray* (24); *Attorney-General* v. *Robinson* (25); *and Inland Revenue Commissioners* v. *Scott's Trustees* (26): see the observations of Darling, J., in *Attorney-General* v. *Dobree* (23). That view supports the argument that the policy was an absolute policy six years before the death of the settlor and not settled property. The property was the right to call for the policy moneys. An interest did not arise from any existing settlement, but because the eldest son was the absolute owner of the policy.

Upjohn, K.C., in reply.

Cur. adv. vult.

EVERSHED, M.R., reading the judgment of the court, stated the facts and continued:—Vaisey, J., held that the claim of the Crown under s. 2, sub-s. 1 (*c*), of the Act of 1894 failed. He held that the word "donee" in s. 11 of the Act of 1889 meant the ultimate donee; that the reference to donee is not properly applicable to a series of donees; and that the word only properly signifies the final beneficiary and the owner of the policy in question. He further held that the deceased could not be considered on the facts of this case as having kept up the policy for the benefit of the plaintiff as donee. It was kept up by the deceased until November 10, 1934, but it was not kept up for the benefit of the plaintiff.

The judge also held that the claim of the Crown under s. 2, sub-s. 1 (*d*), failed. He held that the plaintiff was the sole and absolute owner of the assigned property at the death of the deceased in 1940, and having been so for more than five years from the date of the assignment to the death of his father, no duty could attach to it. He held that no beneficial interest accrued or arose on the death of the plaintiff's father, and that

(20) [1939] Ch. 610.
(21) [1939] A. C. 207.
(22) 1942 S. C. 426.
(23) [1900] 1 Q. B. 442, 452.
(24) [1904] 1 K. B. 165.
(25) [1901] 2 I. R. 67.
(26) 1918 S. C. 720.

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the decision of the Inner House of the Court of Session in Scotland in *Lord Advocate* v. *Hamilton's Trustees* (27) concluded the matter in the plaintiff's favour. He decided that no estate duty was payable at the deceased's death on the policy, or on the value of it or on any part of such value, or on the sum of 48,765*l.* which became payable under the policy or on any part of such sum.

From this decision the Crown appeals. We have been greatly assisted by the arguments of Mr. Upjohn and Mr. Stamp for the Crown and Mr. Millard Tucker and Mr. Cyril King for the plaintiff, and, as we propose to discuss those arguments in detail in the course of our judgment, we need not set them out at this stage. The many authorities which have been cited to us in support of the various contentions will more conveniently be discussed in those parts of the judgment where they apply.

The Crown has (as above stated) claimed to be entitled to charge duty alternatively under paras. (*c*) and (*d*) of s. 2, sub-s. 1, of the Finance Act, 1894. It was said before Vaisey, J., on the plaintiff's behalf, that the claim under para. (*d*) should logically be first considered, but the judge dealt first in his judgment with the claim under para. (*c*), and the appeal was argued in that order before us. We adhere to it in this judgment.

The Crown's claim under s. 2, sub-s. 1 (*c*), admittedly rests exclusively on the paragraph added to s. 38 of the Customs and Inland Revenue Act, 1881, by s. 11 of the Customs and Inland Revenue Act, 1889: "The charge under the said section shall "extend to money received under a policy of insurance effected by "any person dying on or after June 1, 1889, on his life, where the "policy is wholly kept up by him for the benefit of a donee, "whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is "partially kept up by him for such benefit".

It was and is the contention of the Commissioners of Inland Revenue that the plaintiff, when he received upon his father's death, and as a result of the various deeds to which we have referred, the sum of 48,765*l.* policy moneys was a "donee" thereof within the meaning of the paragraph quoted, the relevant donation being the original settlement of 1907; and inasmuch as the deceased had provided twenty-seven out of the total of thirty-three premiums paid since the date of that settlement, that the charge extended accordingly to 9/11ths of the policy moneys.

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(27) 1942 S. C. 426.

To this contention the first answer presented by Mr. Millard Tucker before Vaisey, J., and maintained before us was that in the light of the facts of this case it was an abuse of language to say that the plaintiff was such a " donee ". The relevant question (according to his argument) was this: did the deceased keep up the policy to the extent of the twenty-seven premiums paid by him for the benefit of the plaintiff? To which question, since the plaintiff's title to the policy moneys arose from the appointment in 1934 (from the date of which the deceased ceased to pay any further premiums) the answer must be in the negative. Alternatively, Mr. Millard Tucker contended before the judge that if there had been a " donation " within the meaning of the charging paragraph by virtue of the 1907 settlement, that donation was superseded by the disentailing deed and the resettlement of 1930, from which alone was derived the power of appointment exercised in the plaintiff's favour in 1934; and on that basis, if in other respects the claim of the Crown was well founded, the proportion of the policy moneys in respect of which duty was exigible was reduced to 2/5ths. To this argument Mr. Tucker also adhered in this court, but in the circumstances later mentioned its importance somewhat receded, and it appeared indeed at one time that it might even change sides.

Vaisey, J., accepted, as we read his judgment, the validity of both Mr. Tucker's contentions. " It is clear ", he said, " that " in 1930 the original settlement was destroyed and a new settle- " ment came into operation under which a class of beneficiaries " different from the class interested under the original settlement " came into existence." (See page 329 of the Report.) And again later (at p. 331): " I do not think that the deceased can " be considered for the present purpose as having kept up the " policy for the benefit of the plaintiff as donee. He could never, " before 1934, have been understood to be doing so, except " prophetically. The only person who kept up the policy for the " benefit of the plaintiff was the plaintiff himself. I rejected the " argument that the fact that the plaintiff was one of a number " of beneficiaries under the previous settlements has any bearing " on the present question ".

As regards the " destruction " of the original settlement by the deeds of 1930, the judge derived assistance from the case of *Parr* v. *Attorney-General* (28). With all respect to the judge, we think that there are, on the facts of the case, formidable difficulties in the way of regarding the original settlement as having lost all significance for present purposes. The deceased was enabled to join with the plaintiff in executing the disentailing assurance and the resettlement by the special Act of 1928, but subject to the substantial restrictions which that Act imposed upon him. The question in the case of *Parr* v. *Attorney-General* (28) was (as the judge observed) different from that with which we are concerned. In that case there had been a settlement in usual form followed in due course by a disentail and resettlement also in usual form. The question there posed was whether on the death of the original life tenant the trust property passed "under" the original settlement or the resettlement; and the answer was, "under" the latter, for the succession which then occurred was in accordance with the limitations of the resettlement. But three out of five of the noble Lords were also of opinion that the life interest of the deceased under the original settlement still persisted—not, as Lord Blanesburgh observed, as the magical result of the incantations of the conveyancers but because such was manifested to be the intention of those concerned, the original life interest being "restored" and "confirmed" by the terms of the resettlement. In the present case the relevant words in the resettlement are "restoration" and "continuation"; and particularly when regard is had to the terms and effect of the Act of 1928 it seems to us difficult indeed to say that during the rest of his life the deceased's original protected life interest under the 1907 settlement did not for some purposes at least remain in being; and if this is so, it is impossible to treat that settlement as "destroyed".

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(28) [1926] A. C. 239.

And as regards Mr. Millard Tucker's main point in the court below, there are, as it seems to us, formidable difficulties also. We agree with the judge that there is a certain unreality in speaking of the plaintiff, at the date of his father's death, as his father's "donee" under the settlement of 1907. But a certain artificiality is inescapable under taxing statutes. Moreover, if the question posed by Mr. Tucker is the correct question, still the negative answer which he demanded cannot, we think, be regarded as self-evident. In a sense, no doubt, the plaintiff is not appropriately described as having been since 1907 (and before he was born) his father's "donee" of the policy moneys for whose benefit his father had kept the policy up until 1934; and

(28) [1926] A. C. 239.

when he himself and his father joined in 1934 in making an absolute appointment to him, it is not to be forgotten that they could have so appointed to anyone in the world, e.g., to an individual who was not and never had been in any way interested under the trusts of the 1907 settlement or of the 1930 resettlement in default of appointment; and that so far as the plaintiff was concerned, his power of appointment (that is, of disposition) arose out of his interest under the 1907 and 1930 settlements.

On the other hand, if the deceased is not to be treated as having kept up the policy from 1907 to 1934 for the benefit of the plaintiff, for whose benefit did he so keep it up? Not, certainly, for his own. By the terms of the Act of 1928, he was disabled from recalling at all in his own favour the disposition of the policy he had made in 1907. As Mr. Upjohn observed, he had then, so far as his own interest was concerned, parted altogether and irrevocably with the policy and all benefits to be received in respect thereof. For so long, then, as pursuant to his covenants in the 1907 and 1930 settlements he in fact kept up the policy, he must be taken to have done so for the benefit of the person or persons who ultimately should become entitled to receive the policy moneys under the limitations of the settlement of 1907 or under limitations which might fairly be regarded or contemplated as derivable therefrom.

In this respect we find ourselves unable to share the view of Vaisey, J., that on its facts the present case is on all fours with that of *Lord Advocate* v. *Fleming* (29). In that case a father having taken out a policy on his own life and paid a certain number of premiums then assigned the policy absolutely to his daughter who, from the date of the assignment, paid out of her own resources all subsequent premiums; and it was held not legitimate to regard the premiums paid before the assignment as constituting a keeping up of the policy for the daughter's benefit; for during that period the father had no thought of any interest but his own—no thought not only of the daughter as a donee but of any donee at all: see *per* Lord Herschell (30). The principle of *Lord Advocate* v. *Fleming* (29) applies to exclude from consideration premiums paid from the date of the policy to the date of the marriage settlement—from 1904 to 1907; but is thereafter, in our view, inapplicable; for, as we have already observed, from 1907 onwards the deceased must have been keeping up the policy for the benefit of some donee in the sense of some person who would ultimately become entitled to the moneys as a result of his having parted irrevocably with all interest in the policy as part of the settlement of 1907.

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(29) [1897] A. C. 145.

(30) Ibid. 154.

As at present advised, we agree with the view expressed by Wrottesley, J., in *Attorney-General* v. *Barclays Bank Ld.* (31) (a case not noticed by Vaisey, J., in his judgment), that the word "donee" is apt to comprehend a number of persons entitled to successive interests and ought not to be restricted to one or more specified person or persons designated as the donee or donees from the date of the donation. Thus, in the simple case of a voluntary settlement in favour of such one of a class as the donor or some other might appoint and in default of appointment over, the individual ultimately entitled to take would none the less be a "donee" for whose benefit the policy had been kept up from the date of the settlement, although the appointment in his favour was only made very shortly before the policy matured. Were it otherwise, surprising and capricious results would appear to follow.

It is, however, unnecessary for us to express a concluded opinion on either of the matters so far considered. For in this court Mr. Tucker sought to sustain the judgment of Vaisey, J., on this part of the case, by taking a point not taken in the court below, namely, that, assuming in favour of the Crown that the plaintiff's right to the policy moneys was referable to the settlement of 1907, nevertheless he was not a "donee" within the relevant paragraph of the section, since the settlement was made on the marriage of the deceased, and the plaintiff, as a child of such marriage, was within the marriage consideration; and this point became the main issue on the claim to charge under s. 2, sub-s. 1 (*c*). As we have stated, it appeared possible that the argument for the view that the settlement of 1907 had been superseded by the resettlement of 1930 might be adopted by Mr. Upjohn as an alternative to his main submission; since on that hypothesis he could say that the relevant disposition, being post-nuptial, was without consideration. But Mr. Upjohn expressly disclaimed the argument and was content that his claim under s. 2, sub-s. 1 (*c*), should stand or fall on the basis that the plaintiff's right to the policy moneys was referable to the settlement of 1907. The issue being so defined, we have come to the conclusion, for the reasons which we now proceed to state, that Mr. Tucker's new argument is well founded and should defeat the claim to charge under s. 2, sub-s. 1 (*c*).

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(31) [1943] 1 All E. R. 181.

Marriage settlements, no less than marriage articles, have always been treated as made for good consideration so that not only the spouses but also the issue of the marriage (as being "within the marriage consideration") can enforce them:—see, for example, *per* Kay, L.J., in *Attorney-General* v. *Jacobs Smith* (32). If some of the grounds for this view to be found in the books seem a little out of keeping with modern social philosophy, we have no doubt that the law as we have stated it is well settled. Mr. Upjohn virtually admitted as much and conceded therefore that if the word "donee" in the relevant paragraph of s. 11 of the Act of 1889 bears its ordinary and natural signification, the plaintiff could not (on the assumption on which the argument proceeds) be regarded as a "donee". It is, however, said that the effect of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, is such as to compel a construction of the word "donee" as equivalent to "grantee", or at least as comprehending spouses or issue of a marriage. It becomes, therefore, necessary to examine closely the language of s. 38 of the Act of 1881 as amended by s. 11 of the Act of 1889, and the effect thereon of the impact of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. It will be convenient to set out fully the original section, which is as follows: [His Lordship read the section and continued:] To this provision s. 11 of the Act of 1889 made additions and alterations.

Those made to paras. (*b*) and (*c*) of the original section need not be noticed here. As regards para. (*a*), the Act of 1889 provided that: [His Lordship read the material part of the section and continued:] Finally there was added the new paragraph which we have already set out and on which alone the claim of the Crown rests.

On the amendment made to para. (*a*) the argument of the Crown is concentrated. By that amendment there was introduced into para. (*a*) references to "donor" and "donee" and it is claimed by Mr. Upjohn that the significance to be given to the word "donee" in para. (*a*) after the further amendment required by the Act of 1894 must also be given to the same word in the relevant new paragraph added by the Act of 1889 to that of 1881, though the amendments specified in the Act of 1894 do not in terms apply to such last-mentioned paragraph.

Having regard to its vital significance, we may be forgiven for setting out in full the material words of para. (*a*) as amended by the Act of 1889. They run as follows: "Any property taken "as a donatio mortis causa . . . or taken under a voluntary disposition . . . purporting to operate as an immediate gift inter "vivos whether by way of transfer, delivery, declaration of trust, "or otherwise, which shall not have been bona fide made twelve "months before the death of the deceased, and property taken "under any gift whenever made of which property bona fide "possession and enjoyment shall not have been assumed by the "donee immediately upon the gift and thenceforward retained, "to the entire exclusion of the donor or of any benefit to him by "contract or otherwise".

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(32) [1895] 2 Q. B. 341, 354.

Then comes finally s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, whereby the amended s. 38 of the Act of 1881 is re-enacted as if it extended to real property as well as personal property "and "the words 'voluntary' and 'voluntarily' and the reference to "a 'volunteer' were omitted therefrom".

The Finance Act, 1894, further by s. 3 exempted from estate duty property passing on the death of the deceased by reason only of a bona fide purchase for full consideration in money or money's worth.

The question, then, is: what is the effect and extent of the omission from the original section as amended of the words "voluntary", etc.? As regards paras. (*b*) and (*c*) of the original section (so amended), there appears to be no difficulty; for the omissions seem plainly to have the effect that those paragraphs thenceforward cover equally transactions of the character named whether voluntary or made for a full consideration. The difficulty arises under para. (*a*) which continues to retain the references to gifts and donors and donees.

We fully accept the argument that in construing this paragraph it is not legitimate to read it as though the word "voluntary" had never been inserted therein—so much was laid down by Palles, C.B., in *Attorney-General* v. *Smyth* (33), which Lord Blanesburgh in delivering the judgment of the Privy Council in *Attorney-General for Ontario* v. *Perry* (34) regarded as the leading authority on the subject—a judgment to which we must refer more fully hereafter. So to read the paragraph would indeed appear to produce substantially if not entirely the same result as it had before the amendment of 1894 was made: and would therefore defeat the intention of Parliament. But the construction for which the Crown now contends seems to have hardly less remarkable results since it requires no significance

(33) [1905] 2 I. R. 553. (34) [1934] A. C. 477.

whatever to be given to the use of the words " gift ", " donor " and " donee ".

In the case just cited, *Attorney-General for Ontario* v. *Perry* (34) the question related to liability for duty under the Ontario Succession Duty Act in respect of property settled on his marriage by a deceased husband. " The judicial task ", said Lord Blanesburgh, " is to ascertain how far a transfer not purely " voluntary may still be a ' gift ' ". In the course of discharging that task the noble Lord referred to s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and drew a distinction between a marriage settlement made by a party to the relevant marriage which, if it might purport to operate as an immediate gift, was in truth not voluntary but made for good consideration; and a settlement made, say, by a father on his son's marriage which, purporting to operate as an immediate gift, was also purely voluntary. And other instances were cited in the argument before us of dispositions which though operating as gifts to the persons benefiting thereby yet were not purely voluntary—for example, where A and B mutually agree to make gifts in favour of C. While giving effect therefore to the principle of construction stated by Palles, C.B., we think it would be perfectly possible so to interpret para. (*a*) of the Act of 1881 in its finally amended form so as not to comprehend property taken under an ante-nuptial marriage settlement by a person within the marriage consideration.

Mr. Upjohn, however, challenged the validity of the distinction made by Lord Blanesburgh, and, citing in his support the whole judgment of Palles, C.B., in *Attorney-General* v. *Smyth* (35), contended, first, that in the circumstances the words " donor " and " donee " in para. (*a*) of s. 38 of the Act of 1881 (as amended) must be regarded as equivalent to " grantor " and " grantee " and, second and consequentially, that the word " donee " in the new paragraph added to s. 38 by the Act of 1889 (being the relevant paragraph in the present case) must have a like significance. And Mr. Upjohn argued that this view of the construction of para. (*a*) must have been that adopted by Parliament when s. 59 of the Finance (1909–10) Act, 1910, was enacted, which, as regards " gifts inter vivos ", provided (by sub-s. 2) that so much of s. 2, sub-s. 1 (*c*), of the Act of 1894 as made gifts inter vivos property deemed to pass on the death of the deceased should not apply to gifts made in consideration of marriage.

Assuming, however, in Mr. Upjohn's favour (but without

(34) [1934] A. C. 477.

(35) [1905] 2 I. R. 553, 570.

deciding) that in para. (*a*) of s. 38 of the Act of 1881 (as amended) the words "donor" and "donee" must be construed as "grantor" and "grantee", and that it is legitimate in support of that view to have regard to the later Act of 1910, still in our view it does not follow that a like unnatural construction must be given to the word "donee" in the added paragraph. To construe the word "donee" as including a grantee for valuable consideration is to give to the word a meaning so foreign to its ordinary and proper signification that it can only be justified by the sheer compulsion of the context in which it is found. If the amendment to para. (*a*) of s. 38 of the Act of 1881 introduced by s. 2, sub-s. 1 (*c*), of the Act of 1894 provides in that paragraph such a compelling context, there was no amendment introduced by the latter section into the new and independent paragraph added to the former by s. 11 of the Act of 1889. It is true that the original section with all its amendments was re-enacted by the Act of 1894, and that s. 3 of that Act made express exemption of dispositions for consideration in money and money's worth. And it is also true that prima facie a word used with a particular meaning in one part of a section in an Act of Parliament should have the same meaning in another part of the same section. But the rule is not immutable, and every case must be judged on its own facts. In our judgment, if the word "donee" in para. (*a*) has the sense of "grantee", it has it only by the peculiar force of its particular context. That context is absent from the final paragraph. There the word appears in a different context—"where the policy is wholly kept up by him "for the benefit of a donee whether nominee or assignee"—words pointing, in our view, towards the natural and proper sense of the term.

In our view, therefore, the paragraph in question does not apply to the plaintiff since he, deriving his title (on the assumption made in this argument) from his father's marriage settlement of 1907, is within the marriage consideration and cannot be aptly described as a donee within the meaning of the paragraph.

The view we have expressed may be said not to be in accordance with the opinion expressed by Palles, C.B., in *Attorney-General* v. *Smyth* (35) already referred to; and out of respect for that very learned and experienced judge we must make some further reference to that case. The question in the case was whether certain property which had been made the subject of a settlement by a father on the marriage of his son was liable

(35) [1905] 2 I. R. 553, 570.

for duty under s. 2, sub-s. 1 (*c*), of the Act of 1894, the father having died within twelve months of the settlement. The case was therefore one arising under para. (*a*) of s. 38 of the Act of 1881 (as amended), and it was also a case where the settlor was not himself a party to the marriage. It was argued, nevertheless, that since the settlement was made on the son's marriage, it could not properly be described as a disposition purporting to operate as a gift; and that was the sole question which fell to be determined. Palles, C.B., in his judgment, rejecting the argument of the taxpayer, considered at length the history of the legislation and the effect of the amending provisions of s. 2, sub-s. 1 (*c*), of the Act of 1894 on para. (*a*) of s. 38 of the Act of 1881, and he concluded that the word " gift " in that paragraph must now comprehend a grant for value. His judgment towards its end contained the following paragraph: " Referring " back to the general words of the description, it will be found " that it contains four, and only four, words indicative of bounty. " Taking them in the order of time, they are: (1.) voluntary; " (2.) gift; (3.) donee; (4.) donor. The two latter aptly describe " the persons to whom and from whom the property moves under " the gift, and do no more than reiterate the character they " acquire from the nature of the disposition or gift. They add no " additional force to it, and are referable to it. ' Gift ', as I " have already shown, is referable to the character the disposition " had already acquired from being voluntary. Thus, the word " ' voluntary ' permeates the entire description. It is by reason " of that that the disposition is described as a ' gift ' and that " the parties to it are designated as ' donor ' and ' donee '. When " that element is extinguished, those things which, by reason " of it, acquired particular designations, cease to answer those " descriptions. The disposition itself ceased to be a ' gift ', and " must be read ' disposition '. The parties to it no longer answer " the descriptions of donor and donee; they become ' grantor ' " and ' grantee ' ".

The judge nowhere in his judgment considered the paragraph in the re-enacted section on which the present case depends, for that paragraph was irrelevant to the matter before him. We cannot, therefore, treat the judgment as a pronouncement on, or the argument as directly pertinent to, the matter which we have to decide. We observe, however, that in the recent case *In re Earl Fitzwilliam's Agreement* (36), Danckwerts, J., had to consider whether a disposition for a consideration in money or

(36) [1950] Ch. 448.

money's worth, which was taken out of the exemption in s. 3 of the Act of 1894 by s. 44 of the Finance Act, 1940, was within the scope of s. 2, sub-s. 1 (*c*), of the former Act; and he answered the question negatively, declining to follow the judgment of Palles, C.B., in *Attorney-General* v. *Smyth* (37). In the circumstances, it is unnecessary for us to express any opinion on the judgment of Danckwerts, J., or (save to the extent already stated) on that of Palles, C.B.

In our view, the appeal of the Crown on s. 2, sub-s. 1 (*c*), of the Act of 1894 fails.

It remains to consider the claim under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, whereby property passing on the death of the deceased is to be deemed to include: " (*d*) any annuity or " other interest purchased or provided by the deceased, either " by himself alone or in concert or by arrangement with any " other person, to the extent of the beneficial interest accruing " or arising by survivorship or otherwise on the death of the " deceased ".

Two exemptions from this provision are worth notice as throwing some light on its intended scope. These are contained in s. 15 of the Act of 1894, which exempts by sub-s. 1: " . . . a " single annuity not exceeding twenty-five pounds purchased or " provided by the deceased . . . for the life of himself and of " some other person and the survivor of them, or to arise on his " own death in favour of some other person . . ."; and by sub-s. 3: " . . . any pension or annuity payable by the Government " of British India to the widow or child of any deceased officer " of such Government, notwithstanding that the deceased contri- " buted during his lifetime to any fund out of which such pension " or annuity is paid ".

Reference should also be made to s. 30 of the Finance Act, 1939, which (so far as material for the present purpose) provides by sub-s. 1 as follows: " (1.) Para. (*d*) of sub-s. 1 of s. 2 of the " Finance Act, 1894 (which provides that property passing on the " death of a deceased person shall be deemed to include any " annuity or other interest purchased or provided by the " deceased) shall have effect in relation to an annuity or other " interest that was purchased or provided wholly or in part by " any person who was at any time entitled to, or amongst whose " resources there was at any time included, any property derived " from the deceased, as if that annuity or other interest had been " provided by the deceased, or, if it is proved to the satisfaction

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(37) [1905] 2 I. R. 553.

" of the Commissioners that the application of all the property " derived from the deceased would have been insufficient to " provide the whole of that annuity or other interest, as if a " similar annuity or interest of an amount reduced to an extent " proportionate to the insufficiency proved had been provided by " the deceased ".

It will be seen that there are three conditions which must be satisfied in order to give rise to a claim for duty under s. 2, sub-s. 1 (*d*), namely: (i) There must be an annuity " or other " interest "; (ii) It must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with some other person; and (iii) A beneficial interest must accrue or arise by survivorship or otherwise on the death of the deceased. If these three conditions are satisfied, then the annuity or other interest is deemed to pass on the death to the extent of the beneficial interest so accruing or arising, and accordingly to that extent attracts duty.

As regards condition (i), Mr. Millard Tucker for the plaintiff, while formally submitting the contrary, conceded that the judgment of this court in *Attorney-General* v. *Murray* (38) precluded him from maintaining before us that the policy here in question was not an " interest " within the meaning of the words " or " other interest " in s. 2, sub-s. 1 (*d*).

As regards condition (ii), it was not disputed that, having regard to s. 30, sub-s. 1, of the Finance Act, 1939, and the appointment to the plaintiff of the Wood Street property in addition to the policy by the deed of November 10, 1934, the deceased must be treated as having provided the policy for the purposes of s. 2, sub-s. 1 (*d*), though it was contended by Mr. Tucker that in the event of condition (iii) being held to be satisfied, the policy must under s. 30, sub-s. 1, of the Act of 1939 be treated for duty purposes as a policy for a reduced amount bearing the same proportion to the full sum actually paid under it as the rents of the Wood Street property during the period from November 10, 1934, down to the death of the deceased bore to the premiums paid by the plaintiff during the same period.

The real contest centred on condition (iii). Did any beneficial interest accrue or arise to the plaintiff from the policy on the death of the deceased?

The argument for the plaintiff, which was accepted by Vaisey, J., is to the effect that on the footing that the interest

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(38) [1904] 1 K. B. 165, 172.

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provided by the deceased should be taken to be the policy, i.e., the benefit of the contract of life assurance constituted by the policy, the plaintiff became the absolute beneficial owner of the policy and of all rights arising under or conferred by it on November 10, 1934, the date of the absolute appointment thereof to him; that at any time thereafter he could have surrendered the policy to the insurance company concerned for its appropriate surrender value or could have sold it for whatever its current value in the market might be; and that although he in fact elected to hold it until the death of the deceased and receive the full sum which became payable on the happening of that event, no beneficial interest which he did not possess before accrued or arose to him on the death of the deceased, all that happened being that the property, in the shape of the policy, of which he had been absolute beneficial owner ever since November 10, 1934, became more valuable from day to day as it approached maturity, and finally reached its full value on the deceased's death.

This argument is supported by the recent decision of the Inner House of the Court of Session in *Lord Advocate* v. *Hamilton's Trustees* (39), which the judge thought it his duty to follow.

An alternative argument for the plaintiff was to the effect that if the interest provided by the deceased should be taken to be the policy moneys, then the exemption afforded by s. 3, sub-s. 1, of the Finance Act, 1894, in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes (said in this case to be the insurance company from whom the policy moneys were purchased by means of the premiums paid) is applicable.

We think that this argument can be shortly disposed of. It is true that in some of the cases expressions have been used which suggest that the interest provided consists of the policy moneys rather than the policy. But this seems to us to be largely a matter of words. To be strictly accurate, we think the interest provided by the deceased should, as assumed in the argument above summarized, be taken to be the benefit of the policy. By virtue of that interest the plaintiff became entitled on the death of the deceased to immediate payment of the sum assured with the appropriate profits. It may therefore be said that the interest provided by the deceased, as ultimately realized

(39) 1942 S. C. 426.

by the plaintiff, consisted of the sum assured, with profits, received by him from the insurance company on the death of the deceased. The question in the case is whether the conversion on the death of the deceased of the prospective right to payment of the policy moneys which had passed to the plaintiff under the appointment of November 10, 1934, into an immediate right to such payment amounted to the accruing or arising of a beneficial interest within the meaning of s. 2, sub-s. 1 (*d*). If it did, then there was a notional passing on the death of the deceased of the benefit of the policy, which then assumed the form of a debt immediately payable in the shape of the policy moneys, to the extent of the beneficial interest accruing or arising, which interest was represented (subject to the question of adjustment under s. 30, sub-s. 1, of the Act of 1939 raised by Mr. Tucker) by the amount of the policy moneys. But this notional passing could not, in our view, be said to have taken place by reason only of a purchase from the insurance company by means of the premiums paid; it would have taken place by reason of such purchase coupled with the provision of the policy by the deceased for the benefit of the plaintiff. Moreover, such a notional passing would have taken place under the disposition of the deceased, not that of the insurance company. We therefore fail to see how s. 3, sub-s. 1, of the Finance Act, 1894, can assist the plaintiff. Indeed, the use Mr. Tucker seeks to make of it seems wholly inconsistent with the reference in s. 2, sub-s. 1 (*d*), itself to the "purchase" of any annuity or other interest.

A similar argument was advanced, and in our view rightly rejected by the Divisional Court, in *Attorney-General* v. *Dobree* (40).

The argument for the Crown was to the effect that on the death of the deceased there arose to the plaintiff for the first time an immediate right to receive the sum assured with profits in accordance with the terms of the policy which in the lifetime of the deceased had existed only as a future or prospective right to arise on the death of the deceased, and moreover as a right not merely future or prospective but conditional on the premiums being in the meantime duly paid. It was claimed that the arising of this immediate right did amount to the arising or accruing of a beneficial interest within the meaning of s. 2, sub-s. 1 (*d*), the extent of such beneficial interest being the

(40) [1900] 1 Q. B. 442, 447.

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amount of the policy moneys, the circumstance that the plaintiff might have avoided the claim to duty by surrendering or selling the policy in the lifetime of the deceased being immaterial inasmuch as he did not in fact do so. Reliance was placed on a series of cases beginning with *Attorney-General* v. *Dobree* (40), which we were invited to follow in preference to *Lord Advocate* v. *Hamilton's Trustees* (41).

We confess our inability to reconcile the last-mentioned case with the earlier authorities bearing on s. 2, sub-s. 1 (*d*), the effect of which we should next proceed to review.

In *Attorney-General* v. *Dobree* (40) the deceased settled a policy on his own life in trust for his wife for life with remainders over and covenanted to pay the premiums, which he duly did. On his death, duty was claimed under s. 2, sub-s. 1 (*d*), on the sum payable under that policy. The argument was advanced, amongst others, that "No beneficial interest passed from the "deceased to the wife or her trustees on his death. No bene-"ficial interest accrued or arose on his death; it arose or accrued "on the making of the settlement". The Divisional Court (Darling and Channell, JJ.) rejected this and other arguments and held that duty was exigible.

The following passage from the judgment of Darling, J., is worth quoting at length (40): "It was contended by counsel for "the defendants that no beneficial interest passed upon Mr. "Atlee's death; that all the interest he ever had was in the "hands of the trustees by virtue of the earlier settlement, and "that what passed to Mrs. Atlee upon his death, though it was "a benefit or advantage, was not within the words 'beneficial "'interest accruing or arising by survivorship or otherwise' on "his death, and therefore is not taxable. It is material, I think, "in order to see what exactly is meant by sub-s. 1 (*d*), to look "at s. 15 of the Act. In (*d*) not only interests but annuities are "dealt with, and s. 15 enacts: 'Estate duty shall not be payable "'in respect of a single annuity not exceeding 25*l*. purchased or "'provided by the deceased, either by himself alone or in con-"'cert or arrangement with any other person, for the life of "'himself and of some other person and the survivor of them, "'or to arise on his own death in favour of some other person'.

"Now the sum in question here is not an annuity, and the "exemption in s. 15 is only in respect of an annuity of a value "not exceeding 25*l*. Supposing in this case every circumstance

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(40) [1900] 1 Q. B. 442, 448–9.

(41) 1942 S. C. 426.

"had been the same except that the amount payable by the "insurance company upon Mr. Atlee's death had been calculated, "not as a lump sum, but had been calculated, as it perfectly "well might have been, so as to give her an annuity during her "life. If that were so, there would be no difference between "that case and this, except that an annuity had been stipulated "for instead of a lump sum. All the other words being the "same, what is there to show that s. 2, sub-s. 1 (*d*), does not "apply if an annuity has not been stipulated for but a lump sum? "I can see nothing. I think that s. 15 shows that exactly what "was done in the present case does result in a taxable beneficial "interest arising upon the death of the person who has insured "his life for the benefit of his widow, as Mr. Atlee did, and that "such a taxable beneficial interest would certainly have attached "if the money to be paid by the insurance company had been "secured to be paid in the way of an annuity, provided that the "annuity had not been within the exemption of s. 15 because its "value did not exceed 25*l*.".

Channell, J., said (42): "So far I think there is no difficulty "in arriving at the conclusion that s. 2, sub-s. 1 (*d*), of the Act "of 1894 applies to the case before us, and s. 15, of course, "throws great light on the matter and assists that conclusion". He then proceeded to discuss and reject (as had Darling, J.) the claim to exemption under s. 3, and, after reading the section, said: "Applying that section to this policy, if you take the word "'property' as referring to the policy itself, undoubtedly the "policy, or the right to it, did not pass on the death of the "deceased; it passed on the making of the settlement many "years before. If, however, you read the word 'property' as "referring to the 1,500*l*. payable under it, then that did pass "on the death of the deceased because it became payable then, "and in that sense it passed, and it passed also on the death of "the deceased, partly, at any rate, by reason of the contract with "the insurance company".

We have quoted this passage because Mr. Tucker placed some reliance on the judge's statement that "the policy or the right "to it did not pass on the death of the deceased; it passed on "the making of the settlement many years before". As appears from what we have already said, however, we think the true view is that the benefit of the policy (i.e., of the contract of insurance) passed on the making of the settlement. But the question so far as s. 2, sub-s. 1 (*d*), is concerned is whether the right to immediate payment of the policy moneys, which by the terms of the policy arose on the death of the deceased, in the sense that it then became for the first time immediately exercisable, was a beneficial interest accruing or arising on such death within the meaning of the sub-section.

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(42) [1900] 1 Q. B. 452.

In *Attorney-General* v. *Robinson* (43) there was a marriage settlement under which policies of assurance on his own life were assigned by the deceased to the trustees and kept up out of the income of a fund assigned to them by his wife. In the events which happened the children of the marriage became absolutely entitled to the policy moneys under the trusts of the settlement on the death of the deceased. The Irish Queen's Bench Divisional Court (Palles, C.B., and Johnson and Boyd, JJ.) held that the policy moneys attracted duty on the death of the deceased under s. 2, sub-s. 1 (*d*).

It is necessary to quote at some length from the judgment of Palles, C.B. He said (44): "There is one peculiarity in a policy "of insurance upon the life of a deceased person which, were it "not for s. 2, might have rendered it arguable whether, when "it was vested in the deceased himself, at his death the full "amount assured would have been liable to duty upon his death. "It is this: that during his life the moneys assured thereby were "not in existence, qua money. Immediately before the death "his property in the policies consisted of a contingent right to "sue at a future period upon a contract which, at that time, had "not been broken. The moneys assured would not in that "event have passed on the death, as to so pass they should "have previously existed, but on that death, or at some period "ascertainable by reference to the death, the right to the moneys "accrued or arose for the first time. The words, however, which "I have quoted from cl. (*c*) of s. 2 negative any such argument. "They render liable to duty, under certain circumstances, "'money received under a policy of insurance' on the deceased's "life, although the policy was not vested in him at his death. "This satisfies me that 'property' which 'passes on' the death, "under s. 1, must be taken to include moneys assured by "policies of insurance on the deceased's life which are vested in "him at his death, although that which really passed was not "the actual money assured, but the benefit of the contract of "insurance.

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(43) [1901] 2 I. R. 67.

(44) Ibid. 88.

"For the same reasons, I am of opinion that property "'deemed' to be 'included' in 'property passing on the death', "within s. 2, includes property assured by policies of insurance "on his life, if such policies or the moneys assured thereby are "within any of the descriptions in the cll. (*a*) to (*d*) of that "section. Thus, the only question appears to me to be, are the "policies in the present case, or the moneys assured thereby, "within cl. (*d*)? A moment's consideration of the words of that "clause seems to me to be sufficient to demonstrate that they "are. 'Any annuity or other interest.' 'Interest' here must "plainly mean interest in property. I pass over, for a moment, "the next following words, and I come to the words 'to the "'extent of the beneficial interest accruing or arising, by sur-"'vivorship or otherwise, on the death of the deceased'. "'Interest', 'to the extent of the beneficial interest', is not a "very happy expression; but the meaning is clear. The thing "subjected to taxation is 'the beneficial interest accruing or "'arising, by survivorship or otherwise, on the death of the "'deceased, in any annuity or in any other interest in property "'purchased or provided by the deceased', as mentioned in the "section. The words 'accruing or arising' are used in contra-"distinction to 'passing'. They indicate, not the transfer upon "death to another of something which the deceased or some other "person had before or at the death, but the springing up, on the "death, and the then vesting in another, of property which "previously had not been existing in any one. This is an exact "description of money secured by a policy of insurance.

"If, then, the policy moneys here answer the description in "the clause, viz., if they were an interest in property purchased "or provided by the deceased, as therein described, they must "be included in it. Now, were they so 'purchased or provided' "—that is, were they purchased or provided by the deceased in "concert or arrangement with his wife? I cannot frame to my "mind any doubt that the marriage settlement constituted a "provision by the deceased, by arrangement with his wife, that "the policies in question should be so kept up that on the death "of the survivor of the husband and wife the whole beneficial "interest in the moneys thereby assured should accrue and arise "to the children of the marriage, that such beneficially acquired "interest did in event accrue and arise accordingly, and that the "marriage settlement brings such 'interest' of the children into "cl. (*d*) of s. 2.

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" Upon the whole, then, I am of opinion that the true effect " of cll. (*c*) and (*d*), taken together, in relation to money received " under policies of insurance effected by the deceased on his own " life, is that the policy moneys, although not vested in the " deceased at his death, are liable under cl. (*c*) to duty if the " policies have been wholly kept up by him for the benefit of " another; and that part of such policy moneys is so liable where " the policies are partially kept up by him for such benefit. This " liability arises from the fact of the policies having been kept " up by the deceased, and is independent of the existence of any " obligation upon him to do so, or any arrangement between him " and any other person in relation thereto. As, however, to " policies which are neither vested in the deceased nor in fact " kept up wholly or partially by him for the benefit of others, " the only liability to duty is under cl. (*d*); and this depends upon " an arrangement within the meaning of the clause having been " made by the deceased ".

He also referred (45) to *Attorney-General* v. *Dobree* (46) in the following terms: " The facts in *Attorney-General* v. " *Dobree* (46) were not identical with those before us. There " the policies were, in fact, kept up by the deceased, and, for " myself, I should have had no difficulty in holding that, for " that reason, the moneys assured were within cl. (*c*) of s. 2. " But, in addition to that, the premiums were so paid by the " deceased under a covenant in a settlement, and therefore the " case was also within cl. (*d*); and the decision was that they " were taxable under the latter clause. This was a decision by " a court whose jurisdiction is co-ordinate with ours, upon an " Imperial Statute rendering property in England and this " country liable to taxation under similar circumstances and at " similar rates; and having regard to the grave inconvenience " that would result from two different systems of taxation being " in operation in the two different countries, under the same " enactment, applicable in the same manner to each country, " even had I doubts as to the decision I should have bowed to " its authority, and left it to be questioned, if at all, in the Court " of Appeal and House of Lords. My own opinion, however, is, " for the reasons I have already given at length, entirely in accord " with the decision ".

In *Attorney-General* v. *Murray* (47) the actual decision was to the effect that a policy of insurance effected by a father on his son's life and settled on his son's marriage was not purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2, sub-s. 1 (*d*), but the arguments advanced against liability to duty included the contentions that a life policy was not an " interest " within the meaning of s. 2, sub-s. 1 (*d*), and also that " the whole beneficial interest in the " contingent debt passed under the settlement on the marriage " and the wife had no greater interest in it by reason of the " husband's death than she had as soon as the marriage took " place "; and *Attorney-General* v. *Dobree* (48) and *Attorney-General* v. *Robinson* (49) were both referred to.

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(45) [1901] 2 I. R. 91.

(46) [1900] 1 Q. B. 442.

(47) [1904] 1 K. B. 165, 169, 172.

Cozens-Hardy, L.J., delivering the judgment of the court at p. 172 of the report, said this: " Secondly, it is contended that " a policy of insurance is not an interest within sub-s. 1 (*d*). We " have not been able to appreciate this argument. A policy is " plainly property within the scope of s. 2, and we can see no " ground for excluding it from sub-s. 1 (*d*). We are content to " adopt the reasoning of Palles, C.B., in *Attorney-General* v. " *Robinson* (49), and we do not think any good object would be " attained by attempting to further elaborate it ".

In *Lord Advocate* v. *Scott* (50) policies on the life of the deceased had been settled by the deceased with other property on trusts for the benefit of his daughters for life with remainder to their issue. The trustees were directed to pay the premiums but were empowered at their discretion to sell or surrender the policies, which however they in fact retained until the death of the deceased. Duty was then claimed under s. 2, sub-s. 1 (*d*), and was held by Lord Cullen as Lord Ordinary to be exigible.

His decision was affirmed on appeal, when the Lord President (Lord Strathclyde) said: " It is no doubt true that, during the " continuance of the trust, discretionary powers were conferred " upon the trustees of selling or assigning or surrendering these " policies, but none of these powers was exercised. On the " contrary, the trustees continued to pay the premiums through-" out the whole period of the trust until the truster's death, and " thereupon this money passed as an interest to the daughters " and their children. It seems to me, therefore, that it is " plainly property passing on the death of the deceased; and, if " we are asked for a further definition and description of such " property, then we find it in the sub-section referred to on

(48) [1900] 1 Q. B. 442.
(49) [1901] 2 I. R. 67.
(50) 1918 S. C. 720, 724.

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"record which sets out, read short, that any interest provided "by the deceased, by himself alone, arising on the death of the "deceased, is dutiable. It appears to me that these words "apply in exact terms to the proceeds of these four policies of "assurance. The deceased died, and on his death the interest "passed in terms of his trust-assignation".

Lord Mackenzie said (51): "It is said that the whole beneficial interest passed when the trust was created. I am unable, "looking to the terms of the trust-deed, to take that view. It "is quite consistent with the setting up of an inter vivos trust "that certain interests created should pass only at the death of "the truster. Nor can I assent to the argument that in conse"quence of the special terms of this inter vivos deed, which "conferred a power on the trustees to surrender the policies, it "was they, and not the truster, who were providing the funds "for the premiums. In point of fact the trustees did continue "to fulfil their part of the current contracts, and they did not "consider it necessary to surrender the policies; and the result "was that on the death of the truster the value of the current "policies was enhanced, and it is upon the capital value so "created that the Crown is entitled to charge duty". Lord Skerrington concurred.

Lord Sands, while not formally dissenting, expressed certain doubts to which, as they support the plaintiff's argument, we should perhaps refer (52): "I confess that I have certain doubts "in this case, but my views are not so clear as to lead me "formally to dissent. I may, however, state what my doubts "are. These policies belonged, after the creation of the trust, "to certain trustees for behoof of certain beneficiaries. Now, no "doubt when a man dies who has insured his own life the policy "upon his life is part of his estate, and in respect of that part "of his estate a beneficial interest accrues to his executors. But "I confess I entertain some doubt as to whether, where one "already holds as one's own property a policy of insurance on "the life of another party, any beneficial interest that was not "in the holder before accrues to him at the time of the death of "the person whose life is insured. The policy which he had in "bonis simply matures".

In *Attorney-General* v. *Pearson* (53) liability to duty under s. 2, sub-s. 1 (*d*), on the policy moneys in question was not disputed, but it was claimed that the exemption from aggregation afforded by s. 4 of the Finance Act, 1894, to property in which the deceased never had an interest was applicable. Rowlatt, J., held that the exemption did not apply. The question with which we are now concerned was, therefore, not in issue. But Rowlatt, J., said of s. 2, sub-s. 1 (*d*): "That "the policy moneys in a case like this are liable to duty under "that sub-section is clear upon the authorities beginning with "the Irish case of *Attorney-General* v. *Robinson* (54)".

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(51) 1918 S. C. 720, 726.

(52) Ibid. 726.

(53) [1924] 2 K. B. 375, 387.

Tennant v. *Lord Advocate* (55) was another case on the question of aggregation, liability to duty under s. 2, sub-s. 1 (*d*), being admitted. Lord Russell of Killowen said: "For myself, "I am not prepared to accept without some further consideration the correctness of the first step". (He was referring here to a contention that what passed on the death was "the cash "payable by the insurance company and nothing else".) "Three authorities were cited as establishing it, namely, "*Attorney-General* v. *Dobree* (56); *Attorney-General* v. *Robinson* (54); and *Inland Revenue Commissioners* v. *Scott's* "*Trustees* (57). No doubt language is used in some of the "judgments in those cases which might give colour to the view "that what passed on the death was the cash, and not the policy "or the value of the policy; but in none of those cases was it "material that any such question should be decided. Indeed, it "is not easy to see how the question can ever become material. "The policy must, if valued, be valued as a matured policy and "with reference to the solvency of the insurance company, with "the result that the value of the policy will be the same as the "value of the moneys payable thereunder. But I would wish "to keep the question open in case it should ever hereafter be "necessary to decide between the two alternatives".

With respect to these observations, it is proper to note that counsel for the Crown had not been called upon to argue. His Lordship went on to decide that the policy moneys were to be aggregated, expressing agreement with Rowlatt, J.'s decision in *Attorney-General* v. *Pearson* (58).

In *Westminster Bank Ld.* v. *Attorney-General* (59) the point at issue was again aggregation, and was decided in favour of the Crown on the authority of *Tennant* v. *Lord Advocate* (60), which had been decided between the conclusion of the hearing and the delivery of the reserved judgment of the Court of Appeal. But Clauson, L.J., delivering the judgment of the court (61), said: "The first step is to ascertain with precision what it is that is "deemed to pass on the death of Sir Frederick in respect of the "policy moneys by reason of the operation of s. 2, sub-s. 1 (*d*). "The answer, in the words of the sub-section, is 'the interest "'provided by the deceased to the extent of the beneficial "'interest accruing or arising on the death of the deceased'. "The interest provided by the deceased is the amount of the "policy moneys including the bonuses. It is not, however, "the whole of that sum which is deemed to pass; that sum is "deemed to pass only to the extent of the beneficial interest "accruing or arising on the death of the deceased. In the "present case the extent of the beneficial interest so arising is "commensurate with the life interests which spring into being "on the death of Sir Frederick, that is to say the life interests, "whether vested or contingent, on attaining twenty-one or "marrying of the five children of Mrs. van der Goes living at the "testator's death. It follows that that which passes in respect "of the policy moneys is so much thereof as is equivalent to the "value of those life interests therein".

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(54) [1901] 2 I. R. 67.
(55) [1939] A. C. 207, 213.
(56) [1900] 1 Q. B. 442
(57) 1918 S. C. 720.
(58) [1924] 2 K. B. 375.
(59) [1939] Ch. 610.
(60) [1939] A. C. 207.

With the exception of *Lord Advocate* v. *Hamilton's Trustees* (62), these are all the cases to which we need refer. It will be seen that they include three actual decisions (namely, *Attorney-General* v. *Dobree* (63), *Attorney-General* v. *Robinson* (64) and *Lord Advocate* v. *Scott* (65)), a judgment of this court in *Attorney-General* v. *Murray* (66), which expressed complete approval of the reasoning of Palles, C.B., in *Attorney-General* v. *Robinson* (64), and a further judgment of this court in *Westminster Bank Ld.* v. *Attorney-General* (67), containing a statement of the effect of s. 2, sub-s. 1 (*d*), which entirely accords with that reasoning, while the other two (namely, *Attorney-General* v. *Pearson* (68) and *Tennant* v. *Lord Advocate* (69)) both proceeded on the footing that the question of liability under s. 2, sub-s. 1 (*d*), was well settled.

In *Lord Advocate* v. *Hamilton's Trustees* (62) the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons (as we understand it) were to take absolute interests on attaining twenty-five, while the daughter's share was settled on her for life with remainders over. No other property seems to have been settled. The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2, sub-s. 1 (*d*), on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary, on the grounds (1.) " that in the circumstances the property sought " to be charged had not been provided by the deceased ", and (2.) " that there was no beneficial interest accruing or arising on " the death of the deceased in the respect that the whole interest " in the policies had passed to the beneficiaries twenty-four years " before the truster's death, their interest having fully vested ". The judgment of Lord Wark is extensively cited by Vaisey, J., in his judgment in the present case. We will not repeat that process, and need only say that in our view, so far as the second of the above-stated grounds is concerned, *Lord Advocate* v. *Hamilton's Trustees* (70) seems to us to be in direct conflict with *Attorney-General* v. *Dobree* (71) and *Attorney-General* v. *Robinson* (72).

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(61) [1939] Ch. 610, 618.
(62) 1942 S. C. 426.
(63) [1900] 1 Q. B. 442.
(64) [1901] 2 I. R. 67.
(65) 1918 S. C. 720.
(66) [1904] 1 K. B. 165.
(67) [1939] Ch. 610.
(68) [1924] 2 K. B. 375.
(69) [1939] A. C. 207.

In this state of the authorities and particularly in view of the express and unqualified approval accorded to *Attorney-General* v. *Robinson* (72) by this court in *Attorney-General* v. *Murray* (73), it seems to us that, notwithstanding *Lord Advocate* v. *Hamilton's Trustees* (70), our duty is to apply to the present case the law as laid down in *Attorney-General* v. *Dobree* (71) and *Attorney-General* v. *Robinson* (72).

Those cases appear to us clearly to proceed on the principle that the terms of the ordinary policy of life insurance are in themselves such as to produce for the owner of the policy on the death of the person whose life is insured a beneficial interest then accruing or arising in the shape of an immediate right to receive the policy moneys in the sense in which the expression " beneficial " interest accruing or arising . . . on the death of the deceased " is used in s. 2, sub-s. 1 (*d*). Once this principle is accepted, it seems to us to dispose of Mr. Tucker's argument and to lead necessarily to the conclusion that if a policy has been provided by the deceased and has been so disposed of that on his death the moneys which then became payable under it are payable to or for the benefit of some other person or persons, whether that result is achieved through the medium of a trust created in the lifetime of the deceased or by means of an assignment in his lifetime of the legal as well as the beneficial interest in the policy to such other person or persons, all the conditions of liability under s. 2, sub-s. 1 (*d*), are satisfied.

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(70) 1942 S. C. 426.
(71) [1900] 1 Q. B. 442.
(72) [1901] 2 I. R. 67.
(73) [1904] 1 K. B. 165.

Thus, if A effects a policy of assurance on his life, assigns the whole legal and beneficial interest in it to B, and pays or provides for the payment of all premiums down to the date of his death, while B retains the policy down to the date of A's death and receives the moneys then becoming payable under it, the result on the principle above stated must, as it seems to us, be that a beneficial interest in the shape of the policy moneys—or the right to immediate payment of the policy moneys—will have accrued or arisen to B on the death of A within the meaning of s. 2, sub-s. 1 (*d*), and that it can avail B nothing that the contract (i.e., the policy) under which this beneficial interest so accrued or arose to him became his absolute property at the date of the assignment, or that he might, had he chosen, have sold or surrendered the policy at any time after that date.

In the present case the effect of s. 30, sub-s. 1, of the Finance Act, 1939, appears to be that, subject to the question of insufficiency raised by Mr. Tucker, the plaintiff can be in no better position for the purposes of the claim under s. 2, sub-s. 1 (*d*), than he would have been in if the deceased had himself in fact provided for the payment of all the premiums on the policy from the date of the appointment of November 10, 1934, down to the date of his death; and if the deceased had in fact done this, the claim would, so far as we can see, have been unanswerable on the footing that *Attorney-General* v. *Dobree* (74) and *Attorney-General* v. *Robinson* (75) are to be taken as correctly stating the effect of s. 2, sub-s. 1 (*d*), in relation to policies of life insurance.

We have not overlooked the fact that in all the cases to which we have referred the policies were the subject of settlements or trusts. In our view, as appears above, the principle on which *Attorney-General* v. *Dobree* (76) and *Attorney-General* v. *Robinson* (77) are based in no way depended on this circumstance. On

(74) [1900] 1 Q. B. 442.
(75) [1901] 2 I. R. 67.
(76) [1900] 1 Q. B. 442.
(77) [1901] 2 I. R. 67.

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that principle the beneficial interest is to be regarded as accruing or arising under and by virtue of the contract of insurance irrespective of any settlement or trust affecting the policy moneys. The only relevance of a settlement or trust appears to be that where the policy moneys pass under it to a person taking a life interest only, the beneficial interest accruing or arising on the death of the deceased and so attracting duty under s. 2, sub-s. 1 (*d*), is limited to the value of that life interest: see *Westminster Bank Ld.* v. *Attorney-General* (78).

In the course of the argument, Mr. Tucker called attention to a statement in Green's Death Duties (2nd ed.), p. 100, that "It "is not the official practice to claim duty in the case of a fully-"paid policy given by the deceased more than five years before "his death to a donee absolutely".

Mr. Upjohn, for the Crown, admitted that his argument involved the conclusion that duty would as a matter of law be exigible even in those circumstances. That may well be so, but for the present purpose we need only say that this is not such a case.

In the result, we would allow this appeal so far as the claim under s. 2, sub-s. 1 (*d*), is concerned. As to the question of insufficiency and any consequential reduction in the amount on which duty is exigible, we understand that the parties are content that, in default of agreement, this should be the subject of an inquiry in the Chancery Division.

Appeal allowed in part.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons.*

J. L. D.

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(78) [1939] Ch. 610.

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July 5, 9.

Evershed, M.R., Jenkins and Birkett, L.JJ.

In re POWER'S SETTLEMENT TRUSTS.
POWER AND OTHERS *v.* POWER.

[1950 P. 2973.]

Trustee—Appointment of additional trustee—Statutory power—Donee of power not entitled to appoint himself—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 36, *sub-s.* 6.

The person authorized by s. 36, sub-s. 6, of the Trustee Act, 1925, to appoint an additional trustee is not entitled to appoint himself to be such an additional trustee.

In re Sampson [1906] 1 Ch. 435 approved.

Dictum of Denning, L.J., in *Royal Crown Derby Porcelain Co. Ld.* v. *Raymond Russell* [1949] 2 K. B. 417, 429, applied.

Decision of Wynn-Parry, J., ante, 689, affirmed.

Appeal from Wynn-Parry, J. (1).

Under a settlement dated February 22, 1939, made between Sir John Cecil Power, of the one part, and trustees of the other part, the defendant George Frederick Cecil Power was tenant for life. Clause 16 of the settlement provided: "The power of "appointing a new trustee or new trustees hereof shall be vested "in . . . [the defendant] during his life . . .".

By a deed of appointment dated August 15, 1950, the defendant purported to appoint himself to be an additional trustee of the settlement. It was not disputed that the power referred to in cl. 16 of the settlement was the statutory power contained in sub-s. 6 of s. 36 of the Trustee Act, 1925.

The trustees of the settlement by this summons asked whether the appointment of August 15, 1950, was a valid and effectual appointment. Wynn-Parry, J. (2), held that it was not. The defendant appealed.

Jennings, K.C., and *T. A. C. Burgess* for the defendant. It is submitted that Wynn-Parry, J., was wrong in holding that the power conferred by s. 36, sub-s. 6, of the Trustee Act, 1925 (3), did not authorize the defendant to appoint himself to be an additional trustee of the settlement. It appears from the fact that Parliament has by sub-s. 1 of s. 36 expressly authorized an appointor to appoint himself that such an appointment is no longer considered to be improper. [They referred to *In re Skeats' Settlement* (4).] If beneficiaries in fact object to an appointor appointing himself to be a trustee they can always go to the court and ask to have him removed.

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(1) Ante, 689.

(2) Ante, 689, 692.

(3) Trustee Act, 1925, s. 36, sub-s. 1, authorizes the persons entitled to appoint trustees "by writing, to "appoint one or more other persons "(whether or not being the persons "exercising the power) to be a trustee "or trustees in the place of the trustee "so deceased, remaining out of the "United Kingdom, desiring to be discharged, refusing, or being unfit or "being incapable, or being an infant "as aforesaid".

Sub-s. 6 provides that the person having the power to appoint new trustees "may, by writing, appoint "another person or other persons to "be an additional trustee or additional trustees".

The difficulty arises in the use in sub-s. 6 of the words " another person or other persons ". The parenthesis added to sub-s. 1 makes it clear that in that sub-section " one or more " other persons " includes the appointor. It would be odd if a different construction were put on " other persons " in sub-s. 6 from that put on the same words in sub-s. 1. It is submitted that the parenthesis in sub-s. 1 must be read into sub-s. 6. The judge reached his conclusion with reluctance that the defendant could not appoint himself. He felt bound to hold that the defendant could not appoint himself because the language of sub-s. 6 is identical with that of s. 10, sub-s. 1, of the Trustee Act, 1893 (5), which had been held not to entitle an appointor to appoint himself to be a new trustee. It is submitted, first, that the decisions on s. 10, sub-s. 1, of the Act of 1893 have no bearing on the construction of sub-s. 6 of s. 36 of the Act of 1925; secondly, that those decisions, which were never approved by the Court of Appeal, were wrongly decided.

Burgess following. The settlor must have known that under sub-s. 1 of s. 36 the appointor could have appointed himself to be a new trustee of the settlement. In those circumstances, there is no reason to suppose that he would have objected to the defendant appointing himself to be an additional trustee.

Pennycuick, K.C., and *Maurice Berkeley* for the trustees. It is submitted that Wynn-Parry, J., has rightly construed sub-s. 6 of s. 36 of the Trustee Act, 1925. There is a material distinction between the power to appoint a new trustee conferred by sub-s. 1 and the power to appoint an additional trustee conferred by sub-s. 6. Parliament may well have thought it proper to authorize the appointor to appoint himself in the one case and not in the other. Before 1926 judges were unanimous in considering that

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(4) (1889) 42 Ch. D. 522.

(5) Trustee Act, 1893, s. 10, sub-s 1, provided that the person having the power to appoint new trustees might " by writing, appoint another " person or other persons to be a " trustee or trustees in the place of " the trustee " ceasing to act as trustee.

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it was undesirable for the donee of a power to appoint trustees to appoint himself: *Montefiore* v. *Guedalla* (6). It is frequently difficult to find a person willing to act as trustee, and Parliament may well have thought that, where a new trustee had to be found, it was expedient to allow an appointor to appoint himself in order to avoid the necessity for an application to the court. There is, however, no such advantage in allowing an appointor to appoint himself to be an additional trustee.

With regard to the question of construction, it is submitted, first, that, since the wording of sub-s. 6 is identical with that of sub-s. 1 of s. 10 of the Trustee Act, 1893, the same construction should be placed upon sub-s. 6 as was placed upon sub-s. 1 of s. 10. Parliament, by adding the parenthesis to sub-s. 1 of s. 36, has recognized the validity of the decisions on sub-s. 1 of s. 10. Accordingly, those decisions should be followed in construing sub-s. 6: see *Royal Crown Derby Porcelain Co. Ld.* v. *Raymond Russell* (7).

Secondly, it is submitted that in sub-s. 6 the words " another " person or other persons " more naturally refer to persons other than the appointor rather than to the trustee.

Thirdly, it is submitted that the difference in language between sub-s. 1 and sub-s. 6 of s. 36 is intended to result in a different meaning.

Berkeley following. If the defendant is right, the donee of a power to appoint new trustees can, immediately a settlement is executed, if there are then fewer than four trustees of that settlement, appoint himself to be an additional trustee. Settlors cannot have intended this result.

Jennings, K.C., in reply. If a different construction is placed on sub-s. 1 from that placed on sub-s. 6, the result will be most capricious.

EVERSHED, M.R. We have had the advantage of an interesting discussion upon a somewhat curious point which the draftsman and the legislature between them have left open on s. 36 of the Trustee Act, 1925. The question is whether the power conferred, for the first time, in sub-s. 6 of that section to appoint additional trustees may be so exercised that the donee of the power can appoint himself.

The problem has arisen because under the settlement of 1939 the defendant has the statutory power to appoint new trustees.

(6) [1903] 2 Ch. 723.

(7) [1949] 2 K. B. 417.

There has been no vacancy caused by any death or retirement. The existing trustees are three in number. The defendant has executed a document purporting to appoint himself as a fourth trustee additional to the other three trustees. His self-appointment appears not to be agreeable to the other trustees, and these proceedings have consequently arisen.

As a matter of history, s. 10, sub-s. 1, of the Trustee Act, 1893, authorized the appointment of new trustees where a vacancy arose owing to death or retirement or in the other circumstances which are now referred to in sub-s. 1 of s. 36 of the Act of 1925. The formula which was used in s. 10, sub-s. 1, was, so far as material, that the person or persons nominated for the purpose, or, if there were none, then the surviving or continuing trustees might " by writing appoint another person or other persons to " be a trustee or trustees in the place of the trustee dead ", etc.

The question whether that form of words permitted an appointor, that is, the donee of the power, to appoint himself came on some few occasions before the Chancery Court, and the decisions of the Chancery judges were, uniformly, that the donee could not, by exercising that power, appoint himself. No case ever reached the Court of Appeal, and it has been one of the arguments presented by Mr. Jennings that it is open to this court now to express disapproval of those earlier decisions. There is no doubt that over a period of a generation or more the old sub-section had consistently been so construed.

The consolidating Act, the Trustee Act, 1925, which we have to construe, in two material respects differs from its predecessor of 1893. In the first place, the old sub-s. 1 is reproduced as sub-s. 1 of s. 36, but the new sub-section makes it clear that in the events contemplated the donee of the power could appoint himself; for the parenthesis " whether or not being the persons " exercising the power " was inserted after the enabling words. But the sub-section also did this: the legislature altered the formula of the enabling provision. Then instead of saying, as had been the language, " may, by writing, appoint another person or " other persons ", the new Act said: " may, by writing, appoint " one or more other persons ". Mr. Jennings has pointed out that there cannot be very much difference in meaning between the old formula and the new, if indeed there is any. The new formula certainly has no merits as a piece of English by comparison with its predecessor. But the point remains that the formula was altered.

Finally s. 36 added a new power not in the previous statute, namely: a power within certain limits to add to the number of trustees which the settlor or testator had appointed. Sub-section 6 provides: "Where a sole trustee, other than a trust "corporation, is or has been originally appointed to act in a "trust, or where, in the case of any trust, there are not more "than three trustees (none of them being a trust corporation), "either original or substituted and whether appointed by the "court or otherwise, then and in any such case—(*a*) the person "or persons nominated for the purpose of appointing new trustees "by the instrument, if any, creating the trust; or (*b*) if there is "no such person, or no such person able and willing to act, then "the trustee or trustees for the time being, may, by writing, "appoint another person or other persons to be an additional "trustee or additional trustees, but it shall not be obligatory to "appoint any additional trustee . . .".

That is the sub-section which we are called upon to construe, and it will be observed that there is no parenthesis such as has been added to sub-s. 1. In sub-s. 6 the legislature retained the precise formula which was in the old Act of 1893, "another person "or other persons", a formula which had been construed by the courts, and in particular had been construed in *In re Sampson, Sampson* v. *Sampson* (8).

What is the proper inference to be drawn from these differences in terminology? Mr. Jennings' main point, certainly that which I found the more attractive, was this: he said that there was really no difference in significance between the two formulæ, "one or more other persons", and "another person or other "persons", and that, Parliament having in sub-s. 1 made it clear by the parenthesis that the former language was intended to include the appointor among the class of possible appointees, that parenthesis should be treated, so to speak, as a definition for all the sub-sections in this section, rendering it unnecessary to repeat it in sub-s. 6.

The judge came to the conclusion, particularly in view of the decisions to which reference has been made (and which would in any case bind him), that the difference in sub-s. 6 was material, and that a donee of a power could not appoint himself, when

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(8) [1906] 1 Ch. 435.

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exercising his powers under that sub-section. He regretted the decision to which he felt constrained to come. He regretted it because he thought that it was a capricious result that a donee could appoint himself, if there were a vacancy, but could not appoint himself if there were not.

After considering the arguments, I have come to the conclusion that the judge was right. For my part I feel less constraint and reluctance than he did. I agree with Mr. Jennings that the court should perhaps, if the two meanings are equally open, tend to avoid what might be thought to be capricious and to offend against what he described as a " consistent system " dealing with new appointments.

But I have been persuaded by Mr. Pennycuick that, as a matter of construction, the right conclusion is that which the judge reached. I arrive at my conclusion thus—and I will state it quite briefly, for the point is after all a short one. I begin by accepting for the purposes of my argument, as Mr. Pennycuick accepted, the statement of this rule of construction which is to be found in the judgment of my brother Denning in *Royal Crown Derby Porcelain Co. Ld.* v. *Raymond Russell* (9): " The true " view is that the court will be slow to overrule a previous decision " on the interpretation of a statute when it has long been acted " on, and it will be more than unusually slow to do so when " Parliament has, since the decision, re-enacted the statute in " the same terms. But if a decision is, in fact, shown to be " erroneous, there is no rule of law which prevents it being " overruled ".

Parliament, in re-enacting sub-s. 1, as it seems to me, clearly recognized the validity of the judicial decisions in the Chancery Courts, for by the parenthesis Parliament made it quite plain that a power or privilege was being given to the donee of the power which, apart from the parenthesis, he would not have. I think it not insignificant that, in making that change, Parliament also varied the formula from " another person or other persons " to " one or more other persons ". Having made that variation, they could indeed, as Mr. Pennycuick has pointed out, have left out the word " other ". That, however, is another matter. Parliament did change the formula slightly and inserted this parenthesis which, as I think, must be taken to have put, as it were, the imprimatur of Parliament on the judicial decisions. But when Parliament came to formulate its new provision in sub-s. 6, it then went back and adhered strictly to the old formula already judicially interpreted as excluding the donee of the power from being himself an appointee.

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(9) [1949] 2 K. B. 417, 429.

I think that those circumstances make it right to reject the view which Mr. Jennings put forward that the parenthesis, so to speak, acts as a definition provision for the whole section. If it be said there is some natural sense in support of his proposition, I am not sure that there is not also an argument for the other side. Mr. Pennycuick observed that in *Montefiore* v. *Guedalla* (10), Buckley, J., pointed out that, whether or no under the terms of the particular power a person authorized to appoint new trustees could appoint himself, it was a good prima facie rule of conduct that he should not do so. There is, as Mr. Pennycuick also observed, a real distinction between the case where a new trustee falls to be appointed because of a vacancy and the case where a power is given, there being no vacancy among those the settlor originally appointed or their successors, to make an addition to the number which the testator or settlor selected. If a donee of a power could appoint himself in the latter case, he could, of course, do so the next day after the settlement. True, he could the next day after the settlement appoint some other person, but I think that it would be surprising, particularly in view of what Buckley, J., called the salutory rule, if Parliament had intended to give to the donee of such a power the right to appoint himself as an addition to the number of trustees selected by the settlor immediately the settlement was effected.

Finally as a matter of English, though there is in this section in all conscience a certain amount of superfluity of language, I think that in its context in sub-s. 6 the formula "another person or other persons" more easily falls to be construed so as to exclude from the possible appointees the person or persons making the appointment. If Parliament had intended to give such a power, there was ample means at hand, for the words "another person or other persons to be" might have been omitted altogether without affecting the sense in the slightest. Having regard to the tendency to tautology which it is not difficult to discern in this section, I do not, however, place much reliance on that.

Accordingly, I conclude, as a matter of construction, that the defendant had not the power to appoint himself validly as a

(10) [1903] 2 Ch. 723, 725.

trustee in addition to the respondents, and the appeal fails and should be dismissed.

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JENKINS, L.J. I agree.

BIRKETT, L.J. I agree.

Appeal dismissed.

Solicitors: *Woodcock, Ryland & Co., for Preston & Redman, Bournemouth; Collyer-Bristow & Co.*

B. A. B.

In re AUSTIN MOTOR CO. LD.'S POLICIES. *In re* PAYTON, DECD. PAYTON *v.* INLAND REVENUE COMMISSIONERS.

[1950 A. 1384.]

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May 30, 31; *June* 1; *July* 2.

Evershed, M.R., Lord Radcliffe and Denning, L.J.

Revenue—Estate duty—Policy taken out by employers to provide retiring pensions for employees—Option exercised by employee to take lesser pension for himself together with similar pension for widow—Death of employee when in receipt of pension—Pension payable to widow—No "passing" on employee's death—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*d*).

In 1933, a limited company entered into a contract with an insurance company for the purpose of providing pension benefits for specified employees. By cl. 4 the insurers undertook to pay to the persons specified in the schedule the appropriate benefit or benefits to which they were entitled under the policy. The company in 1942 took out a second policy in substantially similar terms. The amount of the pension payable to any employee was to be ascertained in accordance with the tables annexed to the policies. An employee was given an option to exchange his own pension for what was described as a "last survivor pension" for a less annual sum calculated according to the respective ages of the employee and his named wife and payable for the remainder of the employee's life and after his death, if his named wife survived him, to that wife during the remainder of her life. An employee of the company had for many years before his death been in the service of the company. He had retired in November, 1945, and died on February 17, 1946, and was survived by his widow, the plaintiff. It was conceded that the deceased must be treated as having exercised the option in the terms of the policy in both cases for payment of a last survivor pension to himself and the plaintiff. On his death annual payments, one of 178*l.* 15*s.* and another of 1,805*l.* 13*s.* became payable to the plaintiff. In these proceedings the question was raised what was the amount

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of estate duty payable in respect of the two survivor pensions in consequence of the deceased's death. The Inland Revenue Commissioners claimed duty under s. 1 of the Finance Act, 1894, upon the "principal value" of each pension, treating it as a single and continuing pension and as "property passing" within the meaning of the section on his death. The plaintiff contended, on the other hand, that the case fell within s. 2, sub-s. 1 (*d*), of the Act, on the footing that the subject matter to be taxed was her pension benefit as "an "interest purchased or provided by the deceased by arrangement "with" the company "to the extent of the beneficial interest arising "by virtue of (her) survivorship". If the plaintiff's contention were correct, the proviso to s. 4 of the Act of 1894 would apply and the pension would not be aggregated with the deceased's estate and the rate of duty payable would accordingly be reduced.

Held, that for s. 1 of the Finance Act, 1894, to be applicable there must be property passing, that was some property identifiable and persisting independently of the beneficial interests in it. Under the contract between the company and the insurers there was no covenant with the company to pay the company anything: there was a covenant with the company to pay a pension to the deceased during the period from his retirement to his death and then to pay the same pension to the plaintiff. That did not constitute any single and continuing proprietary interest distinct from the beneficial interests under the contract of the deceased and the plaintiff respectively, which proprietary interest could be said to "pass" on the deceased's death. The only right of property which emerged from the respective policies was a chose in action. A mere chose in action, however, could not be considered or apprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given. Accordingly, there was no passing on the death of the deceased within s. 1 of the Finance Act, 1894.

In re Duke of Norfolk [1950] Ch. 467, and *In re Cassel* [1927] 2 Ch. 275 considered and distinguished.

Decision of Wynn-Parry, J., affirmed.

APPEAL from Wynn-Parry, J.

The following statement of facts is taken substantially from the judgment of Evershed, M.R.:—In the years 1933 and 1942 the Austin Motor Company Ld. (hereafter called "the com-"pany") entered into contracts with the Legal and General Assurance Society Ld. (hereafter called "the society") for the purpose of providing benefits for certain of their employees. These contracts (which were described as "group policies", dated April 10, 1933, and April 13, 1942, and numbered 1157 and 2367 respectively) were of a somewhat elaborate character, and the benefits to be provided included pensions after retirement from service with the company, life assurance, and total and permanent disablement insurance. The present case was concerned only with pensions.

There was some difference in wording between the two policies but it was not contended that it was material and the court only considered policy No. 1157. Clause 1 of this policy, which contained the definitions, defined the class of employees entitled to benefits as "eligible employees" and the term "original "member" was applied to those eligible employees who became entitled to the benefit of the policies on their respective dates. The phrase "normal pension date" was defined as meaning, in the case of an original member under the first policy, the anniversary of the date of the commencement of membership which fell nearest to attainment of the age of sixty-five; and in the second policy, the anniversary of the date of commencement of membership which fell nearest to attainment of the age of seventy in the case of members who were aged more than sixty-four and a half years at the date of commencement of membership. Clause 2, so far as relevant, provided that: "It is hereby "declared that the grantees" (that is, the company) "shall hold "this policy and all benefits payable hereunder upon trust for "the respective persons to whom the said benefits are expressed "to be payable under and in accordance with the schedule hereto . . .". Clause 4 provided: "The society will pay . . . to "the person or persons specified in the schedule hereto on proof "of existence and identity the appropriate benefit or benefits as "and when the same shall fall due in accordance with the terms "and provisions of the schedule". Clause 5 provided that the receipt of any person or persons to whom any benefit was expressed to be payable should be a good and sufficient discharge to the society.

The amount of the pension payable to any member was to be ascertained in accordance with tables annexed to the policies by reference to length of service with the company prior to normal pension date: and (subject to the option presently mentioned) began in the case of a member whose service terminated on normal pension date on that date and continued by monthly instalments for a period of five years certain and for so much longer thereafter as the member lived. The option enabled the member to exchange his own pension for what was described in both policies as a "last survivor pension" for a less annual sum calculated according to the respective ages of the member and his named wife, and payable for the remainder of the member's life only (i.e., and not for five years certain in any event) and after his death, if his named wife survived him, to that wife during the rest of her life. Part 1 of the schedule, against the marginal note " Last Survivor Pension ", provided: " At any time prior to normal pension date a male member may " give written notice to the society requiring that any pension " benefit becoming payable to such member at normal pension " date shall after the member's death be paid to a (named) " surviving wife . . .", and there followed provisions as to the amount of the pensions and other matters. The amount of the pensions was calculated by reference to a table in the schedule which bore the heading " Table showing reduced amount of " pension payable from normal pension date until death of " survivor of male member and his wife if the member elects to " take a last survivor pension ". For the purpose of providing these pensions, premiums were payable by the company to the society derived in part from the contributions of the members themselves and in part out of the company's own resources.

The late Ernest Leopold Payton had for many years before his retirement and death been in the service of the company, and he was, before he retired, chairman and joint managing director of the company. He was an original member within the meaning of both the policies. His normal pension date within the meaning of the first policy was April 10, 1942, and his normal pension date within the meaning of the second policy was April 13, 1947. The deceased's service with the company was, with the consent of the company, prolonged until November 21, 1945. He died on February 17, 1946.

The deceased did not retire on his normal pension date under the first policy, and did not survive to his normal pension date under the second policy: and as a consequence the terms of neither policy strictly applied so as to enable the deceased to take advantage of the respective options under the policies for last survivor pensions. Special agreements were, however, made between the company, the society and the deceased (or on his behalf) so that (as had been conceded throughout these proceedings) the deceased and the plaintiff (who was his widow) might be treated in all respects as enjoying respectively the benefits provided by the policies as though the deceased had within the terms of the policies exercised his option in both cases for last survivor pensions in favour of himself and the plaintiff.

Under the first policy, the weekly contributions made by the deceased amounted to 15*s.* a week and the last survivor pension which he enjoyed from his retirement to his death and which the plaintiff then enjoyed, amounted to 178*l.* 15*s.* per annum payable monthly. Under the second policy the weekly contributions made by the deceased amounted to 18*s*., and the last survivor pension enjoyed by him and since enjoyed by the plaintiff was at the annual rate of 1,805*l*. 13*s*., also payable monthly.

The actuarial value of the pensions was 17,500*l*. The deceased left an estate of over 1,000,000*l*., accordingly, if estate duty were payable under s. 1 of the Finance Act, 1894, duty would be payable at the rate of 52 per cent. upon 17,500*l*.

By these proceedings the plaintiff asked whether estate duty was payable under s. 1 as the Crown contended or under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894 (1), as she contended. Wynn-Parry, J., held that duty was payable under s. 2, sub-s. 1.

The Crown appealed.

Pennycuick, K.C., and *J. H. Stamp* for the Crown. The Crown claims that estate duty is payable under s. 1 of the Finance Act, 1894 (1), on the footing that the plaintiff's right to receive these pensions on the death of the deceased was an asset which passed to the plaintiff. The actuarial value of the pensions is 17,500*l*. and the Crown claims that that sum is to be aggregated with the deceased's estate, making the rate 52 per cent. The plaintiff contends that the deceased never had an interest in the pension, with the result that duty is payable under s. 2, sub-s. 1 (*d*), on the value of her beneficial interest and is exempt from aggregation.

Wynn-Parry, J., held that each policy granted successive pensions to the deceased and the plaintiff and not continuing pensions which respectively passed from the deceased to the plaintiff. It is submitted that under each policy one continuing pension was granted. Wynn-Parry, J., treats cl. 2 of the policy as mere machinery, and he disregarded the language of the policy and based his judgment on the discredited doctrine that he should look at the substance of the matter and he held that the policy created two choses in action.

First, the language of the policy must be construed. It is submitted that it imposed on the society an obligation to pay one continuing pension during the joint lives of the employee and his

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(1) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death "of the deceased shall be deemed to "include the property following, that "is to say:—. . . (*d*) Any annuity or "other interest purchased or provided "by the deceased, either by himself "alone or in concert or by arrange-"ment with any other person, to the "extent of the beneficial interest "accruing or arising by survivorship "or otherwise on the death of the "deceased".

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widow and not successive pensions. An employee had in the first instance a right to a pension. The policy authorized him to settle that pension on himself and his wife by taking a last survivor pension, that did not turn the original pension into two pensions. If that is the true construction, the continuing pension passed under s. 1 of the Act of 1894. That appears from the decisions in *In re Cassel* (2) and *In re Duke of Norfolk* (3).

Sir Andrew Clark, K.C., and *E. Blanshard Stamp* for the plaintiff. It is submitted that Wynn-Parry, J.'s decision was right. This is not a case of settlement of one continuing annuity. The policy created a contractual liability to pay two pensions, one direct to the deceased and the other to the plaintiff. It created two distinct properties, the one arising when the other ceased and there was no property which passed on the deceased's death. The policy created no underlying trust of one piece of property, as was the case in *In re Duke of Norfolk* (3). This case is distinguishable from those where there is a trust to pay an annuity or sums out of the income of settled property. The rights of the parties here rest in covenant only.

E. Blanshard Stamp following. On the true construction of the policy not one chose in action but two were created. The society did not undertake to pay one pension during the joint lives of the deceased and the plaintiff, but to pay two pensions, one to the deceased and one to the plaintiff. Two separate items of property were created.

Pennycuick, K.C., in reply. The property which it is contended passed on the death of the deceased under s. 1 of the Finance Act, 1894, was the benefit of the society's obligations to make successive payments in respect of a continuing pension as they fell due. The fact that the deceased could only enforce the right to payment of the instalments falling due during his life does not prevent this being a continuing pension. The society entered into one covenant with the company, not into two separate covenants, one with the deceased and one with the plaintiff. There is no ground for distinguishing the case of a continuing annuity which is charged on settled property from that of a continuing pension payable under a covenant.

M. Nesbitt held a watching brief for the company.

Cur. adv. vult.

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(2) [1927] 2 Ch. 275.

(3) [1950] Ch. 467.

July 2. EVERSHED, M.R., reading the judgment of the court, stated the facts and continued:—In these circumstances the question has arisen of the amount of estate duty payable in respect of the two last survivor pensions as a consequence of the deceased's death. The contention of the Inland Revenue Commissioners is that duty is payable under s. 1 of the Finance Act, 1894, upon " the principal value " of each pension, treating it as a single and continuing pension and as " property passing " within the meaning of the section on the death of the deceased. For the plaintiff, on the other hand, it is contended that the case falls within s. 2, sub-s. 1 (*d*), of the Act, on the footing that the subject-matter to be taxed is the plaintiff's pension benefit as " an " interest purchased or provided by the deceased by arrangement " with " the company " to the extent of the beneficial interest " arising by virtue of (her) survivorship ".

Since the contest is between s. 1 and s. 2 of the Act, we may be forgiven for quoting once again the expression given by Lord Macnaghten to his classic dichotomy in *Earl Cowley* v. *Inland Revenue Commissioners* (4): " If the case falls within s. 1 it " cannot also come within s. 2. The two sections are mutually " exclusive. Section 1 might properly, I think, be headed: " ' With regard to property passing on death, be it enacted as " ' follows '. Section 2 might with equal propriety be headed: " ' And with regard to property not passing on death, be it enacted " ' as follows ' ". And Lord Parker observed in *Attorney-General* v. *Milne* (5): " The expression ' passing on the death ' is . . . " evidently used to denote some actual change in the title or " possession of the property as a whole which takes place at the " death ".

It is, then, established that if s. 1 is applicable, there must in truth be property passing. By the definition section, s. 22, sub-s. 1 (*f*), the expression " property " includes real property and personal property; and it is indeed to be given the widest signification. Still, there must be some property identifiable and persisting independently of the beneficial interests therein. If that test is satisfied, then it is that property which is taxed, and the duty is chargeable upon its principal value and not upon the value of the benefit enjoyed by the deceased nor upon the value of the benefit taken by, or arising in favour of, his successor. Further, by s. 4 of the Act, it is provided that all property passing on the death of the deceased is, for the purpose of the rate of duty, to be aggregated so as to form one estate. In the present case, the actuarial value of the two "last survivor pensions" at the death of the deceased was together, we were told, 17,500*l*. The estate of the deceased (apart from the pensions) amounted to over 1,000,000*l*. The result, therefore, of the application of s. 1 would be a charge at the rate of 52 per cent. upon the actuarial value of 17,500*l*.

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(4) [1899] A. C. 198, 212.

(5) [1914] A. C. 765, 779.

If, on the other hand, there is in truth no such item of property which passes; if, upon a just analysis, there was at the deceased's death a cesser of his own pension and an arising of a pension of the same amount and equivalent characteristics in favour of the plaintiff, then the case falls within s. 2, sub-s. 1 (*d*), of the Act and is excluded from aggregation under s. 4 by virtue of its proviso.

As we have already stated, the Crown contended before the judge and contended before this court that the conditions requisite for the application of s. 1 were satisfied, because there came into existence under each of the two group policies "property", namely (putting it broadly for the moment), the single and continuing "last survivor pension", an entity distinct from the respective interests therein of the deceased and the plaintiff. Wynn-Parry, J., decided against this contention, and in our opinion decided rightly.

The contest being such as we have stated, it becomes necessary to examine more closely what precisely were the rights and obligations which emerged from the two policies. Mr. Pennycuick reminded us that in a matter of this kind the answer depends upon the result in law achieved by the particular transactions which are before the court. If the result in this case is that there has, in truth, been created in each case a continuing item of property distinct from the particular interests of the two pensioners, it is no answer to the claim of the Crown that such result is for practical purposes the same as the creation, simply, of two separate, though in all material characteristics identical, pensions, the one payable to the deceased and wholly ceasing on his death and the other arising for the first time upon his death and payable to the plaintiff for the remainder of her life.

The question, then, turns on the legal result which flows from the language used in the policies properly construed according to the ordinary canons of construction. There is some divergence in the wording of the two policies but it was not suggested before Wynn-Parry, J., nor before us, that for present purposes the divergence was material. It is therefore sufficient to refer only to the first policy numbered 1157. [His Lordship stated the effect of the policy and continued:] The schedule to the policy is undoubtedly so expressed that the "last survivor pension" is treated as one pension or annuity payable in the present case to the deceased and the plaintiff successively, and not as two pensions of the same amount, one payable to the deceased for his life and one to the plaintiff (if she survives him) for her life: and Mr. Pennycuick has pointed out the arithmetical difference in result if the plaintiff died less than a month after the deceased. For, in such event, if a monthly instalment of pension had fallen due just before the deceased's death, nothing further would be payable in respect of the period of three weeks or so for which the plaintiff survived; whereas, if there are two separate pensions, the society would be liable for the plaintiff's pension benefit in respect of that period, even though the plaintiff did not live to survive the first monthly pay day after the deceased's death.

What is the legal effect of these provisions? They are clearly framed so as to get over the difficulties that arise under English law in enforcing a covenant with A by B to pay a sum of money to C on the ground that such a covenant gives, if unperformed, no right to A to recover other than purely nominal damages (since he suffers none) and no right of enforcement to C (as being res inter alios acta).

By the joint effect of cll. 2 and 4 in the event of default by the society in paying, say, to the deceased an instalment of his pension on its due date, the deceased could sue the society joining the company as co-plaintiff with him or as co-defendant with the society. So much these clauses are plainly contrived to achieve. But in this respect their effect would be the same whether there were one pension or two. Mr. Pennycuick therefore goes further and says that under this contract there has been created a single and identifiable (and intelligible) item of property, viz., the benefit of the society's covenant with the company to pay what we may call the Payton last survivor pension throughout its term; which piece of property is enjoyed successively and is enforceable successively by the deceased and the plaintiff. On this basis he contends that the case is in pari materia with the *Duke of Norfolk's* case (6).

We have been unable to accept the argument. If the society's covenant had been with the company to pay the latter during some period—e.g., a fixed period or the life of the longest liver of a number of named persons—a certain annual sum; and if the company had then declared itself a trustee of the annual sum or of the benefit of the covenant for A and B successively, it may well be (though we do not so decide) that the case would have been covered by the *Duke of Norfolk's* case (6). But the effect of the contract seems to us to be otherwise. Adhering (as enjoined by Mr. Pennycuick to do) to the actual terms of the bargain, there is here no covenant with the company to pay the company anything: there is a covenant with the company to pay "the pension", i.e., the annual sum of *xl.* by monthly instalments, to the deceased during the period from his retirement to his death and then to pay the same pension, i.e., the same annual sum by like instalment, to the plaintiff (if she survives the deceased) during the rest of her life. Though the distinction be a fine one, there does not seem to us to be in the latter case, in any real sense of the term, any single and continuing proprietary interest distinct from the beneficial interests, under the contract, of the deceased and the plaintiff respectively, which proprietary interest can be said to "pass" on the deceased's death.

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(6) [1950] Ch. 467.

We think that some assistance may be derived from considering the effect of a release of the society by the deceased during the latter's life. Such a release would appear wholly to discharge the society, so that during the rest of the deceased's life (or during any less period for which the release operated) there would be nothing left at all—no discernible proprietary right in the company or anyone else and certainly no acceleration of the "pension" rights of the plaintiff.

In the *Duke of Norfolk's* case (6) the problem had arisen out of the will and codicils of a testator whereby he had (a) devised and appointed his freehold hereditaments to his trustees for a term of 1,000 years and declared trusts of such term, including a trust to pay out of the rents and profits any annuity bequeathed by him, and (b) given to his trustees an annuity of 2,000*l.* to commence from the day of his death and to continue payable during the lives of his brother, the late Viscount Fitzalan and his nephew the then present Viscount and the life of the survivor of them, and to be paid to the late Viscount during his life and after his death to the then present Viscount. The late Viscount having died, the Crown claimed estate duty under either s. 1 or s. 2, sub-s. 1 (*b*), of the Act in

(6) [1950] Ch. 467.

respect of the " slice " of the capital of the testator's estate which bore the same relation to the whole as did, at the date of the late Viscount's death, the annual sum of 2,000*l.* to the whole income of the estate.

It was conceded throughout the case that " on the true con-" struction of the relevant provisions of the will and codicils, " the interest in question is in truth one continuing annuity " (charged on the estates comprised in the 1,000-year term) for " the longer of the lives of the two annuitants, and cannot be " regarded as comprising two successive annuities, the first " ceasing and the second commencing on the death of the late " Viscount ". (See *per* Jenkins, L.J. (7).) The Crown, nevertheless, contended that (contrary to the existing office practice) duty was exigible on the " slice " theory and that there was no logical or sensible distinction between such a case as that before the court and the case of two separate and successive annuities —in which case duty was admittedly charged on the " slice " theory upon the death of the first annuitant. They further contended that the case was distinguishable from that of *In re Cassel* (8) (decided by Russell, J., in 1927): alternatively, that the decision in *In re Cassel* (8) should be overruled.

The subject-matter in *In re Cassel* (8), which gave rise to the claim for duty, was a direction in the testator's will that during a period of years ending in 1995 the testator's trustees should provide out of the rents and profits of the trust estate the annual sums required for payment of rent, rates and certain other outgoings in respect of premises known as " Brook House ", which was itself bequeathed in trust for the benefit of several persons in succession. Russell, J. (contrary to his own inclination), held himself bound since *Cowley's* case (9) to hold that there passed, on the death of the first person beneficially entitled to Brook House, a specific item of property, namely, the variable annuity already described, that is, the benefit of the variable annual sums to be raised and provided by the trustees.

In the *Duke of Norfolk's* case (10) this court held that the case before them was covered by *In re Cassel* (11), which it thought (having regard to later affirmation and notwithstanding certain criticisms made of Russell, J.'s judgment) binding at least on the Court of Appeal (see the judgment of Evershed, M.R. (12)); but it held also that the annuity bequeathed by the first and

(7) [1950] Ch. 467, 482.
(8) [1927] 2 Ch. 275.
(9) [1899] A. C. 198.
(10) [1950] Ch. 467.
(11) [1927] 2 Ch. 275.
(12) [1950] Ch. 467, 475–477.

AUSTIN MOTOR COMPANY LD.'S POLICIES, *In re.* PAYTON, DECEASED, *In re.* PAYTON *v.* INLAND REVENUE COMMISSIONERS.

second codicil, being an item of property separate and distinct from the beneficial interests therein, "passed" upon the death of the first annuitant within the meaning of s. 1 of the Act of 1894.

In our judgment the present case is essentially different from the *Duke of Norfolk's* case (13) and also from *In re Cassel* (14). In each of the latter cases the annuity arose out of specified trust property—the provisions of the will directed the trustees to raise the amount of the annuity yearly out of the income of the trust funds, for securing which in the *Duke of Norfolk's* case (13) a term of years was also created. The annuity so raised was given to the trustees to hold (in the *Duke of Norfolk's* case (13)), or was to be applied by the trustees (*In re Cassel* (14)) on trust for certain persons successively. In the present case the only rights and interests subsisting or capable of subsisting arise exclusively out of the terms of the contract of insurance. The only right of property which, according to the suggestion of the Crown, emerges from the respective policies is a chose in action. But a mere chose in action cannot, in our judgment, be considered or comprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given. If there be any rights or interests in the company, as distinct from the separate and individual rights of the pensioners, they seem accordingly to us altogether too spectral to be fairly analogous to the interests of the trustees in the *Norfolk* (13) or *Cassel* (14) cases or to be fairly regarded as "passing" on the death of Mr. Payton within the meaning of s. 1 of the Finance Act, 1894.

For these reasons we think that the appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Ward, Bowie & Co., for Duggan, Elton & James, Birmingham; Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham.*

B. A. B.

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(13) [1950] Ch. 467.

(14) [1927] 2 Ch. 275.

Affirmed.
[1952] 1 Ch. 129

In re LYONS; BARCLAYS BANK LD. *v.* LYONS.

ROMER, J.

1951
June 26, 27;
July 11.

[1951 L. 441.]

Will—Annuity payable by trustees "free of income tax"—Recovery by annuitant of income tax paid on taxable income by reason of business losses—Annuitant's liability to account to trustees—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 34.

A testator, by his will, gave an annuity free of income tax, and the annuitant obtained relief under s. 34 of the Income Tax Act, 1918, by way of repayment of the whole of the sums paid in tax in respect of his annuity in the financial years 1946–47, 1947–48, by reason of business losses sustained by him in those years.

On a summons taken out by the trustees to have determined whether the annuitant was accountable to them for the sums recovered:—

Held, that the annuitant was not entitled to retain for his own benefit any sums recovered by way of tax repayments made in respect of his annuity, in years in which it was found that no tax on the annuity was ultimately payable, and that the residuary estate of the testator was entitled to the whole of the sums so recovered.

In re Pettit [1922] 2 Ch. 765 applied.

ADJOURNED SUMMONS.

The testator, by his will dated October 8, 1942, devised and bequeathed his residuary real and personal estate to his trustees on the usual trusts for sale and conversion, and directed them, after paying his funeral and testamentary expenses, death duties, debts and legacies, to invest the residue of the proceeds of sale. By cl. 12, he directed his trustees to stand possessed of his residuary estate and the income from it on trust to pay the sum of 10*l.* each week free of income tax to his son during his life on protective trusts; and from and after the son's death on trust to pay the sum of 8*l.* each week free of income tax to the son's wife during her life on protective trusts; and subject to that, to stand possessed of the residuary estate on trust for all the children or child of the son who should attain the age of twenty-one years.

The testator died on March 25, 1946, and, as from his death, the trustees had paid the annuity out of income of the testator's estate which had borne income tax at the standard rate by deduction at source.

In each of the financial years 1946–47, 1947–48, the son sustained substantial business losses in respect of which he claimed,

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

and obtained, relief under s. 34 of the Income Tax Act, 1918. In the year 1946–47 the son's taxable income was (a) annuity 945*l.* 9*s.* 1*d.* (being the gross annuity required to produce the net annuity of 10*l.* a week for a year less tax at the standard rate of 9*s.* in the *l.*); (b) wife's earned income, 97*l.*; (c) other income 43*l.* 11*s.* 11*d.*, making an aggregate income of 1,086*l.* 1*s.* In the year 1946–47 425*l.* 9*s.* 1*d.* was paid as tax on the above gross annuity (the net annuity being paid out of dividends received by the trustees which had borne tax) and 4*l.* 10*s.* on a dividend which had not borne tax.

The Inland Revenue authorities repaid to the son the payments of tax above referred to, aggregating 429*l.* 19*s.* 1*d.*, on a claim by him under s. 34 of the Income Tax Act, 1918, in respect of a business loss for the year 1946–47 of 1,027*l.*

In the year 1947–48 the son's taxable income was (a) annuity 963*l.* 12*s.*, being the gross annuity required to produce the net annuity for fifty-three weeks; (b) wife's earned income 242*l.* 10*s.*; (c) other income 12*l.* 10*s.*; less 28*l.* 18*s.*, bank interest, and 37*l.* 0*s.* 8*d.* taxed charges, leaving an aggregate income of 1,152*l.* 14*s.* 8*d.*

In the year 1947–48 433*l.* 12*s.* 9*d.* was paid as tax on the above gross annuity, the tax being actually paid as in the preceding year, and 5*l.* 12*s.* 6*d.* tax on a dividend. The Inland Revenue authorities repaid to the son 422*l.* 11*s.* 11*d.*, being those payments of tax aggregating 439*l.* 5*s.* 3*d.*, less a certain sum of 16*l.* 13*s.* 4*d.*, on a claim by the son under s. 34 in respect of a business loss for that year of 1,152*l.*

In those circumstances the trustees took out a summons to have determined whether the annuitant under the rule in *In re Pettit* (1) was liable to account for and pay to the trustees in respect of his annuity, either in whole or in part, sums recovered by him in respect of allowances and reliefs for income tax for the financial years 1946–47, 1947–48, on claims made by him pursuant to s. 34 of the Income Tax Act, 1918, in respect of business losses sustained by him in those years.

Droop for the plaintiff.

J. H. Stamp for the annuitant. The annuitant is entitled to the tax repaid by the Inland Revenue, save that proportion of it attributable to statutory allowances and reliefs to which the annuitant would have been accountable to the trustees in respect

(1) [1922] 2 Ch. 765.

of the annuity if he had made no claim under s. 34 of the Income Tax Act, 1918.

It is inherent in the gift of an annuity free of tax that the gift carries with it the proper tax payable on the annuity, which is the tax payable after allowance has been made for the ordinary personal reliefs. Section 34 of the Income Tax Act, 1918, only operates when the total tax payable by the applicant has been ascertained: see also Sch. V, Finance Act, 1927; s. 29, sub-s. 4, Finance Act, 1948. Tax is therefore properly payable on the annuity, and, accordingly, if the annuitant becomes entitled to repayment in respect of it, the fact that no tax is ultimately borne by him is an irrelevant consideration, and the proper tax thus repaid belongs to him: see *Hunter's Trustees* v. *Mitchell* (2); *Inland Revenue Commissioners* v. *Cook* (3); *Michelham's Trustees* v. *Inland Revenue Commissioners* (4).

In re Pettit (5) is distinguishable, for all that that case decides is that if, by reason of the method of collecting tax, a greater sum of tax than that which is due in respect of a tax-free annuity is collected from the trustees, then the excess on repayment forms part of the trust estate and does not belong to the annuitant. [He also referred to *In re Jones* (6); s. 33, Finance Act, 1926.]

E. G. Wright for persons interested in residue. The annuitant must account to the trustees for the whole of the tax repaid to him under s. 34 of the Income Tax Act, 1918, and attributable to the annuity.

When an annual sum is given by will, free of tax, the additional element in the gift over and above the annual sum is, not the tax, but an indemnity against the tax: *per* Uthwatt, J., in *In re Williams* (7); *per* Lord Thankerton in *Inland Revenue Commissioners* v. *Cook* (8). Therefore the distinction drawn by counsel for the annuitant between the "proper tax" and the ultimate tax liability is irrelevant. In any case, it is submitted that the taxing sections do not justify the distinction. The proper tax payable by the annuitant is the tax payable after all relevant exemptions, including exemptions under s. 34 of the Income Tax Act, 1918, have been allowed.

Cur. adv. vult.

July 11. ROMER, J. [reading his judgment, stated the facts

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(2) 1930 S. C. 978, 982.

(3) [1946] A. C. 1, 10, 11, 12, 16.

(4) (1930) 15 Tax Cas. 737, 751.

(5) [1922] 2 Ch. 765.

(6) [1933] Ch. 842.

(7) [1945] Ch. 320, 322.

(8) [1946] A. C. 1, 16, 17.

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and continued:] If the annuitant had made no claim for repayment of tax under s. 34 of the Income Tax Act, 1918, in each of the financial years in question, he would have been entitled to a refund of the following sums:—personal allowance of 180*l.* at 9*s.*, 81*l.*; first 200*l.* of income at 3*s.*, 30*l.*; next 50*l.* of income at 6*s.*, 15*l.*; total 126*l.* He would also have been entitled to allowances in respect of his children and in respect of life insurance premiums paid by him, but the amount recoverable would have been less the earned income relief of his wife for each year. For convenience I will hereafter refer collectively to reliefs recoverable under the income tax legislation as the "statutory allowances".

In these circumstances there would, with reference to the two years above mentioned, appear to be three views of the annuitant's position in relation to the trustees of the testator's will. The first view is that he is under no obligation to account to the trustees for any of the income tax which was repaid to him by the Revenue pursuant to s. 34 of the Act of 1918. The second view is that he is accountable in accordance with the rule in *In re Pettit* (9) for so much of each of the sums of tax recovered as would be equal to the amount for which he would have been accountable to the trustees in respect of his statutory allowances attributable to his annuity for the year in respect of which such sum was recovered if he had made no claim under s. 34. The third view is that he is accountable for so much of each of the said sums as represented repayment of tax paid by the trustees in respect of his annuity for the year in respect of which such sum was recovered.

On behalf of the annuitant, Mr. Stamp said that he did not dispute the limited liability to account involved in the second view. His reason for this concession is that the annuitant was under a fiduciary obligation to recover and pay over to the trustees that proportion of his statutory allowances to which they are entitled: *In re Kingcome* (10); and that the trustees should not in this respect be prejudiced by the fact that he successfully claimed total repayment of tax under s. 34, a course which naturally precluded any claim for statutory allowances. Mr. Stamp contended, however, that the excess of repaid tax remaining after giving effect to the second view belongs to the annuitant.

The foundation of Mr. Stamp's contention is that this excess forms part of the annuity. He says, and rightly, that the tax paid by the trustees on this annuity forms part of the annuitant's

(9) [1922] 2 Ch. 765.

(10) [1936] Ch. 566.

income for sur-tax purposes; and that inasmuch as the annuitant has to include the amount of such payments in his return of total income, so also should he be entitled to retain what Mr. Stamp acknowledges to be a windfall.

Mr. Stamp relied on certain judicial utterances of the highest authority as supporting his argument. In *Hunter's Trustees* v. *Mitchell* (11) Lord Sands said (12): "When under a will an "annuity is payable free of income tax the amount of tax is "taken to be an additional gift, and is included in the income of "the annuitant when, for revenue purposes, a return of total "income is necessary. Further, the income from this source is "not the annuity plus the tax upon it, but the amount of the "annuity plus such sum that, when the tax is levied upon the "total amount, the net amount left will be the amount of the "annuity". This citation was, in *Inland Revenue Commissioners* v. *Cook* (13), accepted by Viscount Maugham, Lord Thankerton and Lord Simonds as being an accurate statement of the law. In *Cook's* case (13) a testatrix bequeathed an annuity of 100*l.* "free of all deductions including income tax" to the respondent, to whom the annuity had been paid by the trustees of the will out of income that had been brought into charge. In the year ending April 5, 1940, the gross amount of the payment was 153*l.* 16*s.* 11*d.*, the balance after payment of the annuity being income tax accounted for to the Inland Revenue. The respondent, who had no other income, lodged a claim for repayment of 47*l.* 11*s.* 4*d.* tax, but the inspector of taxes, having learnt that she intended to hand over the returned tax to the trustees, disallowed the claim. It was held by a majority of the House that the respondent was entitled to the repayment which she claimed inasmuch as the sum of 53*l.* 16*s.* 11*d.*, having been deducted at source, must be dealt with as if it had been paid by the respondent herself and that the Inland Revenue had no concern how the sum repaid to the respondent was applied by her.

In the course of his speech Viscount Maugham said (14): "Gifts by will of annuities free from income tax have been "common both in Scotland and England for many years, and "have given rise to a large number of reported decisions. At an "early stage there was a little hesitation in dealing with them, "for it was and is apparent that a named annual sum cannot

(11) 1930 S. C. 978.
(12) Ibid. 982.
(13) [1946] A. C. 1.
(14) Ibid. 10.

"literally be given free from income tax, since the annuitant "must normally pay income tax on his or her income, and what "is sometimes called a benevolent construction had to be applied "if the plain intention of the will was to be carried out. That "intention could be achieved by the simple means of holding "that the testator must have intended to give, in addition to the "fixed annuity, such a sum as would enable the trustees in each "year to discharge the income tax on the total amount of the "fixed annuity and the additional sum and to pay the balance, "which in the normal case would be the exact amount of the "stated annuity, to the annuitant. Unless there is something "special in the language of the will, which prevented that con- "struction being adopted, that became the recognized construc- "tion in cases of gifts of annuities of fixed amounts free of "income tax both in England and Scotland".

Then after referring with approval to the statement of the rule by Lord Sands in *Hunter's Trustees* v. *Mitchell* (15), which I have already quoted, Lord Maugham said (16): "The rule, "where it is properly applied, is in my opinion a fair and just "one. It carries out the intention of the testator. It has been "applied in very numerous cases and it is far too late to "challenge it today. It is clear that it applies in the present "case. I will only add that under the rule what is treated as "being given to the annuitant is given, to use the language of "that eminent judge, the late Lord Fleming (17), in two annual "constituents. The one is the annuity of 100*l*., the other is "'just an addition to the gift of 100*l*.' to enable the trustees to "comply with the direction to pay that annuity free from income "tax and it 'became in law part of her income'".

Then, after further observations, Lord Maugham continued (18): "To make the position clear it may be desirable "to point out that the amount of the annual benefits given on "the true construction of the will to the annuitant was 100*l*. "plus the sum which might ultimately prove to be payable by "her for income tax for that year, so as to leave 100*l*. for her "personal behoof. In other words, the annuity given to her was "an amount equal to 100*l*. plus an amount, say *xl*., varying "from year to year and liable to exemptions and abatements. "The *xl*. is none the less a constituent of her income because it "may vary from year to year and (if payable) has to be paid in

(15) 1930 S. C. 978, 982.
(16) [1946] A. C. 1, 11.
(17) 1944 S. C. 286, 295.
(18) [1946] A. C. 1, 12.

" discharge of her income tax. The fact that the value of *xl.* is " unascertainable until after the end of the year, when the " deductions for abatements and exemptions, if any, will be " ascertained, does not occasion any practical difficulty ".

In the course of his speech, Lord Thankerton said (19) that the " duty of the trustees is to provide by means of the additional " gift a sum to meet the annuitant's liability for income tax ", and Lord Simonds, after approving the proposition of law by Lord Sands, already referred to, said (20): " It leaves entirely " open the question what upon the true interpretation of a par- " ticular will is the amount of the tax which is the subject of the " additional bequest ".

In *Michelham's Trustees* v. *Inland Revenue Commissioners* (21) Romer, L.J., expressed his view of a tax-free annuity, so far as the present point is concerned, as follows: " Where a testator by his will purports to give an annuity free " of income tax, the will necessarily must be read as conferring " upon the annuitant such an annuity as, after deduction of the " tax therefrom, shall leave the clear sum mentioned by the " testator ".

It is upon statements of the law such as those which I have cited that Mr. Stamp founds his contention that the sums paid by the trustees in the two relevant years in tax on this annuity ought, except for the amounts of the statutory allowances, to be regarded as forming part of the annuity; with the result that, as they have been recovered, they belong to the annuitant just as much as does the annuity itself.

It is, of course, fully established by the speeches in *Cook's* case (22), and it had indeed been established before, that if a testator gives an annuity free of tax, he confers on the annuitant two benefits, namely, firstly, the amount of the annuity, and secondly, the amount of the tax payable on the annuity in the annuitant's hands. If income tax is ultimately found to be payable in respect of the annuity, having regard to the tax legislation and to the circumstances of the annuitant in any particular year, then the amount of that tax is regarded as a gift by the testator to the annuitant. I am unable, however, to regard the " additional gift " as a bequest in the full sense that that word ordinarily bears; for in my judgment it is a gift for a particular purpose and for no other, and if it is not required to

(19) [1946] A. C. 1, 16.
(20) Ibid. 27.
(21) (1930) 15 Tax Cas. 737, 751.
(22) [1946] A. C. 1.

answer that purpose, it fails and cannot be applied to some other purpose instead. If Mr. Stamp is right in his contention, the amounts which the trustees paid to the Revenue in the relevant years would not go in relief of the annuitant's tax liability (which was nil), but in relief of his business losses, and I can see no trace of an intention by the testator in his will that such losses should fall upon his residuary legatees in exoneration of the annuitant himself. The object of the testator in giving an annuity free of tax was surely to exonerate the annuitant from a particular burden, for example, tax, and not from some other burden such as a loss in his business. This conception of a tax-free annuity does not appear to me to be in the least inconsistent with any judicial utterances. On the contrary, it is, I think, supported by some of the observations of the Law Lords in *Cook's* case (23). For example, Lord Thankerton, in the course of his speech, after pointing out the two stages in a taxpayer's liability to income tax, namely, the sufferance of deduction at source at the standard rate and the subsequent adjustment when the taxpayer claims and obtains relief by repayment, said (24): "Now, the duty of the trustees in a case such as the present is "to provide for the liability of the annuitant to tax under the "first stage, and it is difficult to see why they are not to get the "benefit of the later adjustment to which the provisional dis-"charge of the taxpayer's liability is subject. The additional "gift in such a case, either in whole—as in the present case—or "in part, serves to meet a temporary tax liability, and, when "the tax liability is ultimately ascertained, its service is ter-"minated, and it should be pro tanto returned to the trust "estate".

Then the noble Lord, for the purpose of illustration, made the assumption that in the case which was before the House there was no statutory machinery for collection at the source, and said (25): "The annuitant would then be directly assessed "on her total income, and there can be no doubt that her total "income would be found to be 100*l.*, and she would be exempt "from any liability to tax, with the result that the additional "gift would become unnecessary in the particular year".

The late Lord Uthwatt, when a judge of first instance, referred in *In re Williams* (26) to the tax-free element in an annuity bequeathed free of tax as an "indemnity". He said that the question which usually arises in cases of this kind is

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(23) [1946] A. C. 1.

(24) Ibid. 16.

(25) Ibid. 17.

(26) [1945] Ch. 320, 321.

"whether the reference to income tax is a reference to the "standard rate of income tax merely as an arithmetical factor in "the calculation of the gross amount of the annuity given by "the will, or whether the provision as to income tax merely "indemnifies the annuitant against that part of the annuitant's "income tax (other than sur-tax) which is properly referable to "the annuity. . . . The practice of the court has been to assume "that the annuitant is entitled to treat as his income, for the "purpose of calculating his reliefs and allowances, the whole of "the income tax paid for his account; and on that footing, it has "been held that the annuitant is bound to claim reliefs and "allowances in respect of his total income—he is indeed declared "a trustee of the right to claim them—and to account to the "paying hand for a rateable proportion of the sum received. "The net result is that the annuitant receives only his "indemnity".

Whether one regards the "additional gift" in a tax-free annuity as being a gift for a specific purpose, or as an indemnity, I am unable to see how the annuitant can claim the benefit of it in any year in which no tax on his annuity has to be paid.

Mr. Stamp's argument as to this is that in each of the relevant years the annuitant's liability to tax was ascertained, and tax had to be paid in discharge of such liability, before any question of a repayment of tax under s. 34 of the Income Tax Act, 1918, could arise. It is true that the machinery prescribed by the section leads to this result and that it is only upon the commissioners being satisfied of the amount of the loss and of the payment of tax upon the aggregate amount of income that they are to give a certificate authorizing repayment of so much of the sum paid for tax as would represent the tax upon income equal to the amount of the loss.

In my judgment the administrative machinery of the section does not affect the matter. The question is not whether at any particular stage the annuitant was liable to tax, but whether he was ultimately liable, and the answer to that question is that he was not. Accordingly, the purpose for which the testator made the "additional" bequest, or the burden against which he provided the indemnity (whichever may be the proper way of defining the position), never effectively arose.

Mr. Stamp described the tax repayments made by virtue of s. 34 as windfalls, and claimed them for the annuitant as statutory alleviations of his business misfortunes. To accept this argument would result, in my opinion, in undermining the reasoning upon which the judgment in *In re Pettit* (27) proceeded.

Romer, J., in that case, referred to the position of trustees of a tax-free annuity paying tax thereon to the Revenue at the standard rate and of the amount so paid proving in the end to be too little or too much, and said (28): " If the annuitant were " liable to pay super-tax it would be too little and the proper " proportion of her super-tax referable to her annuity would, " when ascertained, have to be paid to her by the trustees and " would so go to reduce the income payable to the residuary " legatees. It might, on the other hand, turn out that the circumstances of the annuitant were such that she was not liable " in respect of her income to the full rate of income tax, that, in " my opinion, being the true effect of the provisions for relief and " abatement contained in the relevant taxing Acts. In that case " the sum so set aside and the 428*l*. 11*s*. 5*d*. paid in the first " instance to the Revenue would be too much and if, in consequence of this, the annuitant is repaid the excess by the " Special Commissioners, I cannot understand on what ground " it can be suggested that such excess should be retained by the " annuitant who has not paid it, and not be handed back to the " residuary legatees who have. If the annuitant were to retain " the excess, she would in the end have received out of the " estate more than 20*s*. in the *l*. on the 1,000*l*. given to her by " the will ".

In my judgment, accordingly, the whole of the sums recovered under s. 34 for the years 1946–47 and 1947–48 in respect of income tax paid by the trustees, is repayable to them. I would add that had the annuitant carried forward his business losses under s. 33 of the Finance Act, 1926, instead of claiming repayment of tax under s. 34 of the 1918 Act, different considerations might well have arisen. With that, however, I am not concerned, as he did not in fact do so.

Declaration accordingly.

Solicitors: *Saville & Mannooch; Wright & Webb.*

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(27) [1922] 2 Ch. 765.

(28) Ibid: 770.

END OF VOLUME AND OF CHANCERY SERIES FOR 1951

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2. —— *Determinable Life interest—Forfeiture on income becoming vested in other persons—Express power of advancement—Whether consent to exercise of power operates as forfeiture—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19).
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4. —— *Trust of income for adult and infant beneficiaries — Resolution by trustees in successive half-years dealing with income — Part of income allocated in shares to infant beneficiaries—Resolution that as not required for maintenance shares on income to be accumulated in accordance with Trustee Act*, 1925, *s.* 31 — *Section inapplicable—Validity of allocation—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.
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5. —— *Will—Gift on trusts of the settlement—Accretion or independent settlement.*
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2. —— *Charity — Development charge — Exemption—Lands held by company controlling school for girls—Company entitled to make profits and to declare dividends—Share capital held by educational trust—Profits and assets of company not to be applied otherwise than for the promotion of the work and efficiency of the school or for the advancement of the education of girls—Whether lands held on charitable trust or for charitable purposes—Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 85, *sub-ss.* 1, 2.
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3. —— *Development charge—Exemption—Land held on charitable trusts—Public school—Company owning lands and buildings paying limited dividends — Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 85, *sub-ss.* 1, 2.
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2. —— *Oral contract — Memorandum in writing—Two documents—Document recording sale signed by vendor only—Construction—Validity—Material term omitted—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.
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3. —— *Sale by public auction—Memorandum of agreement—Date for completion inserted before sale—Vendor's initials and surname inserted by auctioneer also before sale—Purchaser's name added by auctioneer after sale—Signature over stamp by purchaser after sale at auctioneer's request—Allegation by vendor of no contract—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.
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4. —— *Specific performance—Purchaser remaining in possession—Delay in completion—Purchase money — Payment into court — Interest payable after lodgment.*
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2. —— *Annuity—Free from income tax—Intention of testator.*
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3. —— *Annuity payable by trustees "free "of income tax"—Recovery by annuitant of income tax paid on taxable income by reason of business losses—Annuitant's liability to account to trustees—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 34.
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4. —— *Charity — Executors not appointed trustees — Subsequent directions to "my "trustees"—Whether executors also trustees—Gift for "the old people over sixty-five "years of" a district—Whether charitable—Statute* 43 *Eliz.*, *c.* 4, *s.* 1.
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5. —— *Construction—Gift in futuro "upon "trust, for all or any the children or child "of . . . who shall attain . . . twenty-one "years if more than one in equal shares"—Time for ascertaining class—Rule of convenience.*
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6. —— *Construction — Gift to beneficiary "if she shall be living at the death of my "daughter"—Gift over in the event of death before daughter—Beneficiary survives daughter but predeceases testatrix—Lapse—Gift over fails.*
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7. —— *Construction—Gift to hospital for department of medical school—Effect of nationalization—If hospital "nationalized" then to Royal College of Surgeons of England—Whether charitable institution—Customs and Inland Revenue Act*, 1885 (48 *&* 49 *Vict. c.* 51), *s.* 11—*National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 8, *sub-s.* 1 *and s.* 15, *sub-s.* 1.
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8. —— *Construction—Gift to hospital "if "still at my death run on a voluntary system "and not taken over by the State"—Whether condition imported into residuary devise—Whether nationalized hospital a charity—National Health Service Act*, 1946 (9 & 10 *Geo.* 6, *c.* 81), *s.* 59.
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9. —— *Construction—Gift to "relations" after prior life interest—Date of ascertainment of class—Whether joint tenants or tenants in common.*
In re GANSLOSER'S WILL TRUSTS. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* CHILLINGWORTH - - - **Vaisey, J. 864**

10. —— *Construction — Incorporation of trusts of settlement—Settlor's power of revocation—Validity.*
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11. —— *Construction—Life interest to wife—Ultimate gift equally between "issue of our "marriage"—Meaning.*
In re NOAD, DECD. NOAD *v.* NOAD **Roxburgh, J. 553**

12. —— *Construction — Power of appointment—". . . according to my wishes, for the "benefit of my family"—Defective execution—Implication of gift over—Whether power coupled with a trust.*
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13. —— *Construction—Substitutionary gift to beneficiary's "personal representatives and "to form part of his estate"—Life interest bequeathed by beneficiary to his widow—Codicil to will of testatrix directing will to be read as if widow were dead—Effect.*
In re WRAY, DECD. WRAY *v.* WRAY **C. A. 425**

14. —— *Direction to set aside and accumulate annual sum free of tax—Whether setting aside a "payment"—Finance Act*, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.
In re BANBURY, DECD. WESTMINSTER BANK LD. *v.* BANBURY - - - **Danckwerts, J. 1**

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15. —— *Direction to trustees "to found a "cot in the Westminster Hospital . . . and "to use for this purpose the sum of* 1,000*l.* "*free of duty"—Validity.*
In re GINGER, DECD. WOOD ROBERTS *v.* WESTMINSTER HOSPITAL BOARD OF GOVERNORS **Roxburgh, J. 458**

16. —— *Estate duty—Option to purchase freehold property—Purchase price lower than value for purposes of estate duty—Option exercised—Incidence of duty—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 8, 9—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 16, *sub-ss.* 1, 5—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 1, 36, *sub-s.* 9.
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17. —— *Gift to trustees of infirmary and dispensary in memory of testator's father—Nationalization before death of testator—National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 60.
In re HUNTER. LLOYDS BANK *v.* GIRTON COLLEGE, CAMBRIDGE (MISTRESS AND GOVERNORS) - - - - - **Vaisey, J. 190**

18. —— *Husband and wife—Legitimacy—Gift of trust fund for life and to lawful child or children of beneficiary living at his death—Separation of beneficiary and wife—Birth of children to wife after separation—Decree of nullity of beneficiary's marriage owing to his incapacity—Marriage of wife to putative father of children—Whether children lawful children of beneficiary—Law Reform (Miscellaneous Provisions) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 4; *Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 9.
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19. —— *Legacies to hospitals—Nationalization before death of testator—Legacies "to be "added to the invested funds of the respective "charities to which they are given"—How distributable—National Health Service Act* 1946 (9 *&* 10 *Geo.* 6, *c.* 81).
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In re MEYERS. LONDON LIFE ASSOCIATION *v.* ST. GEORGE'S HOSPITAL - **Harman, J. 534**

20. —— *Legacy "to each member of the "staff who shall have . . . had not less than "five years' service"—Validity—"Member of "the staff"—"not less than five years' ser-"vice"—Meaning.*
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21. —— *Mutual wills—Husband and wife—Agreement by each spouse to give effect to testamentary dispositions of the other—Absolute gift to survivor—Direction by survivor to divide residue into husband's and wife's moieties—Fresh will by survivor after accepting benefits—Deceased spouse's moiety subject to trust in hands of survivor.*
In re GREEN, DECD. LINDNER *v.* GREEN
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22. —— *Settled fund—Shares in company—Distribution of capital profits—Capital not issue of settled fund.*
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23. ——. *See* SETTLEMENT.

WAR DAMAGE—*Repeated damage to same hereditament—"Not total loss"—Intended rebuilding not in original form—Value payment—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 10, *sub-ss.* 2, 5; *s.* 11, *sub-s.* 1; *s.* 13, *sub-s.* 1 (*b*); *s.* 16, *sub-ss.* 1, 2, 4—*War Damage (Increase of Value Payments) Order,* 1947 (*St. R. & O.*, 1947, *No.* 390).
In re 102–107 FETTER LANE, LONDON. SOLICITORS' LAW STATIONERY SOCIETY LD. *v.* WAR DAMAGE COMMISSION - **Vaisey, J. 20**

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